



सत्यमेव जयते

LAW COMMISSION OF INDIA
NINETY-SEVENTH REPORT

SECTION 28, INDIAN CONTRACT
ACT, 1872

PRESCRIPTIVE CLAUSES IN CONTRACTS

[March, 1984]

GOVERNMENT OF INDIA
Ministry of Law Justice and Company Affairs

LAW COMMISSION OF INDIA

JUSTICE K. K. MATHEW

D.O. No. F. 2(10)/83-L.C.

NEW DELHI

DATED, THE 31ST MARCH, 1984.

My dear Minister,

I am forwarding herewith the Ninety-Seventh Report of the Law Commission on "Section 28, Indian Contract Act, 1872 : Prescriptive Clauses in Contracts".

The subject was taken up by the Law Commission *suo motu*. The need for taking up the subject is explained in para 1.1 of the Report.

The Commission is indebted to Shri P. M. Bakshi, Part-time Member, and Shri A. K. Srinivasamurthy, Member-Secretary for their valuable assistance in the preparation of the Report.

With regards,

Yours sincerely.

Sd/-

(K. K. MATHEW)

Shri Jagannath Kaushal,
Minister of Law, Justice & Company Affairs,
NEW DELHI

Encl : 97th Report.

CONTENTS

	Pages
CHAPTER 1—INTRODUCTORY	1
CHAPTER 2—THE EXISTING LAW	2—4
CHAPTER 3—DEMERITS OF EXISTING LAW	4—7
CHAPTER 4—COMMENTS RECEIVED ON THE WORKING PAPER	7—8
CHAPTER 5—RECOMMENDATION	8—9

CHAPTER 1 INTRODUCTORY

1.1. This Report addresses itself to one anomalous situation that prevails under the present Indian law in regard to prescriptive clauses in contracts (clauses extinguishing rights under a contract on the expiry of a specified period). For reasons to be indicated in due course in subsequent paragraphs, the matter seems to call for urgent reform. The point primarily relates to section 28 of the Indian Contract Act, 1872.¹ The subject is of great importance from the point of view of economic justice, avoidance of hardship to consumers and certainty and symmetry of the law. The Law Commission has taken up the subject for consideration on its own, having regard to its many-sided importance and relevance to present day thinking. Genesis and scope.

1.2. Under section 28 of the Indian Contract Act, 1872—to state the point in brief²—an agreement which limits the time within which a party to an agreement may enforce his rights under any contract by proceedings in a court of law is void to that extent. But the section does not invalidate an agreement in the nature of prescription, that is to say, an agreement which provides that, at the end of a specified period, if the rights thereunder are not enforced, the rights shall cease to exist. As will be explained in greater detail in later Chapters of this Report,³ this position creates serious anomalies and hardship, apart from leading to unnecessary litigation. *Prima facie*, it appeared to the Commission that the section stood in need of reform on this point. The arguments for and against amendment of the section will be set out later. For the present, it is sufficient to state that the problem is one of considerable practical importance as such stipulations are frequently found in agreements entered into in the course of business. Point for consideration.

1.3. At this stage, it may be mentioned that on the subject-matter of this Report, the Commission had, after a study of the question at issue, prepared a Working Paper for eliciting the views of interested persons and bodies.⁴ The Working Paper was circulated to High Courts, State Governments, Chambers of Commerce and similar associations of businessmen, and other interested persons and bodies including the Legislative Department of the Government of India in the Ministry of Law. The Commission is grateful to all those who have responded by sending their views on the Working Paper. A gist of the comments received will be given in a later Chapter of this Report.⁵ At this stage, it is enough to state that almost all the comments received on the Working Paper have agreed with the need for amendment of the law on the lines envisaged in the Report. Working Paper.

CHAPTER 2 THE EXISTING LAW

2.1. The problem with which this Report is concerned arises out of section 28 of the Indian Contract Act, 1872. We propose to examine in this Chapter the section and its implications. The problem.

2.2. Section 28, Indian Contract Act, 1872, in its main paragraph, provides as under:— Section 28, Contract Act.

“Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void to that extent.”

