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WIELDING THE BLUE PENCIL: A PANACEA OR BANE FOR THE NON-COMPETE COVENANTS

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Abstract

Severability is generally an idea in retrospect, a filtering through a plethora of contractual rubble to rescue whatever endures a decision that a piece of a law or an agreement is illegal or in contractual terms, unfair. However, severability presents a pressing question time and again and that is: If part of an agreement is illegal or unfair, does the rest of the agreement holds good? The question is likewise universal and could emerge whenever part of an agreement is disputed or a specific utilization of a rule is held unlawful. Besides, the appropriate response can have significant results. It could be safely concluded that are severable parts of the agreement carry the risk of leaving the rest of an agreement in such a shape that the resultant agreement would be something that a party would have never sanctioned alone. On the other hand, a holding of non-severability can mean, for instance, that a whole covenant falls. In the landmark case of a solitary unlawful arrangement. As per Black's Law Dictionary the Doctrine of Blue Pencil is a legal standard for choosing whether to discredit the entire agreement or just the culpable words. Under this standard, just the culpable words are refuted on the instance that it is conceivable to erase them essentially by running a blue pencil through them rather than changing, including or revising words. The Blue Pencil rule permits the courts just to strike down the culpable arrangements and authorize the remainder of the accord. Hence, it becomes imperative to study and analyse the balance to be created between the employer's right to keep his trade and business intact as well an employee's right to earn livelihood. This balance could be established by using the Doctrine of Blue Pencil, however, the same comes up with a few roadblocks of its own, which would be discussed further.

Introduction

The law of contracts takes a shot at a general standard which is that the unlawful portions of any kind of contract or agreement are illegal and along these lines, could be deemed to be unenforceable. Nevertheless, there are numerous kinds of covenants which could contain one area or any declaration of sorts as unlawful and rest of various parts as authentic. The court in such cases strike out the unlawful part and approves the genuine one when it is found that the parts could be separated. The same is called the doctrine of severability.

This is done when the rest of the agreement actuate the objective of the parties involved. The doctrine of severability has presented many issues for the courts, for example, it doesn't offer ability to the court to alter a restrictive agreement in purview. In perspective on the precept of severability, another idea or principle was created in 1843 by virtue of *Mallan v. May* case, which later came to be known as Blue Pencil. (McGARVIE, 1977)

The Blue Pencil Doctrine is generally applied in circumstances where the non-compete proviso create some kind of dispute. As per Section 27 of the Indian Contract Act, any agreement in restraint of trade, to that extent, is void. In any case, the courts have started receiving assorted procedure and endorse such accord in the event that they appear to be reasonable and sensible. If some declaration is overbroad or out

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of line or discretionary, by then the court can strike down that part by running a Blue Pencil. Under the Blue Pencil rule, the chief approach is to scrutinize out the particular arbitrary arrangements of the agreement and thereafter, removing the part by running a blue pencil over it. The courts had developed the degree of usage of blue pencil rule by reconsidering the out of line arrangements in a covenant. (Nightingale, 2016) (McGARVIE, 1977)

The principle of blue pencil could be exercised if the legitimate stipulation isn't influenced by the lawlessness of the other part, then the substantial part stays unblemished.

In Halsbury's Laws of England, it is expressed that a contract will infrequently be absolutely illicit or void and certain pieces of it might be completely legal in themselves. The inquiry along these lines emerges whether the illicit or void parts might be isolated or 'cut off' from the contract and the remainder of the contract implemented without them. Almost every one of the cases emerge with regards to restriction of trade, yet the accompanying standards are relevant to contracts when all is said in done. (Nagle, 1993)

The courts have begun utilizing the blue pencil test in contracts whereby the court may strike the piece of the non-compete agreements so as to make the pledge sensible. This was done to make an unenforceable pledge enforceable.

