INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 5

2022

The Application of Fundamental Rights in Contract Law: A Critical Analysis

DEVESH MEENA[1]

ABSTRACT

The aim of the contract law is to govern the relation between contracting parties but when it comes to the fundamental right, these rights are assured rights given by a state to its subjects. The provisions of the contract law should be interpreted in such a manner so that the fundamental rights of the parties should be protected, especially when the case of unequal bargaining is there then the horizontal application of the fundamental rights must be there. In this paper, the researcher has tried to deal with the question, Whether the application of fundamental rights in contract law can have a harmonising effect?

I. INTRODUCTION

Fundamental rights and contract law are two main branches of law which define the legal regime of a country. The more robust the application of these two branches of law, the more robustness of the legal regime of the country. While fundamental rights are naturally and invariably placed on a higher pedestal than contract law due to their higher significance, contract law is also an important branch of law primarily because it seeks to regulate the private relations of the parties. However, the flip side of contract law is that it remains prone to discrimination as it largely entails the contractual relationship between parties who have unequal bargaining power. Hence, arguments have been made to subordinate contract law to fundamental rights to ensure that the interest of the weaker party is adopted. Such an approach does seem reasonable but has its own set of problems to deal with. The problems basically persist with the applicability of several fundamental rights in a given contractual dispute which gives a huge amount of subjective discretion to judges and leads to non-uniformity in decision making. Another problem is that the same fundamental right can be used to make supporting arguments for both the stronger and the weaker parties. Hence, these are the problems associated with the subordination of contract law to fundamental rights. [2]Therefore, it has been argued that the remedy must be found within the contract law itself. It has been argued that the parties must keep in mind, and especially the stronger party in the contract, must ensure that the interests of the weaker party are safeguarded

[1] Author is a Student at National Law University, Delhi, India.
[2] STEFAN GRUNDMANN, CONSTIUTIONAL VALUES AND EUROPEAN CONTRACT LAW 35 (Kluwer, 2008).

 [ISSN 2581-5369]

by aligning the contract with the fundamental rights of the weaker party.

Hence, the right approach would be to make fundamental rights and contract law complementary to each other to better protect the interests of the weaker party. Such an approach would be a very beneficial approach which aligns fundamental rights into contract law and vice versa.

II. SUBORDINATING CONTRACT LAW TO FUNDAMENTAL RIGHTS

The protection of interest of the weaker sections of society has always been a concern for the governments across jurisdictions. One of the essential roles of the state has always been to ensure the interests of the weaker sections of the society are kept in mind while taking policy and important governance decisions. For these purpose, fundamental rights have been accorded to the citizens to protect them from the vagaries of the state. However, the moot point is the enforceability of the fundamental rights only against the state and not against the private entities. While the state ensures that its institutions and instrumentalities do not engage in discriminatory practices toward people, the same approach is not reflected in private relations between individuals. It has, therefore, from time immemorial, been argued that fundamental rights must be enforced against private entities to ensure that the interest of weaker parties is protected.

The private relations between the parties are generally regulated via contract law. Parties enter into various kinds of a contract to fulfil their obligations. Contract law is purely like private law; therefore, there is no interference in these contracts entered into between private parties by the state. The state does provide some leeway to its people to enter into contractual obligations among them through the contracts. It is not always advisable to have a top-down approach while dealing with its subjects. However, there have been instances wherein the contractual obligations to be performed by a party in contact have been too onerous. Furthermore, the terms and conditions of the contract have been so unilateral that they directly come in conflict with the fundamental rights of the individual. This is why many legal scholars and academicians have been demanding the subordination of contract law to fundamental rights. It has been argued that the fundamental rights of an individual must be given precedence over the contractual law, which is private in nature, to ensure the best interests of the weaker party. It is invariably presumed by them that the contract law is a contract between the people who have unequal bargaining power, and therefore if the terms and conditions of the contract are detrimental to the inserts and fundamental rights of the parties, then the state must step in to secure the interest of the weaker party. Hence, the constitutionalisation of contract law, they argue would be an approach much suited to the interests of the weaker party.

