



INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

LOOPHOLES IN INDIAN CONTRACT ACT: A CRITICAL ANALYSIS

BY HARJAS SINGH GULATI

1st YEAR LAW STUDENT

SVKM'S NMIMS ,SCHOOL OF LAW, BENGALURU

ABSTRACT

The Indian Contract Act 1872 is a well detailed document that has governed many contracts over the years. It has been so detail drafted by the legislative makers that it has not invited any major changes in its usage in over so many years. It has been governing contracts in the Indian Corporate Sector for an exceptionally long time. However, with the advent of blockchain technology and emerging players with changing contours, it becomes imperative to amend the Indian Contracts Act to incorporate the dynamics of 21st century. It is also in the interests of modern corporate governance that Indian Contract Act is introduced with some changes. This paper talks about the incorporation of smart contracts based on blockchain technology, amendment of contracts for surrogacy in the medical sector, new dimensions related to article 11 and 27 of Indian Contract Act, new provisions for digital contracts and a relook at section 74 of the Indian Contract Act. All of these are major topics that need amendments for plugging the loopholes in the century old Contracts Act. This paper also provides suggestions that needs to be incorporated into the Indian Contract Act 1872 so that new global companies find it easier and helpful to engage in a wide variety of domestic and International contracts with Indian people. Finally, this paper provides a wide overlook at the Indian Contract Act along with the difficulty in interpretation of certain provisions mentioned in the aforementioned act

I argue that reforms in Indian Contract Act based on smart contracts arising out of blockchain technology is the way forward. In addition to that, I dive into the topics of problem of consideration and contract formation in surrogacy. Alongside a revamp of the

existing sections, I argue the benefits that one might find in updating the archaic Indian Contract Act 1872.

Keywords: Blockchain, Section 27, Section 74, Section 11, Amendment, Indian Contract Act 1872, Digital Contracts

INTRODUCTION

The Indian Contract Act is a vast piece of documentation that enables the businesses around India to engage in multitude of contracts. However, there is a certain need for a relook at the act so that it can be called “Up-to Date” with the recent standards and judgements. This article provides a look at the Indian Contract Act with the objective of reviewing it and advancing the loopholes that persist in the Act. Like any sword which needs polishing after its usage, the Indian Contract Act too demands a regular timely update so that it shines brighter.

LITERATURE REVIEW

❖ ARTICLES

Critical Analysis of Section 27 of the Indian Contract Act¹

- This article examines Section 27 of the Indian Contract Act in a varied way.
- It talks about the various type of restraints- whether partial or total restraint exercised by individuals and companies to compete with each other in the market.
- It also draws upon the thin lines of conclusion between what constitutes as fair restraint and what does not constitute into fair restraint.
- This article provides cases to substantiate the voidability of certain restraints to trade and also talks about the prevalent idea of contracts and restraints from the viewpoint of English Law.
- Lastly, this article talks about the two exceptions to the restraint of trade mainly- judicial interpretations and statutory provisions. It also talks about the narrowness of the section and how certain improvements are needed for it to be complaint in the modern times.

English Contract Problems in Indian Code and Case Law²

- The journal gives us a comparison between the Indian usage of Contract law and the similar or dissenting perspective adopted by the English courts in certain perspectives,

¹ JUS CORPUS, <https://www.juscorpus.com/critical-analysis-of-section-27-of-indian-contract-act/>,(01-06-2022)

² R. N. Gooderson, English Contract Problems in Indian Code and Case Law, Vol. 16, The Cambridge Law Journal, pp.67-84, 1958, <https://www.jstor.org/stable/4504494>

- It discusses about limitations governing the Indian Contract Act 1872 in certain provisions like Section 70, Section 11 etc. These limitations show their contradictory opinions when faced with the conflict of opinion both in English courts and Indian Courts.
- It also talks about the importance of English judgements which make a profound impact on the Indian judges which consider the judgements while giving orders for the same in a disputed case of Indian contract act.
- The journal also discusses the variations followed in similar fact cases in English and Indian courts alike. It is observable in cases that what might be followed by English courts may be considered in the Indian decisions but with a slight variation in the implementation. One such example is the Tinn Hoffman³ case and Surendra Nath v. Kedarnath⁴, wherein similar factual scenarios led to the same judgement but with variations arising in the Indian counterpart.
- Lastly, it talks about the infant cases which the author finds to be unsatisfactory with no clarity on the principles either. The author takes note of minors who have to engage in contracts such as film or advertisement contracts and focuses on the difficulty, they have to engage in while enforcement of contract. The provisions of Indian Contract Act bar minors from contracting unless the contract is of a necessity.