(Exceptions to the section, not being material, not quoted).

There are two exceptions to the section, which are not material for the present purpose. They deal with agreements to refer disputes to arbitration.

¹Paragraph 1.2, *infra* and Chapter 2 *infra*.

²For detailed discussion, see Chapters 2 and 3, *infra*.

³Chapters 2-3, *infra*.

⁴Working Paper on Section 28, Indian Contract Act 1872: Prescriptive clauses in Contracts, dated 14th September, 1983.

⁵See Chapter 4, *infra*.

Effect of
Section 28.

2.3. The effect of section 28 of the Contract Act¹ (so far as relates to the subject matter of this Report) may, on the basis of the case law², on the subject be stated in the form of two propositions, to begin with:—

- (a) The parties to an agreement are not allowed to substitute their own *periods of limitation* in place of the period laid in the general law of limitation.
- (b) But the parties to an agreement are allowed to substitute their own *periods of prescription*, that is to say, they are free to provide that if a party does not sue within a specified period, then the rights accruing under the contract shall be forfeited, or extinguished or that a party shall be discharged from all liability under the contract. (The precise words used may differ from agreement to agreement, but in substance their object is usually to forfeit or extinguish the rights). In other words, a clause limiting the time for enforcing a remedy is prohibited, but a clause limiting the duration upto which the rights remain alive, and extinguishing those rights at the end of such period, is permissible.

We are concerned with the latter proposition and our object will be to examine whether it is sound in justice and logic and beneficial in practice.

Illustrative
cases

2.4. We may, in the first place, refer to a few cases illustrating the operation of the present position. In a case which went up to the Supreme Court,³ a clause in an insurance policy provided that all benefits under the insurance policy shall be forfeited if a suit was not brought within a specified period. The clause was held to be valid. The judgement expressly approves High Court decisions which had taken a similar view, including the oft cited Bombay case on the subject.⁴

There are decisions of many High Courts taking a similar view.⁵⁻¹⁰

These cases hold that it is only when a period of limitation is curtailed that section 28 of the Contract Act comes into operation. As was observed in a Bombay case "It [section 28] does not come into operation when the (contractual) term spells out an extinction of the right of the plaintiff to sue or spells out the discharge of the defendants from all liability in respect of the claim."¹¹

Reasoning.

2.5. The reasoning underlying these decisions is that section 28 is aimed at prohibiting agreements which could operate only so long as the rights were in existence.¹² The section is aimed only at—

- (a) covenants not to sue at any time; and
- (b) covenants not to sue after a limited time.

A condition in a contract providing for a forfeiture of all benefits unless an action is brought within a specified period does not therefore violate the section. As per the contract itself, the rights that might have accrued to the party cease to exist on the expiry of the period provided in the contract. What is hit by section 28 is an agreement relinquishing the remedy only, by providing that if a suit is to be filed, then it should be filed within the specified time limit (the time limit being shorter than the period of limitation provided by the Limitation Act). Under such a clause, though the rights accrued continue even beyond the time limit and are not extinguished, yet there is a limiting of the time to sue as prescribed by the Limitation Act. It is such a clause that is regarded as void by rea-

¹Paragraph 2.2, *supra*.

²See case law discussed in paragraph 2.4, *infra* and paragraphs 3.4 and 3.5 *infra*.

³*Vulcan Insurance Co. v. Maharaj Singh*, AIR 1976 S.C., pages 287-294.

⁴*Baroda Spinning and Weaving Co. v. Satyanarayan Marine Ins. Co.* AIR 1914 Bom. 223, followed in *Shakoor v. Hind & Co.*, AIR 1932 Bom. 330.

⁵*Girdharilal v. Eagle Star Ins. Co.* (1923) 27 CWN 955, AIR 1924 Cal. 186.

⁶*New India Ins. Co. v. R. M. Khandelwal*, AIR 1974 Bom. 228.

⁷*Ghose v. Reliance Ins. Co. P. Ltd.*, ILR 11 Rang. 475.

⁸*NDMC v. Tirath Ram*, AIR 1980 Delhi 185, 187, para 7.