 [ISSN 2581-5369]

However, across jurisdictions and particularly in Germany, the Federal Constitutional Courts have stressed upon the importance of applying fundamental rights in contract law to protect the interests of the weaker party who enter into a contract with unequal bargaining power. One of the famous instances is the Burgschaft case[3], wherein the daughter, according to the contract, was to act as a surety for her father's debt. The Court invalidated the security contract against the daughter on the grounds that to enforce the contract against her would amount to hindrance in the constitutional right to free development of her personality as per article 2(1) [4]of the constitution and would be against the principle of social state laid down under article 20(1) [5]and 28(1)[6] of the same constitution. Similarly, in the Parabolantenne case[7], one of the tenants of Turkish origin in Germany wanted to install a second TV antenna to be able to receive Turkish channels, but the tenancy contract prohibited this. The matter went to the court, and the Federal Constitutional Court invalidated the contract stating that the terms of the contract directly impinge upon the right to freedom of information of the penance guaranteed under article 5(1)[8] of the federal constitution. Hence, we do find the courts have extensively protected the weaker parties by invalidating contracts, which was in outright disregard of the fundamental rights of the individuals.

However, various problems do arise with such an approach. There might be situations where you might find the applicability of two or more than two fundamental rights coming to the rescue of the weaker party in a contractual dispute. So, the courts have to neatly balance which fundamental right the courts must apply to protect the interest of the weaker party and invalidate the contract. For example, in the Burgschaft case, the court provided relief to the daughter, who was to act as surety on the basis of her constitutional right to private autonomy coupled with the principle of social right. However, in order to provide relief, another constitutional right could have been applied, that is, the surety's right to family life as guaranteed by Article 6(1)[9] of the federal constitution. The courts in this situation are left to their subjective discretion, which can lead to the making of arbitrary choices by the judges, which is inherently problematic, leading to non-uniformity in decision making. However, the problem does not end here; even if the courts decide upon which fundamental right to apply in order to protect the interest of the weaker party, there is another problem which comes in the way. The problem is that the same

[3] BVrefG, 89/214, Oct. 19, 1993.
[4] GERMANY CONST. art. 2, cl.1
[5] GERMANY CONST. art. 20, cl.1
[6] GERMANY CONST. art. 28, cl.1
[7] BVrefG, 90/27, Feb.9, 1994.
[8] GERMANY CONST. art. 5, cl.1
[9] GERMANY CONST. art. 6, cl.1.

 [ISSN 2581-5369]

set of fundamental right can be used to argue for both sides in the contract. For example, in the Burgschaft case, the fundamental right of private autonomy could have been used to protect the interest of both the weaker and the stronger parties. Hence, to say that the applicability of fundamental rights in a contract will inevitably lead to the protection of the interest of the weaker party is a wrong conception.

Hence, the moot question arises whether the applicability of fundamental rights in the contract is the only way to protect the interest of the weaker party in a contract. Since we observe the problems associated with the applicability of fundamental rights in a case of an unequal contract, it has been argued that instead of subordinating contract law to a fundamental right, the redressal has to come from contract law itself to protect the interest of the weaker party in a contract. The prime examples of such an approach can be found in Dutch and English law. The contract law under Dutch and English law, it is argued, contains inbuilt safeguards to protect the interest of the weaker party, such as the principles of good faith, good morals or public policy, [10]defects of consent and several other specific legal rules. Under this, if any risky transaction is contrary to the principles of good faith or good morals, the such contractual transaction is prohibited from the very beginning and is void ab initio[11]. Hence, it is argued that instead of adopting a top-down approach in subordinating contract law to fundamental rights, it is essential that we find redressal within the specific contract law of the country itself. It is argued that the contract law itself shall be strengthened to ensure that the interests of the weaker party are protected in toto. There might be situations where applying fundamental rights to a contract may yield undesirable results. Such an application of the fundamental rights to the contract law completely depends on the subjective satisfaction of the judge depending on what a judge considers to be just in a given situation. Any outcome on the part of the judge may be justified under the guise of the application of fundamental rights to contract law.