EVOLUTION OF BLUE PENCIL RULE

It is particularly, the field of private law where the doctrine of the blue pencil test is sought to be brought into effect, such as enforcement of contracts, specifically of contracts in which trade is sought to be restrained. The 'principle of blue pencil' was advanced by the English and American Courts. This standard was built up In the landmark case of *Nordenfelt v. Adage Nordenfelt Guns and Ammunition Co Ltd* wherein it was observed by the court that the contract is legitimate so far as it identifies with the trade or business of a maker of firearms, weapon mountings or carriages, black powder explosives or ammo yet was wide in its application for a long time. In this way,by running a blue pencil over it, the court struck down the part which was illegal. The term "blue pencil" was coined by Lord M.R. Sterndale In the landmark case of *Attwood v. Lamont* when he saw that the piece of a contract could be severed, if possible, by running a blue pencil over it. (Pivateau, 2007) In that particular case, Justice Bailhache said:

> "Covenants of this kind are severable where the severance can be effected by striking out restrictions which are excessive with respect to area or subject matter or classes of customers, provided any such restriction is so expressed that it can be dealt with as a separate negative obligation, but the Courts will not split up a single restriction expressed in indivisible terms. As Mr. Matthews put it, the Courts will sever in a proper case where the severance can be performed by a blue pencil but not otherwise."

The U.S. court while observing the case of Mason v. Fortunate Clothing and Supply co. Ltd. exclaimed that "Blue pencil severance must not be used frequently and arbitrarily and should only be used in situations where the part being detached is plainly severable, unimportant and not part of the fundamental imply of the prohibitive pledge. The doctrine of blue pencil ought to be applied when the genuine development of the condition can't stand the trial of reasonability without adding in or erasing some word from the statement and ought not to be utilized in such a way in order to change the entire meaning and significance of the covenant. (Ben-Shahar, 2011) (McGARVIE, 1977)

A triple test was endorsed to be applied so as to analyse the relevance of the blue pencil rule:

- The unenforceable arrangement can be detached off without the need of including or altering the remaining text.

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- The rest of the terms could find support through sufficient consideration.
- The severance of the unenforceable arrangements doesn't mutilate the deal of the parties to an extent that it physically contrasts from the contract the parties intended to agree into ("doesn't so change the character of the contract as to what was intended by the parties at the beginning).

There were numerous interpretation to this doctrine of blue pencil. In the landmark case of *Daymond v. South West Water Authority,* Bridge J. had seen that "a fitting trial of significant severability ought to be applied. Regardless, on his methodology there would be two types of severability tests. (Nightingale, 2016) (Nagle, 1993)

In the first place, when literary severance is conceivable, the test takes this structure: is the legitimate content unaffected by, and autonomous of, the invalid content?

Besides, when printed severance is beyond the realm of imagination with the goal that the court must adjust the content so as to accomplish severance, the court may do this just on the instance, that it is affecting no adjustment in the covenant and impact of the decried enactment.

Though In the landmark case of *Dunkley v. Evans, Lord Lowry* had an alternate view and saw that "an instrument that was completely ultra vires could be maintained by utilizing blue pencil just if literary severance could happen and if what was left additionally breezed through the generous severance assessment".

In different cases, the standard of blue pencil has been condemned and the court held that "the blue pencil test couldn't make a difference to an unenforceable definition inside a non-compete agreement in light of the fact that the alteration would make different arrangements of the contract, different to what was being intended by the parties in the beginning. (Pivateau, 2007) (McGARVIE, 1977) (Agarwal, 2018)

APPLICATION OF BLUE PENCIL RULE IN INDIA

The Indian Contract Act, 1872 clearly states that if any part of consideration or object is unlawful, then the whole contract gets void. In this way, it could be said that Indian Contract Act, too incorporates the Blue pencil principle. In the landmark case of *Babasaheb Rahimsaheb v. Rajaram Raghunath*, the court scrutinised the use of blue pencil in Indian contracts to be holding that "in any covenant, if various conditions are detachable, in the way that one statement, is void, then it doesn't really make other different provisos insignificant. The court has applied this standard by holding that "the sub-clause which made the award as decisive and final was obviously detachable from the primary proviso which made reference to an arbitrator mandatory. The presence of the sub-proviso or the way that the sub clause seems clearly to be void, doesn't in any capacity influence the privilege of the parties to resort to the legal remedy of their choice. In the landmark case of *D. S. Nakara v. Association of India*, the tenet of severability was applied in order to hold the helpful piece of the pertinent notice and make the equivalent appropriate to the beneficiaries regardless of date of their retirement. (Agarwal, 2018)

