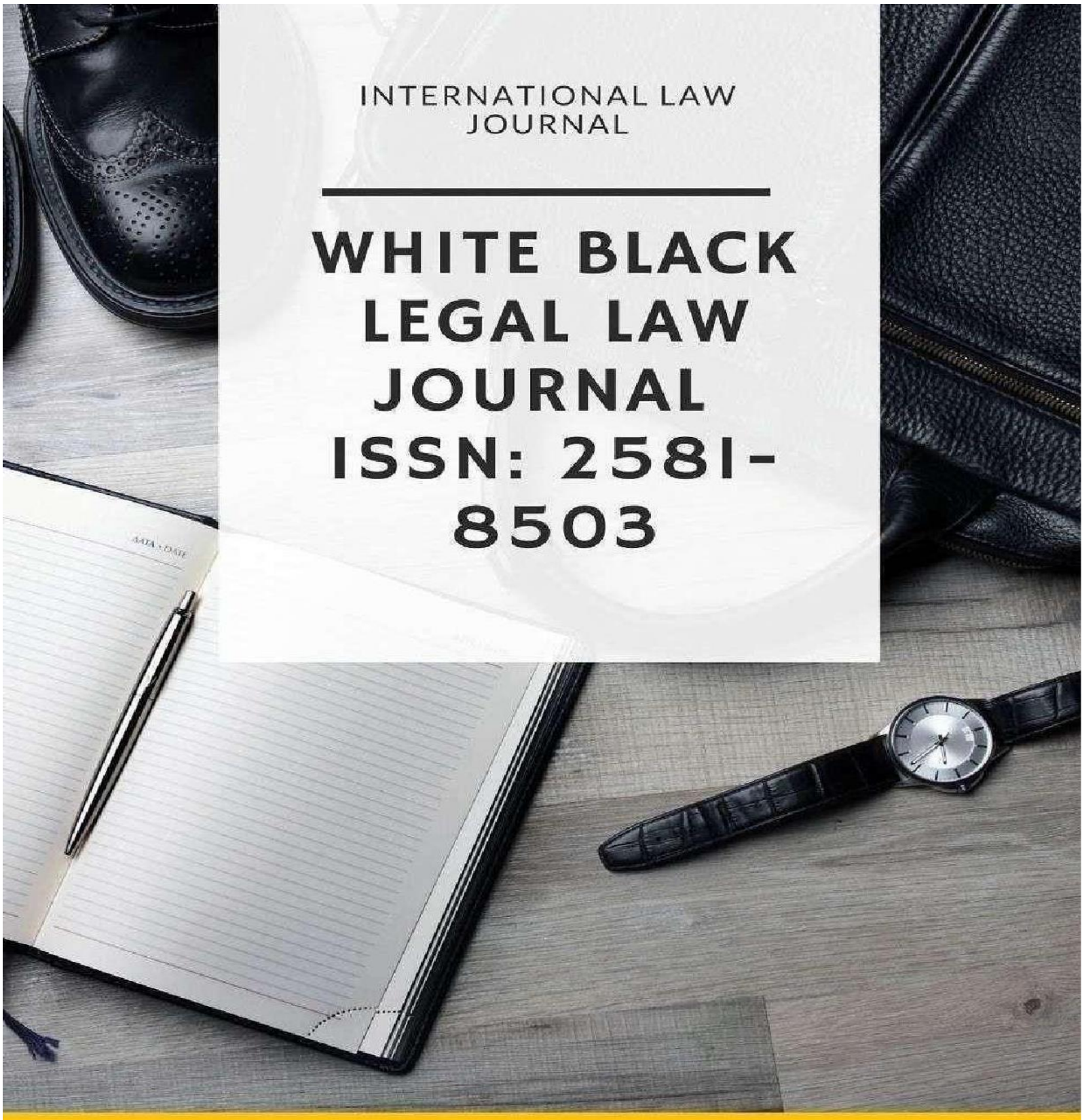

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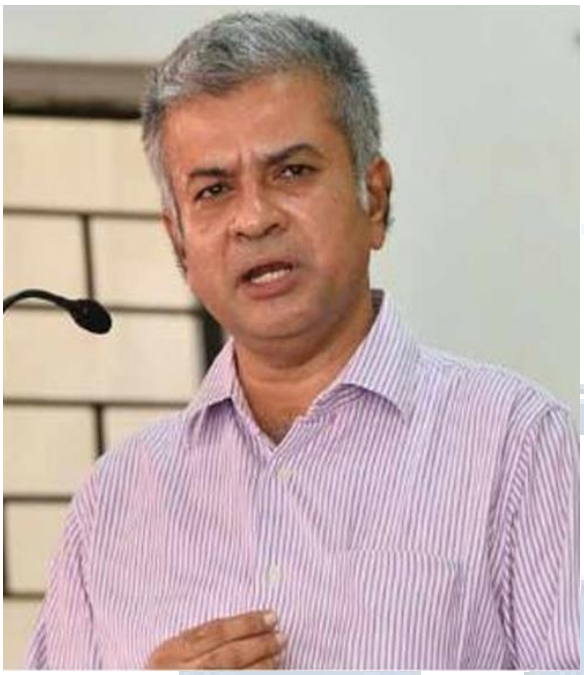

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With this thought, we hereby present to you

PUBLIC POLICY IN RELATION TO CONTRACTS: AN INDIAN OVERVIEW

AUTHORED BY - SUCHANA SEN

ABSTRACT

In order to understand the concept of which contracts are against the public policies defined under the Constitution of India, 1950, first one need to understand what is a public policy and how the concept of contract is interrelated with the same. The law that 'any contract opposing public policy is void' is laid down under section 23 of the Indian Contract Act, 1872. This paper initially explains what is public policy and various judicial interpretations of public policy. Then it goes into the intricacies of various types of contracts which can be termed as void because of their public policy opposing nature along with relevant judicial pronouncements. It also tries to focus light on which contracts are not void as far as public policy is concerned.

KEY WORDS: Public Policy, Contract, Void, Agreement, Constitution.

INTRODUCTION

"Public Policy is a high horse to mount, and is difficult when you have mounted it."[1]

The adoption of the Constitution of India in 1950 provided the foundational framework for public policy. Public Policy broadly means a comprehensive framework encompassing laws, regulations, and governmental measures designed to tackle a wide spectrum of societal challenges.