III. MAKING FUNDAMENTAL RIGHTS AND CONTRACT LAW COMPLEMENTARY

We find that neither subordinating contract law to fundamental rights nor finding solutions within the contract law itself leads to desirous results, that is, the protection of the interests of the weaker party in a contract. Hence, the right approach can be the complementary application of fundamental rights and contract law. It is held that neither of the two, that is, fundamental rights and the contract law, shall be subordinate to each other rather, they must be complementary to each other. This is to imply that the contract law does take into consideration

[10] BVrefG,2 BvR 2376/04, Feb.8, 2005.
[11] BVrefG, 81/242, Jan.4, 1990.

that the stronger party must ensure that the fundamental rights of the weaker party remain intact while formulating the terms and conditions of the contract.

Contractualisation of Work And Fundamental Rights

The recent hullabaloo surrounding the 'ease of doing business and its active promotion by the state has come at a huge cost of labour welfare. Though with its very noble intentions of promoting investments in the country to bring economic prosperity in the country, the same has resulted in the dilution of labour and employment laws in the country. The ease of doing business has given huge flexibility to the employers in defining the terms and contract of the employment relations between the employer and the employee. The same has resulted in the promotion of hire and fire policies, the dilution of labour laws and the inspection regime provided under the laws. The laws have now provided for self-inspection by the employers instead of a labour commissioner inspecting the premises of industry to ensure compliance with the labour laws.

One such corollary of the ease of doing business regime has been the increased contractualisation of the work. This has also given a huge fillip to the privatization policy of the government namely under the garb of PPP (Public- Private- Partnership) policy extensively promoted by the government. Apart from the privatization policy, the government has also come up with the policy of asset monetization. The sum effect of these policies have been that the public assets now are being handled over to the private parties to enhance productivity and bring in more economic benefits. The larger argument has been that these public sector undertakings are loss making and therefore to unlock the economic benefits it is essential to handover these assets to private parties to their effective utilization. However, giving more strength to the private entities and their huge proliferation in private spaces has come at a huge detriment to the workforce. This has also resulted in the informalization of the work. Earlier, the workers or employees working under these public sector undertakings were directly covered under various social security schemes like providing for gratuity, pensions and many more schemes. But with the onset of privatization of public assets and increased contractualization of the workforce, most of these workers now belong to informal or unorganized sector of the workforce with no social security cover.

The contractualization of the work has also resulted in the enhancement of the bargaining power of the employers as a result of which the employment contracts have largely been lopsided in the favor of the employers. With the unemployment rate at a record high, these workers have been forced to accept the unilateral terms and conditions imposed by the employers. This is

 [ISSN 2581-5369]

particularly detrimental for the workers belonging to the vulnerable and marginalized sections of the society. They will their limited or no social conditions are made to work in dire conditions leading to occupations diseases suffered by them during the work. Also, with the advent of newer forms of workforce in the nature of gig workers and platform workers, it has been difficult to bring them within the traditional employer-employee relations by establishing the control test. These gig and platform workers are not entitled to any form of social security and are made to work in uncomfortable and harsh conditions. These workers fall under the category of informal or unorganized workforce and therefore they are deprived of regular benefits provided under various labour laws as various labour laws extend their applicability to the formal or organized workforce. What is even more startling is that almost % of the total workforce comprise of informal or unorganized workforce with no social security cover. The Government has recently come up with the 'e-shram' portal for the registration of the informal or unorganized workers so that government gets to know about the total number of informal or unorganized workers which would help the government in devising social security schemes for them.

The terms and conditions of the contract for these gig and platform workers are highly detrimental for their interests[12]. With the onset and huge proliferation coupled with high penetration of digital devices in the country, e-commerce giants like Amazon, Flipkart, riding apps like Ola, Uber, food outlets like Domino's, Pizza Hut, food delivery companies like Zomato, Swiggy have been employing huge number of gig and platform workers. The Code on Social Security defines these gig and platform workers separately for the first time. These workers have been defined by the code as someone who are outside the traditional scope of employer-employee relations, thereby completely bringing them under the informal or unorganized workforce. Big players like Ola, Uber, Amazon, Flipkart have been framing their terms and conditions of the contract in complete disregard of the fundamental rights of the workers. Sometime, their wages are less than the minimum wages and their wages are highly dependent upon the efforts they put like number of rides or deliveries they make. Hence, the terms and conditions of the contract highly favor the employers and are in outright disregard of the fundamental rights of the workers. Minimum wages have been recognized as part of article 23[13] of the constitution which have disregarded by the employers of these gig and platform workers. Apart from wages, these workers are exploited in terms of the number of hours they

