Advanced Contracts, Tendering and Public Procurement
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Lecture 03: Introduction to Contract Law

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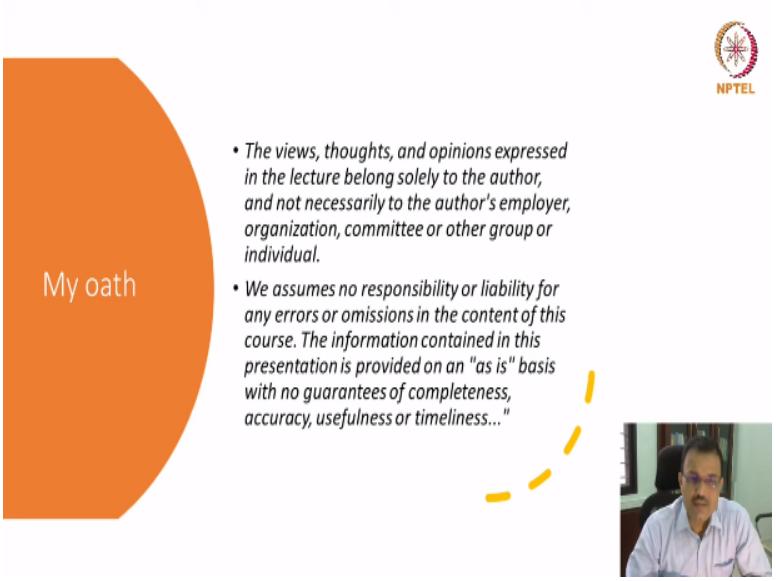

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This is a standard disclaimer in most contracts, so wherever contracts are made, the one who provides the product or the service comes up with such kind of disclaimers in which the service provider or the product manufacturer clearly says that we assume no

responsibility or no liability for any kind of fault, defect, errors, omissions, shortcomings. They simply make a very tall statement which many customers, consumers, citizens have already agreed to and this becomes their defense in court, saying that the customer or the consumer has already agreed to this contract, we already told him the disclaimer and hence we are not responsible.

Now, why do people get into such a habit is because please note in any kind of contract, the market conditions play a very critical role. In market conditions, many of these service providers or these manufacturers or these producers are in a position of dominance and the position of dominance is that they have a higher bargaining power. There is a higher bargaining power because there is a disparity between the demand of the market and the supply in the market.

So, whenever demand increases and the supply is in short, the supplier has a higher bargaining capacity and the supplier or the producer dominates contractual terms and conditions. So, he creates this clause. Why? Because he has the power to draft the contract, he has the power to put across the terms and conditions of the contract and he clearly then says, “Look I will hold no responsibility of that”.

The question that comes is - what is the legal validity of such disclaimer clauses. Are these disclaimer clauses valid and enforceable? If they are valid and enforceable, the seller can escape liability or responsibility. Are they entirely invalid? If they are entirely invalid the citizens and the consumers get to protect their rights in contract but the question is to what extent.

The next question is how are consumer rights to be defined? Are they defined under the consumer protection law? or can they be also be brought about in Contract Law? In many cases one may enter into a contract but not necessarily as a consumer. So, it is important, in this context, to understand that the importance of modern day contract probably comes across from such kinds of one-sided, arbitrary, unfair, clauses and terms and conditions in a contract which we all would see in your everyday life.

For example, when we go to a cinema theater - where do we see the terms and conditions to see a movie in a similar theater. Secondly, most often than not the cinema theatre owner will say look I assume no responsibility or liability for the content of the film or if the film closes or forecloses a little bit early.

So, all of these are standard clauses, they are there in the market, we have to test and evaluate whether these clauses are valid, whether such kind of contracts are permissible or not because if such kind of contracts or clauses are allowed in a legal system, obviously it will result in exploitation. It will result in market trying to make profits from the vulnerable sections of the community and that is probably the reason why there is a need for Contract Law to understand, evaluate, moderate and determine the rights and obligations of the parties to a contract.