In India, the blue pencil precept isn't just pertinent on agreements managing limitation of trade or the non-compete pledges but on the other hand is relevant to Arbitration statements. In the landmark case of *Sunil Kumar Singhal and another v. Vinod Kumar*, it was held that the culpable part in the mediation condition can be cut off or set apart by the blue pencil. The Courts have applied this tenet to contract where some provision was excess, superfluous and contradicted to open approach. The court held that if contract available to be purchased of property with eight pads is unlawful and void being in opposition to building guidelines and ground breaking strategy, the accord available to be purchased of property with lesser number of pads, whenever allowed under Section 12, is enforceable. (Ashok, 2017) (Gera, 2016)

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The Supreme Court, in the case of *Shin Satellite Public Co. Ltd. v. Jain Studios Limited*, observes that the best possible test for choosing legitimacy or generally of an accord or request is 'considerable severability' and not 'printed distinguishableness'. It is the obligation of the court to extreme and separate insignificant or specialized part by holding the fundamental or generous part and by offering impact to the last mentioned in the event that it is lawful, legal and generally enforceable. In such cases, the Court must consider the inquiry whether the gatherings could have concurred on the legitimate terms of the accord had they realized that different terms were invalid or unlawful. In the event that the response to the said inquiry is in the positive, the tenet of severability would apply and the legitimate terms of the accord could be upheld, overlooking invalid terms." Thus, the Indian court asserts the perspectives on Lord Bridge and held that for use of blue pencil rule, generous severability is important. (Gera, 2016) (Kumarasoorier, 2016)

Examining the impacts of the convention on the non contend proviso would basically require experiencing scarcely any case laws set down on non contend conditions.

This guideline and the basic standard and object of Section 27 have been spelt out plainly in a catena of decisions which are as per the following:

In *Wipro Limited v. Beckman Coulter International*, the Delhi High Court has set out the four fundamental charges of prohibitive agreements. These instructions depend on different decisions of the High Courts and the Supreme Court

- Contracts which have restrictive clauses or provisions during the subsistence of a contract would not regularly be viewed as being in limitation of trade, business or calling except if the equivalent are unconscionable or entirely uneven
- Post-end prohibitive pledges among manager and representative contracts limiting a worker's entitlement to look for business as well as to work together in a similar field as the business would be in restriction of trade and along these lines void
- Courts take a stricter view in business representative contracts than in different contracts, the explanation being that in principle-agent or employer-employee contracts, the standard is that the business has a bit of leeway over the representative
- The subject of whether the limitation is incomplete or complete isn't required to be considered at all at whatever point an issue emerges regarding whether a specific term of a contract is or isn't in restriction of trade, business or calling. (Gera, 2016) (Kumarasoorier, 2016) (Ashok, 2017)

In *Superintendence Company of India (AIR 1979 Del 232),* the Delhi High Court pondered about whether a contract of work, went into by the appellant with the respondent, which disallowed him from taking part in comparable business as that of the respondent, during his business, and for a further time of 2(two) years after the end of his business was violative of Section 27 of the Indian Contract Act, 1872. The court held that Section 27 doesn't recognize sensible or outlandish limitation of trade and in this manner any restriction forced on the representative after the term of work, would by all appearances be void and unenforceable

In *Taprogge Gesellschaft MBH v. IAEC India Ltd*., the Bombay High Court held that a limitation working after end of the contract to verify opportunity from rivalry from an individual, who never again worked inside the contract, was void. The court wouldn't implement the negative pledge and held that, regardless of whether such a contract was legitimate under German law, it couldn't be upheld in India. (Ashok, 2017)