Legal Impact of Technology on E- Contracts Communication in India⁵

- The following paper discusses E-contracts in great detail. It talks about the modes of acceptance, offer and how E- contracts come under the purview of Indian Contract Act 1872.
- The paper also discusses the similarities of E-contracts to normal contracts and how such contracts are governed under IT Act,2000, and Indian Contract Act 1872.
- It takes into consideration about how the aspect of communication works in E-contracts and how digital and E signatures work in real time.
- This paper also talks about the legal problems faced in such contracts and goes in detail to showcase the same in the current factual existent like jurisdictional barriers, cyber-crime etc.
- However, this paper doesn't give any suggestions as to what to do for the persistent problems in E-contracts.

³ Tinn v Hoffman, (1873) 29 LT 271

⁴ Surendra Nath Roy vs Kedarnath Bose And Ors., 161 Ind Cas 224

⁵ Devesh Pathak ,Dr. L. S. Rajpoot, *Legal Impact of Technology on E-contracts Communication in India*, Vol.III, IJCMS 84.1, (2015), <http://ijcms2015.co/file/2018-Vol-III-Issue-I/AIJRA-VOL-III-ISSUE-I-84.pdf>

Contractual liability of a minor in India⁶

- This article talks extensively about the perception of minors through the eyes of Indian Contract Act 1872. It talks about ratification of contracts by minors in a broad sense along with their accountabilities in certain contractual obligations.
- This article also deals with minors under Negotiable Instruments Act, 1881 and also in the case of agency.
- Various cases have been discussed in this article related to minors and in a very thorough fashion.
- However, this article fails to establish fresh relevance on the topic of minors in the modern-day world. It also fails to provide any suggestions as to how we can make it better for contracting parties in case of a fraud by minor.

The Indian Contract Act: Its Wanderlust And Warmer Climes⁷

- This article provides a comprehensive worldwide view of implementation of Indian Contracts Act, 1872 in countries like Pakistan, Bangladesh and Burma.
- It starts with the history of contracts act and dives briefly into its origins from the times of Dharmasastra.
- However, the main content includes distinguishable facts between English Common law and the Indian Contract Act 1872. It also talks about the restrictive manner of Section 27 which doesn't allow the principle of Laissez- faire.
- It also ruminates on the effect of Section 74 of the Indian Contract Act and how the implementation of these relevant provisions differs in countries according to their respective societies. This happens despite the usage of the same law.
- However, this article doesn't talk about the shortcomings of some provisions and the need for amendments in certain provisions of the act.

⁶ Dr. Anil Kumar Dixit, Amra, *Contractual liability of a minor in India*, Vol.III, IJAER,436, 436-445,(2018), <https://www.educationjournal.org/download/727/3-2-143-865.pdf>

⁷ Joseph Minattur, *The Indian Contract Act: Its wanderlust and warmer climes*, Indian Law Institute,107, 107-115,(1972), <https://www.jstor.org/stable/43950176>

BOOKS

Avtar Singh's Law of contract and Specific Relief⁸

- ❖ This book talks extensively about Indian Contract Act 1872 and also discuss about many provisions and topics surrounding it. It is based on court decisions and latest precedents set by the court.
- ❖ It also includes new decisions about the problems related to email related decisions, arbitration arguments and covers various aspects related to agreements, acceptance, legality, mistake etc.
- ❖ However, this book does not cover e-contracts or upcoming new sectors like smart contracts. It also does not cover any limitations governing the act or any amendments suitable for the act given the latest scenario.

Cheshire, Fifoot & Furmston's- Law of Contract⁹

- ❖ It is a detailed book concerning itself with law of contracts along with various doctrines associated with it.
- ❖ It covers the origins of the contract with a dive into the medieval times with a follow up to the modern times to give a historical introduction of how the law of contracts came to be what it is today.
- ❖ However, it fails to establish a modern relevance when talked about the problems faced by people in contract formation in electronic form. Furthermore, it doesn't consider loopholes of various provisions of the Indian Contract Act and provides a global view instead of a tailored Indian view.

Anson's Law of Contract¹⁰

- ❖ This book is a detailed manifestation of contracts law. It talks a lot about express and implied terms in a contract along with a clear focus on the exemption clauses.
- ❖ Although it takes a UK centric view upon the topics of contracts discussed in it, it provides a useful comparative narrative as to how the cases are dealt in the European viewpoint and how they differ in the Indian context.

⁸ RAJESH KAPOOR ,AVTAR SINGH'S LAW OF CONTRACT AND SPECIFIC RELIEF, (12th ed. 2017)

⁹ MICHAEL FURMSTON, CHESHIRE, FIFOOT & FURMSTON'S- LAW OF CONTRACT, (16th ed. 2012).

