THE CONCEPT OF ASSIGNMENT OF DECREE-DEBT

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WHAT IS A DEBT?

In the matter of: ***Commissioner of Wealth Tax* V/s *Pierce Leslie & Co. Ltd.***, AIR 1963 Mad 356, relying upon the report in the matter of: ***Webb* V/s *Stenton***, (1883) 11 QBD 518, it was observed that the essential requisites of a debt are:

(1) An ascertained or readily calculable amount;

(2) An absolute unqualified and present liability in regard to the amount with the obligation to pay forthwith or in future within an ascertained time;

(3) The obligation must have accrued and be subsisting and should not be that which is merely accruing.

Thus, a contingent liability or a contingency debt is neither a liability nor a debt. A debt is a *debitum in praesenti, solvendum in futuro.*

WHAT IS CONTINGENT LIABILITY?

The expression *contingent liability* has been defined under Accounting Standard 29 as issued by the Institute of Chartered Accountants of India as under:

"*A contingent liability is:*

(a) A possible obligation that arises from past events and the existence of which will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the enterprise; or

(b) A present obligation that arises from past events but is not recognized because:

(i) It is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation; or

(ii) A reliable estimate of the amount of the obligation cannot be made."

ACTIONABLE CLAIM

(1) Every claim is not an actionable claim; it must be a claim either to a debt or to a beneficial interest in movable property and the movable property must not be in possession of the claimant. In the matter of: ***Sunrise Associates* V/s *Government of NCT of Delhi***, (2006) 5 SCC 603, it was observed that an actionable claim may be existent in *praesenti*, accruing, conditional or contingent.

(2) Section 132 of the Transfer of Property Act, 1882 provides that the transferee of an actionable claim has to take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

ASSIGNMENT OF CONTRACT

An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognized distinction between these two classes of assignments. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

There is in law a clear distinction between assignment of rights under a contract by a party who has performed his obligations thereunder, and assignment of a claim for compensation which one party has against the other for breach of contract. The latter is a mere claim for damages which cannot be assigned in law, the former is a benefit under an agreement, which is capable of assignment.

In *Halsbury's Laws of England*, Volume 8, Page: 258, Para 451, it is stated that:

"*... There is, however, no objection to the substituted performance by a third person of the duties of a party to the contract where the duties are disconnected from the skill, character, or other personal qualifications of the party to the contract. In such a circumstance, however, the liability of the original contracting party is not discharged, and the only effect is that the other party may be able to look to the third party for the performance of the contractual obligations in addition to the original contracting party.*"

In the matter of: ***British Waggon Co.* V/s *Lea & Co.***, 5 QBD 149 (1880), the facts were that a company called the Parkgate Waggon Company had hired wagons to the defendant on the

terms that the defendant should pay rent for their use, and in turn that the Parkgate Waggon Company would execute the necessary repairs for them. The Parkgate Waggon Company then assigned its rights under the contract to another company called the British Company, subject to the obligation to execute the repairs. In accordance with this agreement the assignee did execute the repairs. Thereafter, Parkgate Waggon Company demanded rent from the defendant, who resisted the claim on the ground that the Parkgate Waggon Company had disabled itself from performing the contract, by reason of assignment to which the defendant had not consented. In overruling this contention, the court observed that as the work to be done under the contract did not require personal skill or ability, the Parkgate Waggon Company could get it done by any person, and that would be sufficient performance. That Cockburn C.J. observed that:

"*... All that the hirers, the defendants, cared for in this stipulation was the wagons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company entered into a contract with a competent party to do the repairs, and so procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the wagons in repair.*"

TRANSFERABILITY OF CONTRACT

In the matter of: ***Khardah Co. Ltd.* V/s *Raymon & Co. (India) Private Ltd.***, AIR 1962 SC 1810, it was observed that:

"*... We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again, it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances. Therefore, on the question whether there was an agreement between the parties that the contract was to be non-transferable, the absence of a specific clause forbidding*

transfer is not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement of the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is nothing in law which prevents effect from being given to it." (emphasis added)

ASSIGNMENT OF LIABILITY

In the matter of: ***UCO Bank, Thanedhar Branch* V/s *Leela Wati & Anr***, 2001 SCC Online HP 76, it was held that:

"*... 15. The liability of a debtor under a contract can be transferred by assignment or novation of the contract. However, to be operative the assignment must also amount to a novation of the contract and requires consent of the party other than the assignor and the assignee. Therefore, to be operative and binding the assignment/ novation of contract must fulfil two conditions, viz. (i) that a new debtor has consented to assume the liability of the original debtor, and (ii) that the creditor that agreed to accept his liability in substitution of the liability of the original debtor.*"

VOLUNTARY ASSIGNMENT OF CONTRACTUAL LIABILITIES

(1) A voluntary assignment of contractual liabilities means the transfer of contractual liabilities by one party to the contract to a stranger, without the consent of the other party to the contract.