In *Pepsi Foods Ltd. Ors. Versus Bharat Coca-Cola Holdings Pvt. Ltd*. and Ors. it has been held that "post end limitation on a worker is infringing upon Section 27 of the Indian Contract Act, 1872. A contract containing such a provision is unenforceable, void and against open arrangement and since it is restricted by law it

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can't be permitted by the Courts directive. On the off chance that such order was to be in all actuality, it would straightforwardly abridge the opportunity of workers for improving their future possibilities by changing their business and such a privilege can't be confined by a directive. It would nearly be a circumstance of financial psychological warfare making a circumstance the same to that of fortified work. (Ashok, 2017) (Gera, 2016)

In *Percept D'Mark (India) Pvt. Ltd. Vs.Zaheer Khan and Anr.,* the oppressed respondent had consented to one side of first refusal for the appellant which stretched out past the term of the accord, the zenith court considered such a contract for individual administrations to be void and inferred that any limitation reaching out past the term of a contract is obviously hit by segment 27 of the Contract Act, and is void. In like manner the Supreme Court held that "Provision 31(b) contains a prohibitive contract in limitation of trade as it unmistakably confines respondent (Kumarasoorier, 2016)from his future freedom to manage the people he decides for his supports, advancements, promoting or other alliance and such a sort of confinement reaching out past the residency of the contract is plainly hit by Section 27 of the Contract Act and is void. (Ashok, 2017)

Why removing the doctrine might not be that bad an idea?

The blue pencil doctrine creates confusion for employees, employers, and the court system. The problem arises out of the fact that it is impossible to predict the construction of a non-compete agreement accurately.

a. The Doctrine might create confusion for the employees

The fact could not be disputed that the doctrine of blue tends to confuse employees. Since the principle builds ambiguity into almost every contract for employment, an employee could never be sure and positive of his rights under the employment agreement.

A worker wishing to leave his manager for another employer won't know the real terms of his non-compete contract. Regardless of whether the contract seems irrational and unenforceable, the blue pencil teaching makes vulnerability. This vulnerability conveys with it expenses to the worker. The representative who stays at his position, dreadful that the blue pencil would not support his case, endures lost open door costs. The worker who leaves his position might be compelled to acknowledge a decreased compensation from another business because of the apparent danger of suit.

The *U.S. Supreme Court in Dearborn v. Everett J. Prescott*, precisely portrayed the worker's problem: "The anxious or withdrawing representative could have no 'unmistakable accord of what lead is denied.' He couldn't verify important lawful guidance since he couldn't know\ what the business should authorize. He couldn't request that the business choose without successfully cutting off ties with the business. (McGARVIE, 1977) (Pivateau, 2007)

b. Employers could get confounded as against their privileges and liabilities

It isn't simply workers who endure the blue pencil precept likewise causes perplexity for managers. The blue pencil convention leaves a business speculating with respect to how extensively it can draft a prohibitive contract under the steady gaze of the court will won't blue pencil it. As talked about further underneath, models exist of courts in "blue pencil" expresses that were so annoyed by an exceeding contract that they would not adjust the agreement. Several late choices found the court invalidating the contract totally as opposed to altering it, even where alteration was conceivable. (Pivateau, 2007)

Different instances of potential hurt endured by managers through the joined impact of non-compete contracts and the blue pencil teaching additionally exist. In spite of the fact that the fact of the matter is regularly lost in the discourse of non-compete contracts, for each

business that advantages from the non-compete contract, another endures. Organizations who need to procure a candidate subject to a non-compete contract must gauge the potential advantages of the contract against the weight of conceivably upholding the contract. Regularly, the contracting business must play out its own lawful examination to find whether the non-compete contract can or will be upheld. Tragically, in view of the blue pencil regulation, considerably in the wake of performing such examination, potential managers need direction with regards to the degree the non-compete contract will be upheld since courts after some time have deciphered comparable contracts in various manners. Hence, bosses might be denied of access to skilled workers, even those subject to generally unenforceable contracts. (Pivateau, 2007)