¹⁰J.BEATSON , ANSON'S LAW OF CONTRACT,(31sted. 2010).

- ❖ However, like the other books, it doesn't reflect the modern technologies being implemented in the field of contracts during the 21st century. It is a well detailed piece of writing which covers most aspects of the contract law but fails to observe the new changes.

Pollock & Mulla, The Indian Contract Act & Specific Relief Act, 1872¹¹

- ❖ The book talks about Indian Contract Act in a comprehensive manner. It takes into account the Indian Setting of scenarios and justifies it through cases tailored for the Indian setting.
- ❖ It deliberates the scope of the act and also talks about main provisions governing the act like consideration, promises, communication, revocation etc.
- ❖ It also dives deep into the topic of infancy, estoppel, ratification, and specific performance. The book also makes it easier to understand speculative and wagering transactions are dealt in the Indian Courts.
- ❖ Although it talks a little bit about governance of E-Contracts through the IT act, it is still very barebones in giving a full context about the E-Contracts. It is also lacking in terms of defining surrogacy contracts and other new concept contracts.

Charles L.Knapp, Problems in Contract Law¹²

- ❖ This book is a well-documented piece of work which talks about the problems arising in the Contract Law.
- ❖ It cogitates the various problems like limitations in expectation damages , Rights and Duties of the third parties, statute of frauds etc.
- ❖ The problem with this work is the outdated content of the book. It talks about the problems in contracts from 20th century perspective with no consideration about the technological perspective.
- ❖ It also doesn't talk about contract law problems from a specific Indian point of view.

STATEMENT OF PROBLEM

While dealing with the contracts of the modern era, it is imperative that we take a study of amendments and changes that should be taken into consideration for the modern epoch. The latest advancements in technology, the closing boundaries of businesses due to globalization and a relook at some of the old-fashioned sections of the Indian Contract Act 1872 to plug in the loopholes is very much needed. Our problem mainly deals with gaps in the Indian Contract Act 1872 regarding surrogacy contracts, a non-existent approach to the latest smart

¹¹ R.YASHOD VARDHAN, POLLOCK & MULLA THE INDIAN CONTRACT ACT & SPECIFIC RELIEF ACTS, 1872,(16TH ed. 2022)

¹² CHARLES L. KNAPP, PROBLEMS IN CONTRACT LAW,(2nd ed. 1987).

contracts and how certain sections of the Act pose problems to the Global MNC's in conducting their business in India.

RATIONALE OF STUDY

Contracts form a daily part of our life. We engage in express and implied offers in our daily life on a persistent basis. The new eons of startups and shared global solidarity through new companies establishing production plants in India means that contracts would be one of the first things that these companies would be doing in plethora due to nature of a business transaction. However, with the modern changes required in running a business, it is also quintessential to update the contracts which would be governing business transactions. The problem arises in identifying the key areas wherein the Contract Act needs to be updated. The intention behind this article is to discuss in detail what are some of the problems faced by us due to an outdated contract act and the changes required for the modern businesses to conduct their contracts with ease. It is also an outlook of the new technology which is being implemented by MNC giants in the contract formation sector and how the legislation can keep up with it through certain changes in the Act. Thus, this study explores the reforms which can be implemented in the century old Contract Act to bring it to the level of modernity.

RESEARCH OBJECTIVES

The purpose of this research is

- To take a critical outlook towards Section 27 of the Indian Contract Act.
- To take a outlook at the present problem of minor dealings in modern contracts according to Section 11.
- To take a critical approach at analyzing Section 74 of the Indian Contract Act
- To analyze the current situation of smart contracts based on blockchain technology
- To contemplate on the problems that arise in a surrogacy contract.
- To provide effective suggestions on the changes needed in the Indian Contract Act, 1872.

RESEARCH QUESTIONS

- Does the current Indian Contract Act,1872 need a relook at Section 27 in the modern business world?
- Is it justified to declare contracts with minors void other than that of necessity in the age of global uprising of contracts with influencing teens?
- Does Section 74 of Indian Contract Act,1872 need to be brought up with the current changing scenarios of the 21st century?
- Can there be a provision for outlining surrogacy contracts as a special provision in the Indian Contract Act, 1872?
- Can the Indian Contract Act 1872, incorporate the automation of smart contracts based on automation?

RESEARCH METHODOLOGY

The methodology that would be applied for conducting this research is Doctrinal, Analytical and Comparative research. In this research the primary sources of data are Indian Contract Act, 1872 and Judicial Precedents. The secondary sources of data comprise of published books, journals, scholarly articles, online journals, research reports and others were used.