[2] The doctrine of public policy serves as a crucial safeguard against contracts that would undermine the broader interests of society. Though, the term 'Public Policy' does not have an exhaustive definition as it is fluctuating in nature and is highly uncertain. In simple words, Pubic Policy refers to the policies of government for the welfare of society. In the case of *P. Rathinam v. Union of India*,[3] the apex court held that the term public policy is open for

[1] A. L. Smith, M. R., The Driefontein Consolidated Mines Ltd. v. Janson (1901), Times L.R., Vol. XVII., 605
[2] A Comprehensive Framework Encompassing Laws, Regulations and Governmental Measures designed to tackle a wide spectrum of societal challenges, Kumar Aman, https://www.linkedin.com/pulse/understanding-concept-public-policy-india-its-impact-development-vhi2f/
[3] P. Rathinam v. Union of India, AIR 1994 SC 1844

modification and expansion. In the case of *Gherulal Parekh v. Mahadevdas Maiya*[4] it was observed by the apex court that---

"'Public policy' is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience', or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise"

Explaining the scope of the expression public policy and the role of the judges, C. REDDY of the Andhra Pradesh High Court observed,

"The twin touchstone of public policy are advancement of the public good and prevention of public mischief and these questions have to be decided by the judges not as men of legal learning but as experienced and enlightened members of the community representing the highest common factor of public sentiment and intelligence. Indorsing this view, the Supreme Court added that going by prevailing social values, an agreement having tendency to injure public welfare is opposed to public policy."[5]

[4] Gherulal Parekh v. Mahadevdas Maiya, AIR 1959 SC 781.
[5] Ratanchand Hirachand v Askar Nawaz Jung, AIR 1976 AP 112