Why should we study Contract Law?

Why should we study Contract Law? What is the importance and what will Contract Law study do? Contract Law is a law that attracts human behavior. E.g. the behavior of the seller and also the behavior of the buyer. Law basically is called a power, it actually regulates discipline, law regulates human behavior in one sense, because if we do not regulate human behavior, the human behavior can be that of a social animal, he can get exploitative, he can actually get dominating and people will feel that law and legal system does not exist.

So, to bring peace and order in a society law is required. Now, to bring peace and order in commercial transaction, in market transaction, in economy, in businesses, Contract Law is very, very important. And what does this law set across? When the legislature sets out Contract Law they expect a certain kind of behavior. The certain kind of behavior is expected from the parties in the contract, for example, when we talk about special contracts, we may be talking about payment, pledge, integrity, guarantee and agency these are special kind of contract, sale of goods is also a special kind of contract.

So, what does the legislature prescribe in the law. They prescribe what should these parties to the contract do. For example, in bailment we say what should the bailor do and

what should the bailee do? The interesting concept is that the law sets out the rights of the parties. For example, rights of the bailor, interestingly will become the duties of the bailee, so the contracting parties can make a contract, they have the freedom, no problem, no challenge regarding the same. But that freedom is not an absolute freedom, the law will actually set out the societal norms for those kinds of freedom to come as well.

Continuing on our discussion - why should we study Contract Law? There are certain theories which have said that there is actually no need for law in contract, and that there cannot be a law for every kind of contract. For example, say a cab service driver is taking you from destination A to destination B, can you have a separate law, can you say that because a company is hiring an employer can you have one law just for that.

Let's take another example, suppose we come across market buying and selling of different products, can we have a separate law for each of these contracts. No, we cannot have specialized Contract Law but we can have a general Contract Law, the reason being that when we say there is freedom of contract, there is a theory called the freedom of contract theory, it says that the parties must be free to enter into any kind of contract.

This must be let, go in a society because that must be something that everyone should have a choice of and this will encourage freedom of choice, freedom of business and it is one of the essential freedoms that every democratic country would want to nurture and actually develop and hence freedom of contract is actually very important.

However, when we have freedoms, we have certain reasonable restrictions. No freedom is absolute and hence freedom of contract also cannot be absolute. While we must have the freedom to choose who we want to contract with and what we want, there ought to be some kind of a law or regulation that is necessitated by saying, 'Okay, look you cannot probably hire someone to cause damage to a third party', we say this is called a *Supari* Contract. We cannot hire someone to actually do some contract killing or say kidnapping. We have to have certain public order in place about which contracts can be permitted and which kind of contracts cannot be permitted and hence there are some reasonable restrictions which are justified by a public order.

Secondly, although we have should have this freedom, the freedoms often get abused or exploited by a few individuals who probably think that this is something that they can actually do. So, freedoms have to be regulated in good faith and hence it is very important that when parties choose each other or try to trade or contract with each other they must do so in good faith.

It is one of the principles in contract, that parties must exercise good faith. Good faith means that there should not be any malafide intention, there should not be a bad motive and when people actually contract, both the parties must benefit, and hence contract must promote that win-win situation. For which some curtailment of the freedom of contract through law or through Contract Law is probably one of the justified reasons.

Further, very often than not we can actually make an agreement in which we say I do not want to make it enforceable. Parties can actually make such agreements which are not enforceable of law, they just want to make a social agreement. There may be so many such relationship that may resemble like contract but should not be treated as contracts. And that is where the law will try to intervene, and set down certain regulations, certain guidelines, certain essentials to ensure which contracts have to be enforced and which contracts can be left outside because it is just an arrangement or some kind of relationship between the parties and it is best left to maybe some other legislation to regulate and govern or left to the freedom of choice of the parties as well.