c. Uncertainty with regards to the working in the legitimate framework

Courts are now overburdened with the need to choose inquiries of sensibility and whether the limitation as set out in the contract is really important to ensure the real business interests of the business. The blue pencil precept does nothing to reduce this issue, as courts must interpretation of the extra weight of changing a contract in the way that the gatherings could have, yet didn't, compose it upon execution. (Pivateau, 2007) (Nightingale, 2016)

d. The Blue Pencil Doctrine Encourages Litigation

The above discussion clarifies that the reality explicit nature of the sensibility test alone makes a motivating force to prosecute. As the test is directly translated, it is hard for anybody manager, representative, or lawyer to foresee the consequence of the edge sensibility question. In any event, for those contracts that contain confines on degree, length, and geology, it is for all intents and purposes difficult to anticipate whether those breaking points will be held enforceable. While for all intents and purposes everybody would concur that a five-year boycott would abuse open strategy, it is difficult to figure whether a six-month to three-year restriction would be held enforceable. So also, while an overall geographic confinement appears to be excessively huge, one could put forth the defence that for those working together on the Internet, the world likely could be a legitimate geographic limitation. (Ben-Shahar, 2011) (Pivateau, 2007)

The blue pencil tenet worsens the issue by giving further vulnerability. The blue pencil teaching denies the court and the gatherings of the touchstone to contract development: the genuine, composed contract between the gatherings. The blue pencil tenet gives those workers well off enough to get to the court framework permit to test the breaking points of the non-compete contract. The blue pencil precept energizes prosecution by building a level of vulnerability into each business contract.

Further, non-compete contract related cases may go past a minor business representative debate. An organization that contracts a representative ostensibly bound by a non-compete concurrence with a previous business may confront potential risk for, in addition to other things, tortious obstruction with contract. The new manager should regularly settle on the troublesome choice of whether to enlist a candidate or hazard a claim, in view of an intentionally ambiguous contract marked a long time previously.

Conclusion

Summing the above discussion up, it tends to be seen that non-compete agreement are not upheld by Indian Courts, aside from the instance that such covenants are brought under the exemption provided in Section 27 of the Indian Contract Act. In any case, even here it is for the party in advantageous position because of the non-compete, to provide a proof that the statement meets the reasonability test. Then again, there is a developing and certifiable worry for managers needing to implement non-compete

agreement to ensure their exclusive information. Given the development of innovation and the basic job it plays in present day business, the "blue pencil" approach pursued by U.S. and U.K. courts would go far in meeting a portion of these worries. It is in such manner that revisions can be made to the law cherished in Section 27 of the Indian Contract Act, to enable sensible limitations to work post end of business. (Ashok, 2017) (Kumarasoorier, 2016)

Approach creators ought to consider the vagueness of the overall framework in contract law makes. For the most part, the Sri Lankan contract law reacts in a responsive way. We react to the difficulties simply after emergency emerges and accordingly make the legal point of reference later. Presenting a rule would empower the state to react to the necessities in proactive way while giving space for legal development and imagination to settle the issues in worthy way. (Agarwal, 2018) (Gera, 2016)

Keeping in mind that a fresher, who does not have much experience going in to their first job, in in most of the case, he does not have any bargaining ability, and hence, is in no situation to propose any progressions to whatever the draft agreement is provided to him by the employer to sign his accord on. In such a circumstance, the manager is clearly in a dominant position and may incorporate certain terms and conditions which, to any ordinary and reasonable individual, will clearly not agree to on the conditions showing impressions of being, illogical, unfair and arbitrary. In any case, as the contract has been marked, it turns into a coupling record and with the progression of time the representative – in the wake of accomplishing a smidgen of security and experience, and furthermore offers from contenders – may regret the day when he had marked it.

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