(2) The general rule is that the contractual liabilities cannot be assigned to a stranger to the contract voluntarily.

(3) According to the *First Paragraph* of Section 37 of the Indian Contract Act, 1872, only parties to a contract are bound to perform their respective promises. A party to a contract cannot voluntarily transfer his contractual liabilities to a stranger.

(4) In the matter of *Khardah Co. Ltd.* (Supra) it was held that the contractual liabilities cannot be assigned voluntarily by a party to a contract.

(5) According to Section 40 of the Indian Contract Act, 1872:

i. Where parties intend that the contract should be performed by the promisor personally and no other person can perform such promise, then the promisor only is bound to perform it; here the promisor cannot delegate his contractual obligations to a third person without consent of the promisee. Such contract is called a *personal contract*.

ii. If performance of a promise does not involve any personal element, skill or qualification then it can be performed by the promisor, or his legal heirs or even by a third person who is employed by the promisor to perform such promise. For example, in the matter of *Khardah Co. Ltd.* (Supra) the Hon'ble Supreme Court of India observed that where a contract is for sale of goods, there is nothing personal about it; it does not matter to the buyer as to who delivers the goods, what really matters to him is that the goods delivered should be in accordance with the contracted specifications.

(6) In the matter of: ***Toomey* V/s *Rama Sahi***, I.L.R. (1890) 17 Cal 115, it was observed that a contract which is based on personal qualifications of the assignor cannot be assigned without other party's consent.

(7) According to Section 41 of the Indian Contract Act, 1872, when a promisee accepts the performance of promise from a third person he cannot, afterwards, enforce it against the promisor. However, it is important to note that the promisee cannot be compelled to accept performance of the promise by a stranger. The promisee is at liberty to accept or reject the performance of promise by a stranger.

(8) The rule contained in Section 41 of the Indian Contract Act, 1872 provides that if the promisee accepts performance rendered by a third party, the promisor becomes free from his obligation and he cannot be held liable for not performing the promise. However, Section 41 of the Indian Contract Act, 1872 does not apply where the third person has not performed the promisor's promise, but merely agreed to perform it. Further, the stranger/ third party must perform the whole promise; performance of the promise in part is of no effect.

INVOLUNTARY ASSIGNMENT OF CONTRACTUAL LIABILITIES

(1) A promise depending upon personal consideration terminates on death of the promisor. The *Second Paragraph* of Section 37 of the Indian Contract Act, 1872 provides that in case of death of promisor before performance of its promise, the representative of the promisor is bound to perform the promise. Thus, when a promisor dies without fulfilling its obligations, the unfulfilled obligations devolve upon the personal representatives of the promisor by operation of law. But this principle is subject to limitation mentioned under Section 37 of the Indian Contract Act, 1872 itself, and the limitation is that where contract is of personal nature, upon the death of the promisor, the representatives of the promisor are bound to perform the promise. It is settled law that a personal action dies with the person (that is, *actio personalis moritur cum persona*).

(2) Section 42 of the Indian Contract Act, 1872 states that when there is a joint promise, all the promisors are bound to perform such promise jointly and unless, a contrary intention appears by the contract, they cannot perform it separately. Further, Section 42 of the Indian Contract Act, 1872 states that after death of any of the joint promisors, his legal representative, jointly with other surviving promisors will have to perform the promise. Thus, it can be said that if a promise is joint, as a general rule, it must be performed by all the promisors jointly, and after their death, the promise will devolve by operation of law upon their legal representatives who will also perform the promise jointly.

(3) Section 32 (3) of the Indian Partnership Act, 1932 provides that notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third-parties for any act done by any of them which would have been an act of the firm if done before his retirement, until public notice is given of the retirement. However, a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner. The public notice may either be given by retired partner or by any continuing partner.