A RELOOK AT SECTION 27 OF THE INDIAN CONTRACT ACT, 1872

Section 27 of the Indian Contract Act states,1872 that, “Every agreement by which one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void.”¹³

A good case study of the current exploitations of the Restraint of profession, trade or business topic can be traced back to sport clubs and agents. They hide the exploitations behind a long-term contractual obligation as they don't like to give up on their treasured assets. In this way, they are denied the right to play and consequently the right to earn through shady contract clauses. One of the primary international cases that governs this idea is the Bosman case.¹⁴ In this case, the court was questioned with the idea of restraint in the free movement of players practiced by the football clubs by charging a fee for the transfer of players whose contract has ended. There were also other aspects which were further looked upon in the Bosman Case. Some of these aspects included ruling quotas which were

¹³ Indian Contract Act, 1872, §27, No.9, Acts of Parliament, (1872)

¹⁴ Union Royale Belge des Sociétés de Football Assn. ASBL v. Jean-Marc Bosman, (1995) C-415/93.

changed to include the quota of only restricting the number of non-EU players on each team. The Bosman ruling turned out to be a landmark judgement for most players around the world and was a first step towards removing the restraint practiced by clubs likewise. The players could now freely move to any club which they liked without having to give substantial fees to their old clubs.

However, this was just a small firing in a big warfare. The current FIFA regulations are still subjective to reforms in the transfer mechanism. Players are still considered tradable possessions where rights of the players are blatantly violated in a contractual obligation. Their regulations can be termed to be anti-competitive and to some extent very illicit and unpardonable.

The Indian side of the sports competitive market is equally guilty of some of the regulations they pose on athletes¹⁵. A prime example of it would be the Percept case against Zaheer Khan.¹⁶

In this case, Percept repeatedly tried to enforce Right of First Refusal (ROFR) clause on Zaheer Khan, practically handicapping him from wielding any bargaining power leaving him at the mercy of Percept in any offer received. This clause granted the company to match any offers made by a third party and retain the clientele if they so desired. The client is only deemed to work with any other party if the first party can't match the other party's offer. This is a practice followed by many Indian companies in the name of restrictive covenants and is a major plughole to be resolved. Like FIFA, this practice also seems very anti-competitive, deleterious, and one-sided. A similar story unfolds in Yuvraj Singh case,¹⁷ which held that negative covenants like these are a restraint on trade for the athletes and should not be followed. The cases have not been going down, albeit there have been some cases like that of Alexander Zverev that have reached out of the court settlements in cases of restraint of trade.¹⁸ It can be analyzed from the above discussions that there exists a clear lopsided bargaining power between clubs or agents in the sporting world who try to parasitically rip off from the personal off pitch brand of an athlete. In this process, they enforce various contractual obligations in the name of reasonable restrictions on restraint of trade which need to be relooked.

¹⁵ Rahul Dave, *Restraint of Trade and Sports Contracts*, SCC ONLINE, (06th June, 2022 6:25 pm), <https://ezproxy.svkm.ac.in:2090/Members/NoteView.aspx?citation=SIRYVC05MDAwMDA3NjI0JiYmJiY0MCMYmJiYmU2VhcmNoJiYmJiZmdWxsc2NyZWVu>

¹⁶ Percept D'Mark (India) (P) Ltd. v. Zaheer Khan, AIR 2006 SC 3426

¹⁷ Percept Talent Management (P) Ltd. v. Yuvraj Singh, (2008) 2 Bom CR 654

¹⁸ Jonathan Scally, *Game, set and match- Specific disclosure does it again*, HILL DICKINSON, (06TH June 2022, 7:08 pm), <https://www.hilldickinson.com/insights/articles/game-set-and-match-%E2%80%93-specific-disclosure-does-it-again-0>

OUTLINING SURROGACY CONTRACTS IN THE INDIAN CONTRACT ACT, 1872

Commercial surrogacy was given a formal greenlight in the landmark case of *Baby Manaji Yamanda v. Union of India*.¹⁹ It is governed by the Indian Contract Act, 1872 in the modern times. However, there is still a wide gap in its implementation through the Contract Act. This gap arises in the form of applicability of contractual remedies upon the breach of any such surrogacy contracts. The innate nature of the contract involving the handover of a human child to the intended parents and the complications which arise on specific performance on the account of pregnancy problems makes it difficult to provide for any reliefs; whether those reliefs be governed by Indian Contract Act itself or Specific Relief Act. Another gap is the prima facie commodification of the human child and damages proposed on the account that the child born is deficient in some area.²⁰ It makes a problem for the surrogate mother to compensate the other couple if such a situation arises or in cases of deception by surrogate mother. The case of *Re P (Surrogacy : Residence)*²¹ is an example of such case where the mother breached the contract by falsely declaring that a miscarriage happened. It was later found out that she was raising the kids on her own and had deceived the original intended parents. Lastly, there arises the issue of free consent in the surrogacy contracts as there are many cases wherein the mothers change the decision of giving away the child. The Indian Contract Act doesn't deal with surrogacy contracts in the way it should be intended. The Surrogate contract places a compulsion rather than a free consent on the surrogate mother to deliver the child at the end. The Law commission report of India recommends that certain provisions should be added for securing the consent of the mother in such cases²². Thus, it would be beneficial for the commercial surrogacy medical hub if certain exception clauses related to surrogacy in India is implemented in such a way that it protects the rights of surrogate mothers like in the situations of maternity leave²³ and also help in clear implementation of surrogacy contracts that are governed under the Indian Contract Act.