⁹*Ruby General Ins. Co. v. Bharat Bank* AIR 1950 E.P. 852.

¹⁰See further paragraphs 3.4 and 3.5, *infra*.

¹¹*Ranjit Karamji v. Unique Motor Ins. Co.* AIR 1951 Bom. 347, 352.

¹²*Baroda Spinning Mills v. Satyanarayan Marine Ins. Co.*, AIR 1914 Bom. 225(2), followed in *Shakoor v. Hind & Co.*, AIR 1932 Bom. 330.

son of section 28. But if the rights themselves are (under the contractual clause as widely worded) extinguished, then there is no violation of limitation law. How far this distinction is supportable or workable is a matter to which we shall presently address ourselves.

2.6. The hardship and injustice resulting from the present position will be dealt with in the next Chapter. Before proceeding to the next Chapter, it would be proper to mention that the question now under consideration—namely, the hardship and injustice caused by the present position did not fall for consideration when the Law Commission had occasion to deal with the Contract Act. At that time, while dealing with section 28 of the Act, the Commission examined only a very narrow issue, namely, conflict of decisions on a particular point, confined to time limit clauses in insurance policies. The Commission had no opportunity of surveying the reported cases on section 28 to decide if, from the point of view of economic justice, any change of substance was needed in section 28. Here is the relevant passage, extracted from the Commission's Report on the Contract Act.¹

Discussion
in Report
on Contract
Act.

"57. Decided cases reveal a divergence of opinion *in relation to certain clauses of insurance policies* with reference to the applicability of this section. On examination, it would appear that these cases do not really turn on the interpretation of the section, but hinge on the construction of the insurance policies in question. The principle itself is well recognised that an agreement providing for the relinquishment of rights and remedies is valid, but an agreement for relinquishment of remedies only falls within the mischief of section 28. Thus, in our opinion, no change is called for *by reason of the aforesaid conflict of judicial authority.*"

2.7. The present discussion is not concerned with special Acts containing elaborate provisions declaring the liability of certain persons or regulating the institution of legal proceedings against them. One such special Act is the Carriers Act, 1865 which, in section 10, provides as follows:—

Supreme
Court
Judgment
relating
to
Carriers
Act,
1865.

"10. No suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff."

Recently,² the Supreme Court was called upon to decide the question whether a contractual clause in a Way Bill, seeking to by-pass the provisions of section 10, Carriers Act (quoted above), could be regarded as valid.

The condition in the Way Bill was as under:—

"15. No suit shall lie against the firm in respect of any consignment without a claim made in writing in that behalf and preferred within thirty days from the date of booking, or from the date of arrival at the destination by the party concerned".

It was held that the above condition was intended to defeat section 10 of the Carriers Act, 1865, and was therefore void, under section 23, Contract Act. According to the Supreme Court, the effect of permitting such a condition would be that even in a case where written notice of the loss or injury has been given prior to instituting the suit and within six months of the loss or injury coming to the plaintiff's knowledge (thereby satisfying section 10, Carriers Act), the contractual condition would still remain unfulfilled and the suit would, therefore, become barred. Thus, section 10 would be defeated. The Court, for the purpose of so construing section 10, emphasised that the Carriers Act had been enacted to declare the liability of the Carriers (and not merely to limit their liability). A bargain that would defeat the liability of the Carriers as enacted by law should, in the Court's view, be treated as defeating the provisions of the law. The Court further emphasised the fact that the condition in the contract stipulated the giving of notice either from the date of arrival of the goods at the destination or from

¹Law Commission of India, 13th Report (Indian Contract Act, 1872), page 27, para 57 (September, 1958).

²Section 10, Carriers Act, 1865.