[12] Divyanshu Sharma, Making a case for constitutionalising contract law in India, THE LEAFLET CONSTIUTION FIRST,(May 25, 2022, 10:25 AM), https://theleaflet.in/making-a-case-for-constitutionalising-contract-law-in-india/

[13] INDIA CONST. art. 23.

work, there is no limit on the minimum number of hours they are required to work thereby putting these workers under constant mental and physical stress. Furthermore, these workers have no permanency in their job. These workers remain in perpetual fear of being terminated , retrenched or laid-off. In most of the times, these workers are retrenched, laid-off or terminated without providing any compensation. These things provide them with additional stress while they embark upon their job. We have had umpteen instances where these workers have been terminated, retrenched as a matter of punishment for minor mistakes. Hence, the contracts in complete disregard of the fundamental rights of the individual are highly detrimental for the working class and therefore attempts must be made to ensure that the employment contracts are not unilateral and the workers and the employers are placed at equal pedestal when it comes to the formulation of the terms and conditions of the contract. The same will ensure that we have a very healthy workforce which will be very beneficial for the economics development of the country.

The unilateral nature of the contract is highly detrimental to another class of workforce that is the women workers. The employment contract concerning women reeks of gender inequality and misogyny. Male employers adopt a discriminatory attitude towards the women workforce as a result of which these women workers face considerable discrimination in the workplace which often results in their sexual harassment at workplace. India is a signatory to CEDAW (Convention on Elimination of Discrimination Against Women) and hence, any form of discrimination entailing women is an affront to women's dignity and is a direct attack on article 14 [14]of the constitution which ensure equality for all citizens. The intersection of gender and caste aggravates the problem further. These women workers mostly work in the informal or unorganized sector of the workforce and most of them are uneducated and belong to marginalized sections of the society which gives the employers an opportunity to unilaterally alter the terms and conditions of the contract to the detriment of the women workforce. It is therefore essential to ensure the applicability of fundamental rights in the employment contract to ensure that discriminatory practices do not take place within the premises of the industry.

IV. CONCLUSION

It is of paramount importance that the interests of the weaker party are protected under a contract wherein the parties invariably are of unequal bargaining power. While the state does ensure that the interests of a weaker party are protected through various instrumentalities of the state, the private domain remains largely unregulated and beyond the purview of the state. The

[14] INDIA CONSTI. art 14.

 [ISSN 2581-5369]

individuals have the fundamental right to enter into contract based on their free consent and choice reflective of their decisional autonomy guaranteed as part of article 19(1)(a) [15]of the constitution. However, we see widespread discrimination and violation of one's fundamental right under the garb of contract law.

The same is largely evident in a country where hierarchical relations are extant in society. The pervasive inequality in the country on account of numerous facts makes a contract law very vulnerable to be detrimental to the interest of the weaker party. A contract is hardly entered into looking at the status of the patties. Contract law is generally seen as a contract of equals which is never the case. The typical examples include the employment contract and labour relations in the country. The employment or labour contracts largely favour the employers by giving them unfettered rights over the working conditions, health conditions, and wages of the workers. The workers have little to no say in these matters which leaves a large section of the workforce at the whims and fancies of the employers. This is hugely problematic in a country like India which is inherently hierarchical and unequal.

Hence, the right approach should be to adopt a complementary approach between fundamental rights and contract law. No law should be made subordinate to each other. Such an approach will go a long way in ensuring that the interests of the weaker party are protected. The same will strengthen the applicability of both the fundamental right and the contract law and will ensure robust fundamental rights and a contractual regime.

*****

[15] INDIA CONSTI. art 19 cl. 1

 [ISSN 2581-5369]