¹⁹ *Baby Manaji Yamanda v. Union of India*, (2008) 13 SCC 518

²⁰ Sonali Kusum, *Legal Glitches Facing Surrogacy Agreement In India*, SCC ONLINE, (06th June 2022, 7:09 pm), <https://ezproxy.svkm.ac.in:2090/Members/NoteView.aspx?citation=SIRYVC05MDAwOTY4NTQxJiYmJiY0MCMYmJiYmU2VhcmNoJiYmJiZmdWxc2NyZWVu>

²¹ *Re P (Surrogacy : Residence)* [2008] 1 FLR 177.

²² Union Minister of Law and Justice, Ministry of Law and Justice, Government of India, Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, Report No. 228, August 2009, <http://lawcommissionofindia.nic.in/reports/report228.pdf> (04th June, 2022).

²³ *Sushma Devi v. State of H.P.*, 2021 SCC OnLine HP 416

ADDITION OF SMART CONTRACTS BASED ON BLOCKCHAIN TECHNOLOGY IN THE INDIAN CONTRACTS ACT 1872.

The Smart contracts can be the answer to the renewable leasing agreement problem faced by many people in the business sector. The real estate boom backs the smart contracts which offers ease and convenience for renewing short term and long-term dynamic business catered leases. Indian Companies are jumping in on the bandwagon with companies like Bajaj Finserv²⁴ and Tech Mahindra²⁵ being the first hoppers. A blockchain can be defined as a shared, immutable ledger that facilitates the process of recording transactions and tracking assets in a business network. Not only is it faster and more efficient than other services but it is also very diverse.²⁶

A smart contract gets stored on a blockchain and self-execute itself based on certain parameters and if-then conditional statements imbibed in its code. Based on external activities and certifiable proofs of execution of trigger events, these contracts are executed. Thus, they minimize the need for liaisons or other third-party interference in making and execution of a contract. They also help in minimizing the costs for parties in terms of contract formation and litigation.²⁷

However, these smart contracts are a relatively new insignia in the world of contracting as these are incorporated as a subset within the E- contracts governed under IT act,2000, and Indian Contract Act 1872. This means that they are recognized as valid under Sec.10 of the Indian Contract Act.²⁸ These contracts do pose some hurdles in their implementation as the essentials of a valid contract work a little differently in smart contracts. These smart contracts are coded by a programmer and self-executory in nature. The theme of binary languages may not be something which a layman or an ordinary lawyer not specializing in tech field may be able to interpret. It can also become difficult to provide a common

²⁴ Pti, *Indian companies using blockchain technology to better services*, ECONOMIC TIMES (04TH November 2017, 7:41 pm), https://economictimes.indiatimes.com/news/company/corporate-trends/indian-companies-using-blockchain-technology-to-better-services/articleshow/61509547.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

²⁵ Etech, *Tech Mahindra to collaborate with TBCA Soft for cross-carrier blockchain platform*, ECONOMIC TIMES, (27TH February 2019, 2:39 pm), [https://economictimes.indiatimes.com/technology/tech-mahindra-to-collaborate-with-tbcasoft-for-cross-carrier-blockchain-](https://economictimes.indiatimes.com/technology/tech-mahindra-to-collaborate-with-tbcasoft-for-cross-carrier-blockchain-platform/articleshow/68183444.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

[platform/articleshow/68183444.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](https://economictimes.indiatimes.com/technology/tech-mahindra-to-collaborate-with-tbcasoft-for-cross-carrier-blockchain-platform/articleshow/68183444.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

²⁶ IBM, <https://www.ibm.com/in-en/topics/what-is-blockchain>, (5th June 2022).