³*M.G. Brothers Lorry Service v. Prasad Textiles* (Civil Appeal Nos. 954-959 of 1978, decided on 28 April, 1983, Supreme Court) D. P. Madon and Sabyasachi Mukharji, J.J.).

the date of booking. The first event (arrival of goods) was, more often than not, unknown to the owners of the goods—an aspect which, according to the Supreme Court was relevant in construing the true object of section 10, Carriers Act. In this context, the Court referred to Lord Macnaghten's dictum in a Privy Council appeal from Canada,¹ where it had been stated that while a time-limit clause in an insurance policy, computing the period from the date of loss, would be reasonable (because the insured would always know when the loss occurred), such a clause, carelessly included in a *re-insurance* policy, must be regarded as inapplicable, since the person reinsured would have no direct contact with the loss.²

As to computing the period from the date of booking—which was the second alternative event mentioned in the contractual condition the court pointed out that that was useless as no liability could arise unless loss or damage occurred.

Section 28,
Contract Act,
not in issue
before the
Supreme
Court.

2.8. The above judgment of the Supreme Court, let it be added, did not hold the contractual condition to be violative of section 28, Contract Act. The trial Court and the First appeal Court had held that the condition was not violative of section 28, and that view was not challenged before the High Court and not "seriously challenged" before the Supreme Court. Further, the Supreme Court observed as under, on this point:—

"It also appears to us that neither there is restriction absolutely from enforcing rights by the usual legal proceedings nor limitation of the time within which such rights might be enforced in the instant case, but condition 15 was *only* intended to defeat or by-pass the provisions of section 10 of the Carriers Act.

CHAPTER 3

DEMERITS OF THE EXISTING LAW

Anomaly and
hardship
under the
present
position.

3.1. The very brief summary of the existing legal position given in the preceding paragraphs shows that a distinction is assumed to exist between "remedy" and "right" and that distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the rights is valid. Now, this approach may be sound in theory. In practice, however, it causes serious hardship and might even be abused, so as to defeat the cause of economic justice. Such contractual clauses are usually inserted where the parties are not in an equal bargaining position. By giving a clause in an agreement that shape and character of a provision extinguishing *the right* (and not merely affecting the remedy), a party standing in a superior bargaining position can achieve something which could not have been achieved by merely barring *the remedy*. In other words, under the present law, a more radical and serious consequence—the abrogation of rights—becomes permissible, while a less serious device—the extinction of the mere remedy—becomes impermissible. *Prima facie*, such a position appears to be highly anomalous. By providing for the extinction of a right, the parties are actually creating a law of *prescription* of their own, which is a far more important matter than merely creating a law of limitation of their own.

If the law does not allow the latter consequence to be imposed by agreement, *a fortiori*, the law should not allow the former consequence also to be imposed by agreement.

Prescriptive
clause and
the freedom
of contract.

3.2. In support of the present position, it might be argued that substantive rights, which themselves flow from a contract, can be left to be dealt with by the contract itself. But we are not impressed by this argument. The barring of remedy affects only the adjective part of the legal system, while extinction of the right may cause serious hardship and injustice. It is difficult to understand why the parties should be allowed to invent their *own rules of prescription*, when they are not allowed to invent something lesser—their own rules of *limitation*. This position is *prima facie* illogical, and we have not been able to think of any countervailing or overriding consideration that may justify the illogicality.

The present misconceived approach has taken root because it is overlooked that limitation and prescription are both the result of one identical circumstance—the running of time. In fact, the Limitation Act is not confined to limitation only. It provides for prescription also, in certain circumstances.

¹*Home Insurance Co. v. Victoria Montreal Fire Insurance Co.* (1907) A.C. 59, 64 (P.C.)

²This case will again be referred to paragraph 3.10 *infra*.

3.3. Further, the matter should really be considered on a broader plane, namely, how much freedom of contract should be allowed to the parties. If a contractual clause causes serious hardship and injustice, such freedom has to be curtailed in the interests of society. There is, of course, nothing new in this approach. The question is only one of applying it to the subject now under consideration.

Freedom of contract and its limits.

