

DISCRETIONARY POWER OF JUDICIARY: CONTRACT LAW

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Aim

The paper deals with the discretionary power accorded to judges to set aside contracts that violate 'public policy'. It is especially relevant as with the advancement of technology and globalization, the earlier established norms and laws fail to administer justice, and there needs to be some set guidelines to tackle arbitrary application of common law in a grey area of contracts. In this respect, it is heartening to note the trend of cases, and the evolution of certain guidelines in this area. The boundaries of public policy have also been examined by the Courts, and are especially important given the ever-changing meaning attached to this term.

Introduction

An agreement is held as unlawful if the court holds it as to be opposed to public policy, according to Section 23 of the Indian Contracts Act. Public policy, as it has evolved, has always been laid out by judiciary, and it is the courts' interpretation, that we follow even today. Over time, the courts have established various heads, or pigeon holes, of public policy, and have diligently followed them while ruling on this subject. Although the procedure for evaluating whether the object of a contract contrary to public policy had largely been evolved by courts, there appeared reluctance by judges of late, especially of the English law¹, to wield their discretionary powers on creating new heads of public policy.

There were growing concerns regarding judges using their powers to create new heads of public policy, and this research paper intends to deal with exactly that debate. It is theoretically possible for a judge to create new avenues as per changing circumstances², but practically, the

¹ Parke B in *Egerton v Brownlow* 10 ER 359, 408.

² Lord Wright in *Fender v Mildmay* 1938 AC 1, 723.

general opinion of both judges and experts side with curtailing discretionary powers. Lord Atkin, in the case of *Fender v John Mildmay*, opined that judges have ‘constantly uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked’. The main derivative here is the comparison of discretion to an open field. Indeed it has also been vigorously contended that judges cannot be trusted as expounders of public policy.³ For a large part, the Supreme Court⁴ has also relied upon the principled arguments made by several distinguished judges in English law. Indian Courts have also established a two-step process to regulate the use of the expression ‘public policy’⁵, which concentrated on advancement of public good as well as prevention of public mischief. This paper shall focus on recent judgements in the Supreme Court and the trend being established in the present-day scenario.

Analysis of public policy in India

A string of recent judgements in this field by the Supreme Court and other Indian courts have laid down groundwork for a broader view with regard to interpretation of public policy and the utilization of discretionary powers in doing so. In the case of *Renusagar Power Co. v General Electric*⁶, the Supreme Court discussed in length regarding utilisation of the power of the courts in creating new heads of public policy. It differentiated between the ‘narrow views’, as the English courts were deemed to have taken, and the ‘broad view’. The court stressed on the fact that there were Supreme Court precedents that encouraged judges to take a broader view of public policy, and to not limit its application to already existing heads. In this case, the principle of ‘unjust enrichment’ was debated in court, and the Court held that such enrichment is against public policy. This was a broader view of the wordings of public policy, and utilization of the discretionary power granted to the judges to evaluate the circumstances and establish new pigeon holes in the system.

The precedent discussed earlier was the case of *Murlidhar Agarwal v State of Uttar Pradesh*⁷, in which the court deliberated about whose duty it was to provide a fair interpretation as regards

³ Lord Davy in *Janson v Driefontein Consolidated Mines Ltd*, 1902 AC 484, 500.

⁴ *Gherulal Parakh v Mahadeodas*, AIR 1959 SC 781.

⁵ *Ratanchand Hirachand v Askar Nawaz Jung*, AIR 1976 AP 112.

⁶ AIR 1994 SC 860.

⁷ AIR 1974 SC 1924.

public policy, and came to the conclusion that while the judges, as individuals of the society, would be fair in assessing public policy, the constitution and law is designed in such a way that the power of interpretation belongs to someone, as mentioned in the ruling, *“the point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the judges and if they have to fulfil their function as judge's, it could hardly be lodged elsewhere.”*

The powers and discretion of the judges in creating new heads of public policy have largely been talked about in the case of *Central Inland Water Transportation Corporation Ltd v Brojonath Ganguly*⁸. In this case, it was observed that practices of public policies must and should be open to flexibility and modification, and once and for all granted the authority to judges to use their discretionary powers for creating a new head, especially when these aren't one, drawing support from the Constitution, *“It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.”⁹*

The above extract contains the essence of the current status of public policy in contract law. This basically gives precedent to the courts to declare new heads of public policy, sidestepping the conservative English mindset echoed by Lord Davey and Lord Halsbury, who were reluctant to invalidate a contract on grounds of public policy unless the same had been established by authorities. The court also quotes Lord Denning, who in the case of *Enderyby Town Football Club Ltd v Football Association Ltd*¹⁰, who believed that the judges needed to

⁸ AIR 1986 SC 1571

⁹ ¶95, Supra Note 8

¹⁰ *Enderyby Town Football Club Ltd v Football Association Ltd* 1971 Ch. 591

be trusted and not second-guessed, as ‘*With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles*’, where the phrase ‘good man’ refers to the judiciary.¹¹

There have also been experts who agree that public policy has to be flexible and discretionary in nature to keep it evolving with changing times and circumstances. Sir William Holdsworth, in his book, ‘*History of English Law*’, talks about the fact that common law requires some fixed principles, and for maintaining those principles, it is necessary for flexible grounds like public policy to suppress practices acting against the nature of common law.¹² It is evident that the author espouses the active use of judicial discretion in ruling on public policy. Percy Winfield, in his paper ‘*Public Policy in English law*’, writes that the judges represent the highest common factor of public sentiment and intelligence¹³.