MERGER OF TRANSFEROR COMPANY INTO THE TRANSFEREE COMPANY AND APPLICATION UNDER ORDER 22 OF THE CODE OF CIVIL PROCEDURE, 1908

In the matter of: ***Bank Kreiss AG* V/s *Ashok K. Chauhan***, MANU/DE/9011/2007, the Hon'ble High Court of Delhi in the context of a merger between two companies noted that in the event the transferor company merges with the transferee company then the transferor company losses its identity and in such a case the transferee company has to file an application under Order 22, Rule 10 of the Civil Procedure Code, 1908 and this application is to be filed by the transferee company before the suit abates. That the questions of law that were formulated by the Hon'ble Court for adjudication in the matter of *Bank Kreiss AG* (Supra) along with the answers to the same are tabulated below:

1. Whether a merging company, upon merger with another company and thereby ceasing to exist as an independent entity, could be construed as having "died" upon such merger in the context of Order 22 of the Code of Civil Procedure, 1908?	Answer: ***Yes***
2. If yes, would a suit filed by the transferor company abate in case no application for bringing its legal representatives on record is filed within the stipulated time in view of the provisions of Order 22, Rule 3 of the Code of Civil Procedure, 1908?	Answer: ***Yes***
3. Whether the transferee company, after the merger referred to above, would be entitled to file an application under Order 22, Rule 10 of the Code of Civil Procedure, 1908 and seek substitution in place of the transferor company as a plaintiff in a suit?	Answer: ***No***

ASSIGNMENT OF "DECREE-DEBT"

A plaintiff can sue a defendant as per law only if the plaintiff has a cause of action in his favour and against the defendant. The term "cause of action" means bundle of facts which the plaintiff needs to prove in a court of law in order to obtain a relief in his favour and against the defendant.

When a claim is launched by the plaintiff against the defendant, say in the nature of *suit for recovery of money*, then for the defendant the amount/ sum of money claimed by the plaintiff against him is in the nature of a "contingent liability". However, for the plaintiff the future receivables which he is likely to get at the conclusion of the litigation ensuing between him and the defendant is in the nature of an "actionable claim".

That at the conclusion of the litigation when a decree is drawn by the court of law against the defendant and in favour of the plaintiff for whatever sum, the decree so drawn is in the nature of a "debt" due and payable by the defendant to the plaintiff.

Once a decree for a particular sum of money is drawn in favour of the plaintiff and against the defendant, then, the plaintiff is always at liberty to assign the decree obtained by him to even a third party. However, the question that arises for consideration is that: *Can an amount payable in terms of a decree of the court by the defendant, be assigned by him to a third party?*

That so far as the law of contract as regards assignment of contractual liability is concerned it is settled law that contractual obligations which are *personal* in nature cannot be assigned, and if the party to the contract otherwise assigns an obligation arising out of the contract to a third party then it results in novation of contract which is possible only if permission of the other party to the contract is sought and is there by obtained.

That when a decree is passed by the court of law for a certain sum of money in favour of the plaintiff and against the defendant then the decree so passed is in the nature of a debt for the defendant which he has to pay to the plaintiff. That the plaintiff in order to enjoy the fruits of the decree which is passed in his favour and against the defendant, has to prefer execution proceedings under Order XXI of the Code of Civil Procedure, 1908. That the general rule is that the executing court cannot go behind the decree and it is concerned with the fructification of the decree.

Now, if we try to fit in the logic of "assignment of contractual obligations" in the supposed "assignment of decree-debt" by the defendant/ judgment debtor, then the situation that comes to fore is one that is not only incongruent but is beyond the contemplation of law, for the following reasons among others:

(i) Executing court will always execute the decree against the original judgment-debtor, for it cannot go behind the decree. However, the situation of execution of decree being preferred against the transferee company instead of the transferor company in case of merger/amalgamation/takeover of one company by the other is a different situation altogether, like the one where by the executing court sometimes enters into the arena of lifting of corporate veil so that the judgment debtor does not escape his liability by exploring and exploiting certain technicalities of law.

(ii) Order XXI of the Code of Civil Procedure, 1908 recognizes and provides for the assignment of decree by the decree holder to a third party, however, there is no procedure stipulated in Order XXI of the Code of Civil Procedure, 1908 which recognizes or provides for assignment/ transfer of decree-debt payable by the judgment debtor to a third party.

(iii) It is settled law that an actionable claim can be transferred by way of assignment. Further, a pending litigation apropos *suit for recovery of money* for a defendant at best is a contingent liability. That a contingent liability is not an actionable claim; the receivables which may accrue in future to the plaintiff vide the suit which he has instituted for recovery of money against the defendant is in the nature of an actionable claim.

(iv) If transfer of decree-debt by the judgment debtor to a third party is allowed then it can be an easy rouse for the judgment debtor to incorporate a sham/shell company and transfer its decree-debt to that company and there by evade its liability.

Thus, it can be said that although a decree can be assigned by the decree holder to a third party but the same does not hold true for a supposed decree-debt because the former is in the nature of "*receivables*" while the latter is not.