3.4. The hardship and injustice referred to above do not reside in the realm of mere conjecture. A Kerala case¹ affords an actual illustration of such hardship. In that case, a clause in a Bank guarantee provided that a suit or action to enforce the claims under the guarantee was to be filed within six months from the date of expiry of the guarantee given by the Bank. The question arose whether the clause was valid with reference to section 28, Contract Act. It was held that it was valid. It was held that *the liability of the bank was to remain alive* only for a period of six months after the expiry of the period of duration of guarantee, and that the rights of the person in whose favour the guarantee was executed were extinguished on the expiry of that period. In other words, there was an extinction of the right of the plaintiff under the contract and a discharge of the defendants from liability. (The bank and its manager, the executant of the guarantee on behalf of the bank were the defendants). Hence, it was held, the time limit imposed by the contractual clause was not hit by section 28 of the Contract Act. The conclusion so reached is, of course, in harmony with earlier decisions. But such a short period allowed to the other party—under a clause which forfeits the rights at the end of that period—must cause hardship.

Kerala case an instance of concrete hardship.

3.5. We may also refer to a Bombay case which relates to the incorporation of policy conditions (Machine risk-insurance policy). It was a condition of forfeiture in case of a fraudulent claim or failure to bring an action within the stipulated time on repudiation of the claim. There was no reference made to this condition in the receipt of first premium, nor was it brought to the notice of the insured before accepting the first premium. Nevertheless, it was held that the condition formed a normal term of the class of policies in question and was binding on the insured. Further, it was held that the condition did not violate section 28 of the Contract Act.²

Bombay case

3.6. No doubt, the view adopted in such cases is in accord with the general understanding of the legal position and there are numerous other decisions adopting the same approach which need not be enumerated. However, having regard to the broader points made in the earlier paragraphs of this Chapter, it would appear that there is need to alter the law on the subject, in the interests of economic and social justice.

Need for reform in the interest of economic justice.

The present position works serious hardship. The major sufferers under the present position are consumers who have occasions to deal with big business. Because of the unequal position of the parties, a consumer may have to 'agree' to a clause extinguishing the rights, but such a situation cannot be regarded as satisfactory from the point of view of justice.

3.7. A revision of the law, by invalidating even prescriptive contractual clauses, is not only required on the merits (for the reasons mentioned above), but will also make the law simpler. At present, in every case, a subtle distinction has to be applied as to whether a clause merely bars a remedy or extinguishes the right. The decision hangs on a fine distinction that is not easy of application, creating uncertainty in the minds of parties for a conflict of approach in actual cases in courts. For example, it has been held that a condition in a life insurance policy that no suit shall be brought on the policy after one year from the death of the insured is void.³ But a condition in a fire insurance policy that the company shall not be liable for loss or damage after the expiry of twelve months from the happening of the loss or damage, unless the claim was the subject of a pending action or arbitration, does not contravene section 28.^{4,5}

Uncertainty resulting from the present position.

¹*Kerala Electrical and Allied Engineering Co. Ltd. v. Canara Bank*, AIR 1980 Ker. 151.

²*New India Ass. Co. v. R. M. Khandelwal*, AIR 1974 Bom 228.

³*G. Rainey v. Burma Fire & Marine Ins. Co.*, AIR 1926 Rang.

⁴*A. N. Ghose v. Reliance Ins. Co.*, AIR 1924 Rang. 15, 16, 17, ILR 11 Rang. 475.

⁵See other cases cited in *Pearl Ins. Co. v. Atma Ram*, AIR 1960 Punj. 236, 240, 244 (F.B.).

Assumed justification for present position.

3.8. We have been at pains to consider whether there are any strong reasons justifying the present position. We must, in this context, note the reasons sometimes given in reported cases in support of the present approach. In a Punjab case in which the validity of a prescriptive clause in contract was upheld, the High Court set out certain grounds in support of its conclusion.¹ They may be summarised as under:—

- (1) The primary duty of a court of law is to enforce a promise and to uphold the sanctity of contracts not opposed to public policy or law.
- (2) The objects and exigencies of insurance are such that promptitude in asserting or enforcing a claim, and in its settlement, is of the essence. The Insurance Companies would thus be justified in putting a time limit within which the claim must be enforced, failing which all rights under the policy would come to an end.
- (3) A prescriptive clause does not provide a limitation period different from the statutory period. The insured can still maintain an action within the statutory period, if the company waives the clause.
- (4) A contract may contain within itself the elements of its own discharge (express or implied), for its determination in certain circumstances.
- (5) As the clause does not limit the time within which the insured could enforce his rights and only limits the time during which the contract will remain alive, it is not hit by section 28 of the Contract Act.