The divisional bench in the AP High Court, in the case of *Ratanchand Hirachand v Askar Nawaz Jung*¹⁴, held that ‘new heads of public policy need to be evolved whenever necessary. Law cannot afford to remain static’. This judgement was then supported by the Supreme Court when the case went on appeal. The necessity of public policy to be used with a humane touch rests largely on the fact that unlike conventional law, public policy keeps changing along with society.

In the case of *C.O.S.I.D vs Steel Authority of India*¹⁵, an export agreement was struck as void as there was extreme shortage of the goods in India. The government already had discouraged such exports, and the court declared the contract void based on public policy, despite the fact that it was not an existing head of public policy.

With all the above case laws and expert opinions, a trend appears in pace where Indian Courts actually have started encouraging discretion of the judiciary in terms of creating new heads. There appears to be a set pattern with all of the above rulings that directly goes against the

¹¹ This metaphor was in response to Justice Burrough’s memorable comparison of public policy to an unruly horse in the case of *Richardson v Mellish*, 1824 (2) Bing. 229.

¹² William Holdsworth, *History of English Law*, Vol 3, pp 55.

¹³ Percy Winfield, *Public Policy in English Law*, Harvard Law Rev. 76, 97.

¹⁴ *Ratanchand Hirachand v Askar Nawaz Jung*, AIR 1976 AP 112.

¹⁵ *C.O.S.I.D vs Steel Authority of India*, AIR 1986 Del 8.

earlier trends set by English courts. The pattern is that courts are now more and more ready to create new heads of public policy while determining the legality of a contract, giving the discretionary powers of judges, a measured yardstick. Judges have now increasingly been permitted to understand the changing situations, and adjudicate accordingly. However, there is a litmus test in place to ensure that these very powers are not misused, and judges still are honest while adjudicating in matters of judicial interpretation of public policy. In the case of *Ratanchand Hirachand v Askar Nawaz Jung*¹⁶ (also a case where the broader view was favored, this case also discussed the need to keep establishing new heads as society is ever changing), the courts established a clear two-step process as described above, taking care that any new head of public policy would take care that it fulfills two conditions- that it would be for the 'advancement of public good' and 'prevention of public mischief'¹⁷. These have been called the 'twin touchstones of public policy' and have since then been used in several cases in the creation of new heads. That is a check on possible abuse of power, as well as curtailing the discretionary power of judges enough to prevent egregious errors while judging the public policy, but also not so tight as to prevent the courts from taking cognizance of changing lifestyles and ruling in sync with the public opinion. The development of this test, which has ended up just right in order to avoid censure from either standpoint, has largely regulated the powers of the judiciary, while still being firmly in support of judges exercising their discretion.

Conclusion

The application of discretionary powers to rule on public policy issues has always been a gray area in the Indian Contracts Act, and the story of its evolution is much in sync with every other area of law. The earlier jurists erred on the side of caution in cases where the law was neither black nor white, but it was soon realized that such an approach only made it harder for the law to operate, and this gray area could be substantially used to enforce law¹⁸, as "*had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved.*"¹⁹ Starting from the 1970s, the jurists and courts

¹⁶ Supra note 14.

¹⁷ Ibid.

¹⁸ Supra Note 12.

¹⁹ Supra Note 8.

have been rethinking the cautious ‘narrow view’ and have gradually tilted more in favor of utilizing the vaguely worded act to deliver pragmatic judgements, while feeling the pulse of public policy. Enabling the courts to deliver justice when it feels that injustice has been done, and carrying forward such practices are in detriment to society, now has enforced the judiciary and bolstered the handling of gray areas in law. This kind of power also has its own repercussions, as was feared by the various conservative judges, but the evolution of the two-step test²⁰ has put a check on the conversion of the judges’ duty to unbridled power. The law of contracts has thus progressed a long way from 1824, where public policy was compared to an unruly horse was first given²¹, to the Supreme Court in 1986, asserting that it is the duty of the judges, as per constitution, to provide interpretations as regards public policy²².

²⁰ Supra Note 14.

²¹ *Richardson v Mellish*, 1824 (2) Bing. 229.

²² *Central Inland Water Transportation Corporation Ltd v Brojonath Ganguly*, AIR 1986 SC 1571.