²⁷ Pooja Dhamor, *Smart Contracts in Leasing: Is India Ready?*, SCC ONLINE (5th June 2022, 6:43 pm), <https://ezproxy.svkm.ac.in:2090/Members/NoteView.aspx?citation=SIRYVC05MDAwODAzNDI2JiYmJiY0MCMYmJiYmU2VhcmNoJiYmJiZmdWxc2NyZWVu#FN0003>

²⁸ Indian Contract Act, 1872, §10, No.9, Acts of Parliament, (1872)

consensus between two parties agreeing in a smart contract as consensus ad idem would be absent based on dearth of knowledge of programming code.

It also becomes difficult to incorporate such contracts in the Indian Realm as the legislative framework is not that capable to interpret such contracts. Smart contracts are a lucrative incentive for MNC's to sign more contracts and can strengthen the economic pipeline by inducing more people to enter the Indian subdivision. Since there are regular triggers in a smart contract which execute auto debit or auto credit functions, it helps in maintaining stability and reduces risk in a risk dominated society. In the leasing sector, it can prove to be a beneficial third party which auto debits the lease payment and auto credits the security deposit on expiry of lease. It can also facilitate complete transparency and traceability through a publicly seen audit on the blockchain ledger. During the leasing, any function which requires transfer of funds from one place to another based on specific conditions can be executed automatically making it a time saving feature. Lastly, it can execute conditions and funds based on a court or arbitration decision. Not only this but the talks of implementation have had a far-reaching implication on the government of UK too through its latest law commission report²⁹. Thus, the repetitive costs can be saved through a one-time investment in a smart contract. Hence, this would prove to be beneficial for the commercial businesses who have to enter into smart leasing contracts based on lands and various other assets on a daily basis.

A NEW OUTLOOK ON INDIAN CONTRACT ACT, 1872 IN THE 21ST CENTURY WITH THE CHANGING CONTOURS OF MINORS .

Minors in the entertainment industry is not a very newfangled fascination. Child actors have been gaining utmost importance since the 20th century. The Coogan Act³⁰ is one of the most famous laws in the entertainment industry arising from the Coogan Case wherein the child actor took parents to the court as the parents' didn't allow the child to retain his earnings from films. It is in this respect that minors are gaining utmost importance. Child Youtubers have lately found themselves to be in the scope of fame and huge amounts of earnings from their uploaded videos.³¹ In the Dawn of technical scams³¹ being circulated all across the Internet, it becomes important to include the aspect of minors indulging in such fraudulent

²⁹ Law Commission of UK, Smart Legal Contracts: Advice to Government, Cp 563 Law Com No. 401,(25th November, 2021), <https://www.lawcom.gov.uk/project/smart-contracts/>Last visited on June 10, 2022).

³⁰California Family Code § 6752, Acts of Stats, (2009)(United States of America)

³¹ Madeline Berg ,*The Highest Paid YouTube stars of 2019: The Kids are Killing It.*, FORBES,(06th June,2022 6:25 pm), <https://www.forbes.com/sites/maddieberg/2019/12/18/the-highest-paid-youtube-stars-of-2019-the-kids-are-killing-it/?sh=46ddc3e938cd>.

activities and not keep them safe under the view of voidability in Indian Contracts Act,1872. A minor who has enough technical knowhow in the circulation of scams, bank transfers and more is well aware of the act he is doing and should not be safeguarded in the name of voidability. A new approach should be taken when it comes to Minors in the 21st century who are not only faster than the previous generation in analyzing and implementing technical knowhow but also wary of their actions amounting to an illegal activity.

If a loophole like this is not plugged, then it incentivizes the new age children to engage in online crimes and frauds without the fear of serious repercussions.³² Section 11 of the Indian Contract Act qualifies a person of age of majority to be competent to contract.³³ The act however talks only about competency and majority to be major factors governing the qualifying factors of a contracting party. The act does not include much about minority and the liability of minors in cases. The minors have been subjugated to the Contract Act without taking in the aspect of modernity and altering extent of the minors in the new age of technology and contractual obligations. Minors are also sponsored by many companies in the real world to effectively promote their products through a communicating medium like YouTube. If this scenario persists and grows, it is necessary for the Indian Contract Act to make some exception clauses that make some minors liable for specific performance or breach of the contract for endorsements.³⁴ The minors in the era of E-Contracts have also been subjected to the risks posed by various websites who take the consent innocently through a big button of 'I Agree.'³⁵ There is also a new need to bring reforms in the Indian Contract Act related to minors who access Internet on a daily basis and register for cookies in a Accept or Deny form. It is dangerous for these minors to enter into clickwrap arguments without being given a healthy strict warning from the websites themselves.