This kind of a freedom theory does not say that this freedom is not available but rather says that you still have the freedom, but the freedom should be in such a place where you can negotiate the terms of the contract in a trust relationship in a good faith relationship. We can form the contract on a fair basis and that will properly promote the parties, that will promote the legal system to be an orderly legal system following rules and regulations of law. This way every person's right in business and in contract and in commercial transaction can be protected. And hence, study of Contract Law becomes very, very important.

Third, contract Law originates from the law of obligation, and when we say law of obligation - it is the law of duty, more than the law on rights. Obligations are always

there in the society, every society, is an organized society, be it a village be it a town, be it a state, be it a country, every such kind of society is an organized society and in organized societies people must owe obligation to each other, this is the duty that we have.

In contracts there are certain obligation such as not to misrepresent, to show good faith while entering into contact, obligation not to hide any vital information in this contract. Societies flourish when these obligations are respected and honored by the parties. Hence, one of the easiest definitions of contract is that contract is called the law on promises.

Promises, for example can mean that the seller promises to sell his house and the buyer promises to buy the house. This is the law on promises and when we make promises, we actually owe an obligation of fulfilling that promise, so we cannot make promise without having no intention of fulfilling this.

In a contract it is the duty of the law to ensure that the obligation is completed. So, if the seller makes a promise to sell his house, he has undertaken the obligation to deliver the house to the buyer and the law of contract tries to fulfill and enforce that obligation which the seller has undertaken towards his buyer.

They are not social obligations, they are commercial obligations, they are legal obligations. In social obligations the law still probably need not intervene, but in a legal obligation, a promise to someone else, the law must actually value that legal obligation, must treat it in a way that the rights and duties and the obligations between the parties are actually insured.

Just imagine if Contract Law was not there, in these circumstances, where the seller has made a promise to sell his house. What will happen? The rights of the buyer may be adversely affected by the seller. The seller may make these promises to two or more persons and the buyer then who has probably paid an advance who is expecting that house to be delivered to him, who actually has invested his only saving to buy the house,

his rights will be infringed and he would have no way for the legal system to redress his grievances.

And hence the seller ought to have obligation to sell the house and the buyer ought to have an obligation to make the payment towards buying the house. These are obligations that parties to a contract usually have and these are obligations that the law tries to enforce. It tries to fix and it tries to state who should do what in contract and if suppose one fails to do it, what is the kind of liability that the law would want to impose. When obligations are breached or broken, there ought to be liability that will bring about an effective legal system and an orderly society in any given country.

Futher, obligations are of two kinds. One obligation is something that we can take on our own, we call this self-imposed obligation. Second, there are certain obligations which are externally imposed, it could be something that a public law puts on a party. For example, the law that prohibits smoking in public places. we say do not smoke in public place, if you do so there is a penalty. This obligation not to smoke in a public place is an externally imposed obligation, it is a public law. There may be in-policing regarding the city, there may be punishment or fine regarding this thing and hence, yes, for the betterment of the society, for betterment of orderly behavior among all citizens, public obligations are very, very critical and important.

But the obligations in Contract Law are not imposed by somebody else, the obligations in Contract Law are self-imposed, if you wish to take a contract, if you wish to enter into the contract you actually undertake the obligation yourself, it is a choice that you have, it is a freedom that you have. If you do not wish to sell your house do not sell it, if you do not wish to buy you do not buy it.

Nobody is going to be force you to do so, contract does not actually insist upon that, right, unless there are certain instances where the courts may probably force you to do it because you have breached the law, you have breached the obligation, the court may actually do it, but initially when the contract is made you have the complete freedom to either take the obligation, one. Two, determine the extent of the obligation and this is something that parties can actually exercise and that is why very often then our Contract

Law is also called domain of private law. It is private obligations but with public policy and public perception and Contract Law actually takes you forward and this study makes that relationship all that very interesting.