Illegality is a highly complex area of contract law. It deals with both criminal conduct, conduct prohibited by statute (even if not criminal) and conduct regarded as contrary to public policy. In some cases it will be simple to determine whether or not an illegal contract exists and will be rendered void. According to *The Indian Contract Act, 1872*, "The consideration or object of an agreement is lawful, unless— the Court regards it as immoral, or opposed to public policy."[6] The term public policy in this context is based on the Latin legal maxim maxim *'Ex Turpi Causa Non Oritur Actio'* which means that from any 'dishonourable cause' no action can arise.[7] Consideration of public interest may require the courts to depart from their primary function and to refuse to enforce a contract. Interpretation of the concept of public policy is the function of the court and not of the executive. It is not enough that the terms of contract have been brought to the knowledge of the other party by a sufficient notice before the court is entered into, it is also necessary that the terms of the contract themselves should be reasonable. If the terms of the contract are unreasonable and opposed to public policy, they will not be enforced merely because they were printed on the reverse of a bill or a receipt or have been expressly or impliedly agreed upon between the parties.[8] In the case of *Central Inland Water Transport Corporation Ltd. V Brojo Nath*[9], one of the clauses in a contract of employment provided that the employer (corporation) could terminate the services of a permanent employee by giving him a 3 months' notice or 3 months' salary. In accordance with the above clause, the services of the respondent Brojo Nath and others were terminated instantly by giving them the notice, accompanied by cheque for 3 months' salary. The Supreme court held Rule 9 of service Discipline And Appeals of 1979 frames by the corporation empowering that such a clause in the service agreement between persons having gross inequality of bargaining power was wholly unreasonable and against public policy and was therefore void under section. 23 of the Indian Contract Act, 1872.

[6] S. 23, The Indian Contract Act, 1872
[7] PUBLIC POLICY UNDER SECTION 23 OF INDIAN CONTRACTS ACT, https://www.juscorpus.com/public-policy-under-section-23/
[8] Public Policy In Contracts: Recent Trends, Naman Verma, https://www.lawctopus.com/academike/public-policy-contracts-recent-trends/#_edn1
[9] Central Inland Water Transport Corporation Ltd. V. Brojo Nath, A.I.R 1986 S.C 1571

VARIOUS CONTRACTS WHICH ARE OPPOSED TO PUBLIC POLICY

At different scenarios, the Indian Judiciary has identified a few contracts which can be termed as 'contract opposing to public policy' as discussed below---

- **TRADE WITH ENEMIES**: All contracts made with an alien (foreigner) enemy are illegal unless made with the permission of the Government. An alien enemy is a person who owes allegiance to a Government at war with India. Such agreements are illegal on the ground of public policy because either the further performance of the contract would involve intercourse with the enemy or its continued existence would confer upon the enemy an immediate or future benefit. In the case of *Sushil Kumar Yadunath Jha v. Union of India*,[10] a person agreed to transfer his post in government office in lieu of Rs. Five Thousand. The agreement was declared to be void.

- Traffic in Public Offices: Agreements for trafficking by means of selling or transfer of seats in appointment to public officers hampers the rights of deserving candidates and is unlawful in the eyes of law. Same applies to titles. Titles represent excellence in any field and by means of selling it, its whole purpose and object is destroyed.

    - In the case of *Parkinson v. College of Ambulance Ltd.*[11], the secretary of a college promised Col. Parkinson that if he made a large donation to the college, he would secure a knighthood for him. Held, the agreement was against public policy and thus void

    - Stifling Prosecution: Stifling prosecution refers to making money out of crime and is considered as abuse of law. If in an agreement one party agrees to drop pending criminal proceedings against someone then the agreement is opposing to public policy and unlawful.