³² Tobeornotto, *Need for reformation in laws relating to minors?*, LEGALLYINDIA,(06TH June 2022, 7:23 pm)

<https://www.legallyindia.com/views/entry/need-for-reformation-in-laws-relating-to-minors>

³³ Indian Contract Act, 1872, §11, No.9, Acts of Parliament, (1872)

³⁴ Rupert Neate, *Ryan Kaji, 9, earns \$29.5m as this year's highest-paid YouTuber*, THE GUARDIAN,(06th June 2022,9:05 pm), <https://www.theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber>

³⁵ Federal Trade Commission, *Google and YouTube Will Pay Record \$170 Million For Alleged Violations Of Children's Privacy Law*, FEDERAL TRADE COMMISSION,(04th September 2019),<https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law>

A CRITICAL APPROACH TOWARDS SECTION 74 OF THE INDIAN CONTRACT ACT, 1872.

Section 74 of the Indian Contract Act states that , “When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for”³⁶

Section 74 talks about providing for reasonable compensation in the case the contract contains a stipulation by way of penalty or an assured sum in the contract. However there have been various cases wherein the courts had to distinguish between a Liquidated Damages Clause(LD) from a penalty clause. The court limits the penalty clauses to pecuniary compensation which exemplify the deterrent effect that a party goes through on the account of breach of a contract as a punishment. On the other hand, the liquidated damages refer to genuine pre-estimate of losses and not a grand exemplification of the amount towards a specific breach.³⁷ However, it can be seen from the recent development of cases of Section 74 of the Indian Contract Act in the Supreme Court that these decisions are hampering the set peripheries of public and private law.³⁸ One of the most talked about mechanisms of this act is the claim of compensation even though people are not able to prove, whether or not they suffered any actual severe loss. Kailash Nath case has critically subjected the issue to enable Damage or loss suffered as sine qua non for the applicability of Section 74.³⁹

Section 74 becomes an inquisitive case for subsection to a study. The development of Section 74 through the cases of Maula Bux⁴⁰, Fateh Chand⁴¹ and Saw pipes⁴². Section 74 has also been held in government contracts that the extent of damages for a breach of contract held for government agencies is based on the inconvenience caused to the public. It is not because of the monetary loss that is suffered by the government agencies at that

³⁶ Indian Contract Act, 1872, §74 , No.9 , Acts of Parliament, (1872)

³⁷ Yasmin Barber, *Penalty Clause vs Liquidated damages*, GANNONS SOLICITORS, (07th June 2022, 11:41 am), <https://www.gannons.co.uk/insights/penalty-clause-vs-liquidated-damages/>

³⁸ Jeet H. Shroff & Ifrah Shaikh, *The Public Utility Contract Exception in India Law: Awarding damages without Proof of Actual Loss*, LSE BLOGS(07th June 2022, 11:41 am) <https://blogs.lse.ac.uk/southasia/2021/08/23/the-public-utility-contract-exception-in-indian-law-awarding-damages-without-proof-of-actual-loss/>

³⁹ Kailash Nath Associates v. DDA, (2015) 4 SCC 136

⁴⁰ Maula Bux v. Union Of India, 1970 AIR 1955

⁴¹ Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd, 2003 (2) CTC 282

⁴² Fateh Chand v. Balkishan Das, 1963 AIR 1405

time.⁴³ It is important that the multinational giants are not given the free liberty to interpret section 74 as an advantageous position for them in Legal Battles. This would prove to be very detrimental to the startups and new players in the market who would be bombarded with compensation of breach whether or not damages are occurred, or loss is suffered. Also, it is important that the clause specifies the difference between liquidated damages in the form of penalty and actual penalty clauses that mean pecuniary compensation. The Legislative should also consider that provisions regarding liquidated damages which should come into play while dealing with government contracts. The provision of public inconvenience while dealing with liquidated damages should also be added in the Indian Contract Act 1872.

CRITICAL ANALYSIS AND SUGGESTIONS

While the Indian Contract Act 1872 has been going on for so many years, it is time for the implementation of some changes. These changes are required to make the act more useful and relevant in the modern case and remove ambiguity in certain contemporary scenarios. It also saves time in the courts as the courts could then directly refer to the new sections and give a fair and just answer in contract disputes, saving time and money in the long run. The analysis shows that the contract majorly needs to focus on the relook of surrogacy contracts and clear confusions on the performance of such contracts and damages available to the aggrieved in case of a breach. The study further deepens with the topic of Minors in Section 11 of the Indian Contract Act 1872. It can be seen that increasing complexity in the way minors are perceived in the society and their new engagement with business forces through tech enabled shared spaces has opened a wide speculation for contracts with minors. A look at the increasing difficulty of children specific sites on obtaining of consent of cookies for tracking is a grey area too which needs to be debated upon. The analysis also points to addition of a new way in which a contract is entered into i.e., “Smart Contract”. It becomes imperative to use the new blockchain technology to our advantage to facilitate cost-effective and nifty contracts which can be performed based on the changing dynamics of a business environment. This gives a thriving opportunity for a business and lowers the risk for them, making it easy to engage in regular contracts easily and in a risk-free manner. Lastly, the analysis points to two of the most important sections of Indian Contract Act 1872, namely Section 27 and Section 74. The legislation should consider the free-market exploitation