Possible arguments in support of the present position considered.

3.9. The question at issue now is not whether such clauses are valid under section 28, but rather, whether the present position requires reform in the interests of justice. We shall deal with the above propositions, in so far as they could be relied upon as supporting the justice of the present position. Now, the first proposition in the Punjab judgement summarised above² is a general statement which, of course, is sound. A court must enforce a promise which is not rendered void by a specific legal provision. The question, however, still remains whether such clauses are beneficial or harmful. In this context, let us scrutinise proposition (2).³ At the first sight, a cogent reason is given in that proposition, based as it is on considerations of business convenience, (the exigencies of insurance). But the problem here is, that if the prompt settlement of claims under insurance policies is to be treated as an overriding consideration where the rights are extinguished under the clause, then why is it that clauses (including clauses in insurance policies) which limit the time for filing a suit are treated as objectionable? What applies to a limitation clause must apply to an extinction clause also (and *vice versa*). The exigencies of insurance business require that the remedy should also be allowed to be barred after a time limit. But this is not the law.

Proposition (3) above⁴ is, if we may say so with respect, a bit technical one: waiver of the time limit is hardly met with in practice.

As to propositions (4) and (5) above,⁵ the freedom of parties to set a limit for the duration of rights so created by contracts may (for the sake of argument) be accepted as the basis of the present position. But it would be a weak argument when one has regard to the other aspects of economic justice and unequal bargaining power, set out earlier in this Chapter.

Privy Council case.

3.10. A Privy Council case⁶ sometimes cited in this connection may be noted. In that case, a time limit clause usually inserted in insurance policies was, by careless drafting, incorporated in re-insurance policy. The Privy Council held, that a clause prohibiting legal proceedings after a limited period may be a reasonable provision in a protection against direct loss to specific property, but can hardly be applicable to a re-insurance policy.

Analogy of English law not applicable.

3.11. In this connection, it is also relevant to point out that in England, a clause imposing limitation of the period within which an action can be brought after loss appears to be valid. Apparently, English law has no rule similar to section 28, Contract Act⁷ which might invalidate contractual time limits cutting

¹*Pearl Ins. Co. v. Atma Ram*, AIR 1960 Punj. 237, 240, para 9 (FB) (per A. N. Grover J.).

²Paragraph 3.8, *supra*.

³Paragraph 3.8 *supra*.

⁴Paragraph 3.8 *supra*.

⁵Paragraph 3.8 *supra*.

⁶*Home Ins. Co. of New York v. Victoria Montreal Fire Ins. Co.*, (1907) AC 59 (P.C.), relied on in *Pearl Ins. Co. v. Atma Ram*, AIR 1960 Punj. 236 (F.B.).

⁷See discussion in *Pearl Ins. Co. v. Atma Ram*, AIR 1960 Punj. 236, 239, para 8.

down the period for suing. It has been said¹ that (in regard to insurance cases), there is a great deal of sense in the English approach, particularly in the case of fire insurance or insurance against accident where the liability as to the extent of the damage caused when the matters are fresh can be measured with a certain amount of accuracy. If, however, this is a good reason for recognising the validity of contractual clauses extinguishing rights, it should also apply to limitation clauses. If the assumption that in the former case (extinction clauses) lapse of time results in all kinds claims which cannot be determined with exactitude, then identical is the position for limitation clauses.

3.12. It has been stated that in U.S.A., condition in a policy against the maintenance of an action unless commenced within 12 months after the loss is valid. There the theory is that statutes of limitation prescribe what is supposed to be a reasonable period, so as to ensure promptness in the prosecution of remedies, but "there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims".² American Law.