Moreover, the purpose of Contract Law is to actually not only to categorize a fair contract but also it tries to bring about attitudinal and behavioral change in the parties. Fair contract is fair business and fair business is fair behavior. Hence, fairness in contract is an aim that Contract Law attempts to achieve. One ought to be fair to the other party. It's not about that the law does not say that one cannot make profits, we can but that must be a fair profit. Profit cannot be made at the expense of someone else, and hence any term in the contract, any procedure in a contract should be so fair, so that it actually is rendering justice to both the parties and it looks fair to both the parties.

Finally, we have the theory of collective bargaining. Contract Law actually comes from the theory of bargain which is also used in labor law in terms of collective bargaining. The fact is when we say collective bargaining we have legislations like Competition Act, Consumer Protection Act both of which actually promote the spirit of collective bargaining of the consumer. It strengthens consumer rights, consumer movement. it strengthens consumer's ability to actually look at their rights which are not going to be suppressed by the other party and look, this is no longer a seller's market, it looks to be a buyer's market, right. So, when it is a buyer's market, the buyers ought to seek protection, they ought to seek their redressal of grievances, their rights need to be protected, and hence the study of Contract Law in that sense furthers the spirit of collective bargaining more so in employment.

Now, if you look at employment and collective bargaining, you notice that it was employers who were exploiting the employees at this first stage. During the industrial revolution and during the first issues of independence, quite simply because there was a mismatch of demand and supply, the demand for jobs were so much and the supplier market was so sharp that the employees started exploiting.

And hence they actually had a lot of unfair terms in contract, they had unfair policies towards their workers in a contract and hence the spirit of collective bargaining meant

that when the laborers formed the union together, they could actually negotiate better wages, they could actually negotiate better conditions, they could actually negotiate better pay. So, it is important that when markets get exploitative, people must come together and the Contract Law actually facilitates that kind of collective spirit in terms of ensuring fair bargain between both parties.

Historical Background of the Indian Contract Act, 1872

The need for the Indian Contract Act 1872 was felt during the colonial rule in India and while contracts existed in India, there were regulated under different rules in the Indian society. One rule dominated the Hindus under Hindu law, the other rule dominated the Muslims as Muslim or Mohammedan law.

Both Hindu and Muslim law where religious quotes and religious principles that govern human behavior in one society and hence being a law that applies to a religious community. The Hindu law and the Mohammedan law lay down certain obligations for contract, there are certain principles of contract that actually derive its basis from customary practices and customary law or usage and many of these customary usages and practices are imbibed in religious and personal laws.

So, when the Britishers came and ruled in India, they realized that the Hindus were probably practicing Hindu law in contracts, the Muslims were adopting Muslim law in their contracts and when a Hindu, Muslim probably makes a contract, we are not sure which law should actually apply and hence there should be a law that can govern the same.

Further, we had other different people who came to India, the Portuguese, the French they came to India and basically, they came here for trading for the spice. And to exploit that trading, to exploit resources in this country the Britishers realized that they had to bring in rules, they had to bring in rules of trade and they had to say that look for the entire country you must have one law.

And, if you look at the drafting of the Indian Contract Act it was the third law commission that drafted the Indian Contract Act, if one would want to look into the

history it was the first law commission that contributed in drafting the Indian Penal Code, 1860, and by the year 1872 the third law commission was present and they drafted the Indian Contract Act 1872. It was supposed to be a uniform contractual code for the entire country and this governed contractual relations from now on.

So, the Indian Contract Act, had to be applied to the entire territory of this country and that is how the whole aspect of the background of this legislation becomes very, very critical at this point of time. Now, an interesting part of the 1872 law is that while the Act has come into place at that point of time there is no requirement for rules to be brought into force and even after independence the Indian Contract Act is a substantive law. it is a law on obligations. It is the law of definitions, it is the law on what is valid what is void, it is something that defines the various obligations in law but it does not anywhere state the procedural aspects of Contract Law. Interestingly, even after independence, even as we speak today, it is one of those substantive laws which does not have procedural rules, so there is no Contract Act rules as we speak in the Indian contract.