    - In the case of *Veerayya v. Sobhanandri*,[12] a person entered into agreement for taking back the charge of S. 420 of Indian Penal Code, 1860 against the accused. It was

[10] Sushil Kumar Yadunath Jha v. Union of India, AIR 1986 SC 1636
[11] Parkinson v. College of Ambulance Ltd, (1925) 2 KB 1
[12] Veerayya v Sobhanandri, (1937) 1 MLJ 489

observed that since the offence was compoundable, permission of court is required and hence the agreement was declared as void.

- In the case of *Ouseph Poulo v. Catholic Union Bank Ltd*.[13] two parties entered into an agreement to discontinue the criminal proceedings on a certain consideration, it was held that these kind of transactions are opposed to public policy.

- Champerty and Maintenance: These two terms are used in English Law. Maintenance implies assisting or financing of suits by third parties having no real interest, for its prosecution or defence. Champerty implies a bargain by which one party is to assist the other in recovering property, and is to share in the proceeds of the action. Thus, maintenance and champerty are likely to encourage purposeless, mischievous and retaliatory litigation. Hence both of these are illegal under English Law.

In India, maintenance and champerty are not necessarily void. An agreement to be champertous in India must be grossly unfair on unconscionable ground or opposed to public policy. Thus, an agreement to share the proceeds of litigation if recovered in consideration of other party's supplying the funds in good faith to continue the litigation is not in itself opposed to public policy. However, where the advances are made by way of gambling in litigation, the agreement to share the proceeds of litigation is opposed to public policy and hence void.

A. In the case of Raja Venkata Subhadrayamma Guru v. Sree Pusapathi Venkapathi Raju[14] the Privy Council held that, court can only refuse to enforce such agreements when the court sees that it is not made with a bona fide object or reward seems to be extortionate and held that **champerty and maintenance are not illegal in India.**

- Agreement creating corrupt public life: An agreement inducing corruption in public offices is against public policy. An agreement of the said nature which leads to personal interest other than duty is unlawful, against the public policy and void ab initio.

A. In the case of *Rattan Chand Hira Chand v. Askar Nawaz Jung*[15], two parties entered into an agreement in which one party has to use his influence the minister, it was held

[13] Poulo v. Catholic Union Bank, AIR 1965 SC 166
[14] Raja Venkata Subhadrayamma Guru v. Sree Pusapathi Venkapathi Raju, 48 Mad. 230 (P.C.)
[15] Rattan Chand Hira Chand v. Askar Nawaz Jung, AIR 1976 AP 112

to be void as it tried to corrupt the decision making machinery. It was also observed that the nature of an act can be against public policy based on consideration or acts to be performed.

B. Restraint of personal liberty: Personal liberty is guaranteed under Indian Constitution.[16] Any agreement causing restraint to the right of personal liberty of any individual is against the public policy and not lawful in the eyes of law.

In the case of *Sitaram Deokaran v. Baldeo Jairam*[17], an agreement was made in which the Defendant signed a naukrinama in which he agreed to serve the Petitioner at a salary of ₹2 per month for a period of 112 and a half months in exchange of a loan for ₹225. This agreement was declared to be void by the Court.

A. In the case of *Harwood v. Millers Timber & Trading Co.*[18], there was an agreement between a creditor and the debtor such that the debtor has to do manual work for the creditor so long as the debt was not paid in full. The Court decided that the agreement was against the personal liberty of the debtor and hence, void.

- Restraint of parental rights: As per law, right of guardianship vests in father till a child is minor and it transfers to mother as soon as the child turns major. Any agreement for sale or transfer of guardianship rights is declared as void.

B. In the case of *Giddu Narayansih v. Annie Besant*[19], a father-son agreed to pass the guardianship of his two minor sons to Mrs Annie. Later he went to court take back the custody of children, but it was said that if the adoption as per Hindu Adoption and Maintenance Act, 1956 is valid then children can't be taken back.

- Restraint of marriage: Everyone has a liberty to marry according to his free choice. This free choice should not be disturbed by monetary consideration or engaging paid brokers to procure matches. A marriage brokerage contract is one in which, in consideration of marriage, one or the other of the parties to it, or their parents or third

[16] Art. 21, The Constitution of India, 1950
[17] Sitaram Deokaran v. Baldeo Jairam, AIR 1958 MP 367
[18] Harwood v. Millers Timber & Trading Co., (1917) 1 KB 305
[19] Giddu Narayansih v. Annie Besant, (1915) 38 Mad. (P.C.)

parties receive a certain sum of money. Accordingly, dowry is a marriage brokerage and hence unlawful and void.

C. In the case of *Vaidyanathan v. Gangarazu*[20] a purohit was promised a certain sum of money in consideration of procuring a second wife for the defendant, it was held that the promise was opposed to public policy and thus void.

- Restraint of Trade: Any agreement that restraints anyone from exercising a lawful profession, trade or business of any kind is void because of being opposed to public policy.[21] The law on the subject is contained in Section 27 which reads: "Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void." Thus, in India, all agreements in restraint of trade, whether general or partial, qualified or unqualified, are void.
- In the case of *Madhav v. Raj Coomar*[22], two persons used to carry out a business of braziers in a certain locality of Calcutta. One party *promised to stop business in that locality if the other party paid him Rs. 900 which he had paid to his workmen as advances.* The former person stopped *his* business but the latter did not pay him the promised money. Held, the agreement was void and, therefore, nothing could be recovered on it.

CONTRACTS NOT AGAINST PUBLIC POLICY

There are certain contracts which are fair and not void for being opposed to public policy. A handful of instances are illustrated-----

- Agreement of lease between landlord and tenant: After a petition of eviction has been filed against the tenants by the landlord and the landlord gets order in his favour, if no efforts are made to throw out the tenants, allowing the tenants to continue living can't be considered as against public policy or illegal. There is no such law which prohibits keeping of tenants against whom an order of eviction is there. The said principle was laid down in the case of *M.K. Usman Koya v. C.S. Santha*[23]

[20] Vaidyanathan v. Gangarazu,
[21] S. 27, The Indian Contract Act, 1872
[22] Madhav v. Raj Coomar, (1874) 14 BLR 76
[23] M.K. Usman Koya v. C.S. Santha, AIR 2003 Ker 191

- Copyright Agreement: In an agreement where a party assigns certain copyrights in the favour of other, there is no obligation to public and it can't be said as unlawful as assigning copyrights is allowed under the Copyright Act.[24]

- Consideration and Objects unlawful in Part: In an agreements when there are two or more sets of distinct promises in which void part can be separated from the rest, the other part becomes valid. But, when they cannot be separated, the entire agreement becomes void.[25]

CONCLUSION

It is clear that the ambit and interpretation of public policy is vast and applicability of this is upon the discretion of the court itself on the grounds of agreement and object. It is quite clear that if the consideration or the object of the consideration is, in the opinion of the court, opposed to public policy, the agreement becomes invalid under the provisions of section 23 of Indian Contract Act, 1872. The freedom of citizen, as indeed the freedom of the lawyer, to enter into a contract is always subject to the overriding considerations of public policy as enunciated under section 23. In other words, if the contract is opposed to public policy, it would be treated as invalid in courts of India and its conclusion cannot be challenged on the ground that in involves encroachment on the citizen's freedom to enter into any contract he likes. If any agreement is declared invalid as opposed to public policy, he can't challenge the order on the ground of freedom of citizen to enter into contract. All the agreements affecting or obstructing the administration of justice will be considered invalid under Section 23 of the Indian Contract Act, 1872. The courts must look carefully in the matter before application of doctrine of public policy due to reasons of development of public opinion and morality. In this context, The Bombay High Court said, "The term Public Policy is somewhat vague and thus courts should not be astute to invent newer and newer grounds of public policy". But on the other hand, the construction of the clause "opposed to public policy" in context of administration of justice does not present any difficulty. Therefore, all agreements that obstruct or affect the administration of justice would be treated invalid under section 23 of Indian Contract Act, 1872.

[24] Prentice Hall India Pvt. Ltd. v. Prentice Hall Inc., AIR 2003 Del 236.
[25] Alice Mary Hill v. William Clarke, ILR (1905) 27 All 266