We would, however, like to observe that the analogy of American Law—assuming that the position there is as has been put forth in this paragraph—is of no use. If a legal system permits time limit clauses (in contracts) which bar the remedy, there is nothing illogical if it also permits time limit clauses (in contracts) which extinguish the substantive rights. No anomaly would arise in that case, since, whatever be the form of the contractual stipulation, it would be recognised as valid. The position in India (under the present law) is different. A party is not allowed to provide for the period of limitation by a contractual stipulation but he can provide for the period of prescription. This is obviously anomalous. Moreover, such a distinction encourages the parties to the contract to put forth arguments to the effect that the particular clause in contract is one which extinguishes the right, or that it is one which merely affects the remedy. A party interested in affirming the validity of the clause would argue for the former while a party interested in denying its validity would argue for the latter. The confusion, hardship and disputes arise because the law is illogical and irrational by permitting a contractual stipulation that makes a bigger inroad on the general law, while not permitting a contractual stipulation that makes a lesser inroad on the general law.

3.13. For reasons earlier stated, the proper approach, so far as India is concerned, should be one that ensures that one party to a contract is not left at the mercy of the other on the matter, under consideration, which is basic to the very survival of contractual rights. In fact, a commentary on the Indian Contract Act published in 1915,³ before the cluster of case law on the section arose, reflects the true approach. Dealing in the Introduction, with section 28 (Agreement in restraint of legal proceedings) the commentary says:— Proper approach.

"Another class of void agreements consists of these by which a man is restricted from enforcing his rights by recourse to the ordinary legal tribunals. Such agreements have been discountenanced by the English Courts on the ground that the law will not allow a man to shut himself absolutely off from the benefits of its protection, and lay himself practically at the mercy of the person with whom he has contracted."

CHAPTER 4

COMMENTS RECEIVED ON THE WORKING PAPER

4.1. We shall make our concrete recommendations for the amendment of the law at the appropriate place. Before we do so, it will be convenient to set out, in brief, a gist of the comments received by us on the subject. As has been mentioned in the introductory chapter,⁴ we had circulated a Working Paper on the subject to interested persons and bodies, inviting their comments as to the need for amendment of section 28 of the Contract Act on the point under consideration. With one exception (to be noticed presently), all the comments received on the Working Paper agree that there is need to amend section 28 on the lines envisaged in this report. It may be mentioned that while circulating the Working Paper, the Commission had made a request that the comments Comments favouring amendment.

¹*Ruby Gen Ins. Co. v. Bharat Bank*, AIR 1950 H.P. 350, 353.

²*Cf. Ridgleshager v. Hertford Fire Ins. Co.*, (1872) 19 Law Ed. 257, cited in *Pearl Ins. Co. v. Atma Ram*, AIR 1960 Punj. 236.

³Cunningham and Shepherd, *Contract Act* (1915) page xvii, para 40, (Introduction).

⁴Para 1.3 *supra*.

might be sent by 31st October, 1983. However, all the comments received upto the date of signing this report have been taken into consideration by the Commission.

Analysis of comments.

4.2. The Commission has received fourteen replies in response to the Working Paper. Of these, five are from High Courts; six are from State Governments; and three are from associations of businessmen.

Comments received from the High Courts.

4.3. Of the five High Courts that have sent replies in response to the Working Paper, two have stated that they have no comments to make. The remaining three have expressed the view that the section needs amendment as envisaged in this report.¹ One of them regards such an amendment as very wholesome and fully justified in order to achieve the ends of public justice,² while another regards it as desirable and legally justified.³

Comments received from State Governments.

4.4. Of the six replies received from the Law Departments of State Governments,⁴ all agree that section 28 needs amendment on the lines envisaged in this Report.

Some of the replies received from State Governments have made a few additional points.

We deal with these additional points in the next few paragraphs.

Insurance law and law of Common Carriers (Suggestion of Government of West Bengal).

4.5. There is, in the first place, the point made by the Government of West Bengal⁵ suggesting that not only section 28 of the Contract Act but also the relevant laws of insurance and common carriers so as to promote economic justice. We have taken note of this suggestion.

Adhesion Contracts (Suggestion of the Government of Madhya Pradesh).

4.6. A suggestion has been made by the Government of Madhya Pradesh (Law and Legislative Affairs Department)⁶ that not only the question of time but also many other questions relating to adhesion contracts may be examined in detail and the law may be suitably amended for the protection of the rights of poor litigants.