⁴³ Melwood Construction Corp. v. State, 481 N.Y.S.2d 289 (N.Y. Ct. Cl. 1984)

being done in the name of reasonable restrictions to trade under Section 27, particularly in the Sports Sector. The Contract provisions should be fair to the players who have a right to make use of their brand name and get the best possible value out of it. Section 74 needs a relook at the section of damages in a government contract and the idea of not proving actual damage caused or loss suffered. It is important that a keen look towards the present judgements is made. It is also vital that the section is made fair to the new underdogs in the market and does not prove to be profitable only for the giants.

CONCLUSION

It is quite certain from the recent scenarios that some major amendments should be underway for the Indian Contract Act, 1872 to bring it at par with 21st century. It is high time for the legislature to break the monotony of the Act and incorporate some must have changes in the Act. Although the Indian Contract (Amendment) Bill of 2017⁴⁴ makes the first step at amendment, it is only limited to contractual farming agreements and does not account for the changes that have been analyzed in the study. Hence, the time for change is 'Now'.

BIBLIOGRAPHY

➤ ARTICLES

- Legal Glitches Facing Surrogacy Agreement In India by Sonali Kusum
- Penalty Clause vs Liquidated damages by Yasmin Barber,
- Restraint of Trade and Sports Contracts by Rahul Dave
- Smart Contracts in Leasing: Is India Ready? By Pooja Dhamor

➤ CASE LAWS

- Union Royale Belge des Sociétés de Football Assn. ASBL v. Jean-Marc Bosman, (1995) C-415/93.
- Percept D'Mark(India) (P) Ltd. v. Zaheer Khan, AIR 2006 SC 3426
- Percept Talent Management(P) Ltd. v. Yuvraj Singh, (2008) 2 Bom CR 654
- Sushma Devi v. State of H.P., 2021 SCC OnLine HP 416
- Baba Manaji Yamada v. Union of India, (2008) 13 SCC 518.
- Kailash Nath Associates v. DDA,(2015) 4 SCC 136
- Melwood Construction Corp. v. State, 481 N.Y S.2d 289 (N.Y Ct. CL 1984)
- Fateh Chand v. Balkishan Das, 1963 AIR 1405

⁴⁴ THE INDIAN CONTRACT (AMENDMENT) BILL, 2017, Bill No.21 of 2017, (4th August 2017),India

- Maulla Bux v. Union of India, 1970 AIR 1955
- Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. , 2003 (2) CTC 282
- Re P(Surrogacy : Residence) [2008] 1 FLR 177

➤ **STATUTES**

- Section 27 of the Indian Contracts Act, 1872
- Section 11 of the Indian Contracts Act, 1872
- Section 30 of the Indian Contracts Act, 1872
- Section 74 of the Indian Contracts Act, 1872
- Section 6752 of the California Family Code

➤ **BLOGS**

- The Public Utility Contract Exception in India Law: Awarding damages without Proof of Actual Loss, LSE BLOGS
- Tobeornottobe, Need for reformation in laws relating to minors?

➤ **COMMITTEE REPORTS OR BILLS**

- Committee Report No.228 on Surrogacy by Ministry of Law and Justice, “Need for legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy.
- THE INDIAN CONTRACT (AMENDMENT) BILL, 2017, Bill No.21 of 2017, (4th August 2017),India
- Law Commission of UK, Smart Legal Contracts: Advice to Government, Cp 563 Law Com No. 401,(25th November 2021), United Kingdom

➤ **WEBLIOGRAPHY**

- Indian Companies using blockchain technology to better services by PTI (Economic Times)
- Tech Mahindra to collaborate with TBCA Soft for Cross-barrier blockchain platform by Etech (Economic times)
- What is Blockchain? By IBM
- The Highest Paid YouTube Stars of 2019: The Kids are killing it By Madeline Berg(Forbes)
- Ryan Kaji,9, earns \$29.5m as this year’s highest-paid YouTuber by Rupert Neate (The Guardian)
- Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law by Federal Trade Commission.

- Game, set and match- Specific disclosure does it again by Jonathan Scally,(The Hill Dickinson)

➤ **WEBSITE DATABASES**

- SCC ONLINE
- MANUPATRA
- JSTOR
- HEINONLINE