In this context, we may mention that the subject of unfair terms in contracts has already been taken up by the Law Commission, and a Working Paper on the subject circulated for comments.⁷

Provisions concerned with legal proceedings other than suits.

4.7. Finally, it may be mentioned that the Government of Punjab (Legal and Legislative Affairs Department), while expressing agreement with the need for invalidating contractual clauses which extinguish a (substantive) right on the failure of a party to institute a "suit" has further suggested⁸ that the same should be the position where there is failure to institute a legal proceeding other than a suit. We have found the suggestion acceptable and have incorporated it in the amendment recommended by us⁹ in section 28.

CHAPTER 5

RECOMMENDATION

Need for reform of the law.

5.1. We now come to the changes that are needed in the present law. In our opinion, the present legal position as to prescriptive clauses in contracts cannot be defended as a matter of justice, logic, commonsense or convenience. When accepting such clauses, consumers either do not realise the possible adverse impact of such clauses, or are forced to agree because big corporations are not prepared to enter into contracts except on these onerous terms. "Take it or leave it all", is their general attitude, and because of their superior bargaining

¹Law Commission File No. F. 2(10)/83-LC, serial no. 1, 6, 7, 9 and 12.

²Law Commission File No. F. 2(10)/83-LC, Serial No. 1.

³Law Commission File No. F. 2(10)/83-LC, Serial No. 6.

⁴Law Commission File No. F. 2(10)/83-LC, Serial No. 3, 4, 5, 8, 11 and 14.

⁵Law Commission File No. F. 2(10)/83-LC, Serial No. 3.

⁶Law Commission File No. F. 2(10)/83-LC, Serial No. 5.

⁷Law Commission of India Working Paper on Unfair Terms in Contracts.

⁸Law Commission File No. F. 2(10)/83-LC, Serial No. 11.

⁹Paragraph 5.3 *infra*, section 28(c) as recommended.

power, they naturally have the upper hand. We are not, at present, dealing with the much wider field of "standard form contracts" or "standard" terms. But confining ourselves to the narrow issue under discussion, it would appear that the present legal position is open to serious objection from the common man's point of view. Further, such clauses introduce an element of uncertainty in transactions which are entered into daily by hundreds of persons.

5.2. It is hardly necessary to repeat all that we have said in the preceding Chapters about the demerits of the present law. Briefly, one can say that the present law, which regards prescriptive clauses as valid while invalidating time limit clauses which merely bar the remedy, suffers from the following principal defects:—

- (a) It causes serious hardship to those who are economically disadvantaged and is violative of economic justice.
- (b) In particular, it harms the interests of the consumer, dealing with big corporations.
- (c) It is illogical, being based on a distinction which treats the more severe flaw as valid, while invalidating a lesser one.
- (d) It rests on a distinction too subtle and refined to admit of easy application in practice. It thus, throws a cloud on the rights of parties, who do not know with certainty where they stand, ultimately leading to avoidable litigation.

5.3. On a consideration of all aspects of the matter, we recommend that section 28 of the Indian Contract Act, 1872, should be suitably amended so as to render invalid contractual clauses which purport to extinguish, on the expiry of a specified term, rights accruing from the contract. Here is a suggestion for re-drafting the main paragraph of section 28.

Revised Section 28, main paragraph, Contract Act as recommended

28. Every agreement—

- (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or
- (b) which limits the time within which he may thus enforce his rights, or
- (c) which extinguishes the rights of any party thereto under or in respect of any contract on the expiry of a specified period or on failure to make a claim or to institute a suit or other legal proceeding within a specified period, or
- (d) which discharges any party thereto from any liability under or in respect of any contract in the circumstances specified in clause (c), is void to that extent.

(K. K. MATHEW),
Chairman.

(J. P. CHATURVEDI),
Member.

(DR. M. B. RAO),
Member.

(P.M. BAKSHI)
Part-Time Member.

(VEPA P. SARATHI)
Part-Time Member.

(A.K. SRINIVASAMURTHY)
Member-Secretary.

DATED: