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A DRY CLEANER'S DILEMMA†

A RECENT DECISION of the Madras High Court in *Lily White* v. *Munuswami*[1] has brought the issue of the dry cleaner's contractual liability to the forefront. The question arose whether a dry cleaner could contractually restrict his liability in negligence. In the modern era, when dry cleaning services have become common and the dry cleaners are purporting to limit their liability for loss of the dress due to negligence by a printed condition, an inquiry into the enforceability of such a clause becomes highly desirable.

In order to appreciate the merits of the controversy as to the enforceability of the negligence clause, it is but apt to refer to the factual situation in the instant case and to focus the attention on the legal principles involved therein. Plaintiff gave a new saree and a blouse to a firm of launderers for dry cleaning. On the reverse of the receipt, which was given by the defendant firm to the plaintiff, there was a condition which stated that in case of loss, the customer was entitled to claim only 50 per cent of the market price.[2] Presumably, the plaintiff had the notice of the condition at the time the garment was delivered to the firm and a receipt was issued in lieu thereof. He made no objection to this, and thereby tacitly accepted the provision. During entrustment, due to negligence of the firm, the garment was lost.[3] The plaintiff challenged the validity of the agreement and claimed the market value of the garment. The trial judge upheld the plaintiff's contention and decreed the suit. The new trial bench confirmed this degree. The defendant went in revision to the Madras High Court which dismissed it because the petition had no "merits

† *Lily White* v. *Munuswami*, A.I.R. 1966 Mad. 13.

1. A.I.R. 1966 Mad. 13.

2. The report does not pointedly bring to the attention of readers the actual words of the relevant condition in the printed receipt of the dry cleaner. It merely states: "Under condition No. 2, the customer was entitled to claim only 50 per cent of the market price or value of the articles, in case of loss." *Ibid.* It would have been much better had the condition been quoted verbatim. Presuming the words in inverted commas to be the actual words of the condition, it may be submitted that a court permitting liability saving or restricting negligence clause would have arrived at the same decision, not on any ground of public policy, but, on the ground that the liability for negligent work could not be excluded by an inference from a general expression absolving the bailee dry cleaner from negligence and that the words of exclusion must be specific and clear. See *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*, [1909] I.L.R. 32 Mad. 95 (1908) (majority opinion); *Hollandia Pinmen* v. *H. Oppenheimer*, A.I.R. 1924 Rang. 356. These cases are discussed below in the text. See similarly, *Sundar Lal* v. *Ram Sarup*, A.I.R. 1952 All. 205, 206.

3. The report states that the blouse was subsequently recovered. The action, therefore, related to saree alone.

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whatever."[4] The Officiating Chief Justice Mr. Anantanarayanan (as he then was), who delivered the judgment, said :

> It appears to me to be very clear that a term which is prima facie opposed both to public policy and to the *fundamental principles of the law of contract*, cannot be enforced by a court, merely, because it is printed on the reverse of a bill and there is a tacit acceptance of the term when the bill was received by the customer .... [I]f a condition is imposed, which is in flagrant infringement of the law relating to negligence, and a bill containing this printed condition is served on the customer, the court will not enforce such a term, which is not in the interests of the public, and which is not in accordance with public policy .... [T]here is certainly justification for the observation, both of the trial Judge and the New Trial Bench, that this may well be putting a premium upon the abstraction of clothes, which may be committed by the employee of a firm, intent on private gain, though the firm itself may be blameless with regard to the actual loss.[5]

The court did not explain "the fundamental principles of the law of contract," but surely rested its decision on the principle of public policy, which is a fundamental principle of the law of contract to test the validity of an agreement.[6] The reported facts do not disclose any vitiating element in the formation of contract such as coercion, undue influence, fraud, misrepresentation and possibly even lack of consideration. Although the court stated that there was a "tacit acceptance" of the terms of the printed receipt, it may have thought that there was no clear *consensus ad idem*. Probably, the court also thought that the agreement was inconsistent with section 151 of the Indian Contract Act, 1872, apart from being inconsistent with section 23 of the act, and therefore it could not be sustained in law. In short, the judgment is short, and does not enter into discussion of the various legal principles which might strike down such a clause. Nor does it refer to the Rangoon case, mentioned below, nor to any other case. The judgment, however, is very candid and holds the dry cleaner liable under the head of public policy.

A dry cleaner would complain that while, on the one hand, he cannot be permitted to provide a restricting or exempting negligence clause, since it would be against public policy to do so, on the other hand, the standard of care and professional skill of workers on their first or second employment, apart from their standard of honesty, may well be below the standard of care fixed by law, and that the possible dearth of highly skilful workers at the start and that the not-too-happy financial position of the dry cleaners would stop the spreading and extension of dry cleaning services in the country. The decision may, therefore, stand in the way of his starting or continuing the laundry business. A dry cleaner is, thus, in a dilemma!

4. A.I.R. 1966 Mad. at 14.

5. *Id.* at 13-14. (Emphasis added.)

6. The court stated that the revision petitioner wanted "to enforce an obligation which is opposed to public policy and the common law." *Id.* at 13. It is submitted that the reference to "common law," *i.e.*, English common law, when the Indian Contract Act, 1872, is exhaustive to deal with the situation at hand, is neither necessary nor desirable.

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Before examining the problem, another Indian decision *Hollandia Pinmen* v. *H. Oppenheimer*,[7] involving a similar problem may be referred here. Plaintiff gave a silk georgette dress to defendant for dry cleaning. The printed receipt contained, *inter alia*, the following clause : "Clothing cannot be claimed in case of any accident by fire or if things get torn." The plaintiff received the dress in torn condition. The trial judge found negligence on the part of the defendant's employees and decreed the plaintiff's claim for the full value of the article. On appeal, the Rangoon High Court agreed with this decision. Mr. Justice Lentaigne, who delivered the judgment of the court, said that this clause did not, on a literal construction, exclude the employer's liability for negligence of his employees for tearing of the dress. The learned judge said :

> On such a construction the clause would not safeguard the defendant against any tearing due to negligent treatment or deliberately improper treatment. We find similar clauses in various mercantile contracts and the usual rule is that a clause intended to safeguard against the negligence of employees must be explicit to that effect.[8]

The pronouncement of the Rangoon High Court as to the enforceability of an exemption clause is merely obiter dictum, since the court found that the protective clause, as it was worded, did not provide for exemption of the dry cleaner from the negligence of his employees. Anyhow, the judgment suggests that the negligence clause can well be provided and enforced between a dry cleaner and a customer, but that in order to exempt a dry cleaner from his liability for negligence, the exemption must be stated in unambiguous, unmistakable and clear terms and not be left for inference by a general expression of avoidance of liability. In other words, a dry cleaner has a right to contract out of negligence of himself and of his employees.

The Madras and the Rangoon High Courts thus expressed contradictory opinions as to the legality of a negligence clause.[9]

The sole question for examination is : whether a clause restricting or exempting liability for negligence of the dry cleaner or of his employees can be sustained in view of a provisions of the Indian Contract Act, 1872, and the fundamental principles of the law of contract ?[10]

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7. A.I.R. 1924 Rang. 356.

8. *Id.* at 357.

9. In none of these cases, was there a specific reference in the printed condition to exclusion of liability on account of negligence.

10. The purpose of this comment is to exclude a discussion of legal principles which should govern factual situations concerning gratuitious bailments. Throughout the comment, it will be presumed that there is some consideration between the dry cleaner and the customer for securing to the former exemption from or restriction of liability for negligence of himself or of his employees.

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Under this act, a dry cleaner is a bailee.[11] He will, thus, be governed by the bailee's liability under the law of bailment and also by the general principles governing contracts.[12] In this connection, relevant provisions of the Indian Contract Act, 1872, may be noted.

Section 151 :

> In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Section 152 :

> The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.[13]

Section 23 :

> The consideration or object of an agreement is lawful, unless—
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> . . .
>
> the court regards it as immoral, or opposed to public policy.
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> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.[14]

Generally speaking, the question of enforceability of an exemption clause has arisen in numerous cases, and the courts have been prone to uphold its validity.[15] Almost all these cases[16] are besides the point, since they deal with the liability of a common carrier which has been held not to be governed by the provisions of the Indian Contract Act,

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11. Indian Contract Act, 1872, § 148 :

> A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them ....

12. Under section 148 of the Indian Contract Act, 1872, the legal relationship of bailor (customer) and bailee (dry cleaner) arises because of a contract. It may be noted that under section 71 of the act, the liability of a finder of goods is that of a bailee although, obviously speaking, there is no contractual relationship of any kind between an owner and a finder of goods. See *Union of India* v. *Amar Singh*, A.I.R. 1960 S.C. 233, 238.

13. This section must be read in the light of section 151.

14. This section enumerates the occasions when the object or consideration of an agreement is unlawful.

15. *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*, [1909] I.L.R. 32 Mad. 95 (1908); *Kumber* v. *The British India Steam Navigation Co., Ltd.*, [1915] I.L.R. 38 Mad. 941 (1913); *B.I.S.N. Co.* v. *Alibhai Mahomed*, A.I.R. 1920 Lower Burma 139 (F.B.); *Bombay Steam Navigation Co.* v. *Vasudev*, A.I.R. 1928 Bom. 5 ; *Fut Chong* v. *Maung Po Cho*, A.I.R. 1929 Rang. 145; *Lakhaji Dollaji & Co.* v. *Boorugu*, A.I.R. 1939 Bom. 101: *Home Insurance Co.* v. *Ramnath & Co.*, A.I.R. 1955 Mad. 602, 603.

16. Excepting cases *Fut Chong* v. *Maung Po Cho*, *supra* note 15, and *Lakhaji Dollaji & Co.* v. *Boorugu*, *supra* note 15.

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1872.[17] Also, the nature of the transaction relating to carriage of goods by a common carrier and the principles which by and large should govern this strictly commercial dealing between parties well-equipped with legal advice are fundamentally different from that of a dealing between a dry cleaner and a customer in ordinary walk of life. Furthermore, some of these cases, upholding the validity of the exemption clause contain a merely obiter pronouncement since their factual situations did not warrant a merited discussion on the problem at hand.[18] Nevertheless, three main arguments have been suggested therein, to support the view that parties to a bailment transaction could effectively provide for an extinction of the bailee's liability for negligence.

First, the Indian Contract Act, 1872, does not "expressly prohibit"[19] contracting out of section 151. Secondly, under section 152 of the act,[20] the liability of a bailee can be increased or decreased by a special contract. The contrary view that under this section, the liability can only be enlarged and not reduced is "not clearly deducible" from section 152.[21] Furthermore, "if such had been the intention of the legislature it would have been a simple matter to give expression to it."[22] Thirdly, it would be "a startling thing to say that persons sui juris are not at liberty to enter into such a contract of bailment as they may think fit."[23]

The Law Commission of India (1955) approving these arguments and accepting the majority judicial view that an exemption from liability in negligence could validly be provided, has suggested that the provisions in section 151 of the Indian Contract Act, 1872, should apply only "in the absence of any special contract."[24]

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17. See *Irrawaddy Flotilla Co.* v. *Bugwandass*, [1890-91] 18 I.A. 121 (1891). As to the discussion of this and other cases pertaining to the subject, see *B. I. S. N. Co. Ltd.* v. *Sokkalal*, A.I.R. 1953 Mad. 3. In this Madras case, the court upheld the exception clause which extinguished the carrier's liability for negligence.

18. See *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*, [1909] I.L.R. 32 Mad. 95 (1908) (majority opinion) and *Hollandia Pinmen* v. *H. Oppenheimer*, A.I.R. 1924 Rang. 356, where general expressions of exclusion of liability were held not to exclude liability for negligence. Also see, *Lakhaji Dollaji & Co.* v. *Boorugu*, A.I.R. 1939 Bom. 101, where the remarks of the court concerning the bailee's exemption from liability in negligence are obiter because the court held that the commission agent had already become a bailee for the client under a contract of bailment and that he could not, during the continuance of the bailment contract, unilaterally impose an exemption clause by writing to the bailor that the silver bars were "kept at your risk." *Id.* at 103.

19. Remarks by Beaumont, C.J., in *Lakhaji Dollaji & Co.* v. *Boorugu*, *supra* note 18, at 102. These remarks, however, are obiter; see *supra* note 18. Section 151 is quoted above in the text.

20. Section 152 is quoted above in the text.

21. *B.I.S.N. Co.* v. *Alibhai Mahomed*, A.I.R. 1920 Lower Burma 139, 146; these are the remarks by Twomey, C.J.

22. *Fut Chong* v. *Maung Po Cho*, A.I.R. 1929 Rang. 145, 146.

23. Observations by Beaumont, C.J. in the *Lakhaji Dollaji* case, *supra* note 16, at 102. These remarks, it is submitted, are obiter. See *supra* note 18.

24. Law Commission of India, *Thirteenth Report (Contract Act, 1872)* 60 (1958).

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These arguments, it is submitted, are not sound, and can effectively be countered. Indeed, there are reasons both of policy and law which clearly deny to the contracting parties a right to diminish or abolish the minimum standard of care prescribed in section 151.

The first argument that section 151 does not "expressly prohibit" contracting out has little force. Section 10[25] of the Indian Partnership Act, 1932, which deals with "duty to indemnify for loss caused by fraud," does not "expressly prohibit" an agreement between partners allowing one or some of the partners an exemption from liability to indemnify the firm for the loss resulting from his or their fraud. And yet, nobody would argue that such an agreement can be upheld by courts. Similar remarks apply to section 60[26] of the Transfer of Property Act, 1882, which deals with the "right of mortgagor to redeem."

It may be suggested that while various sections of the chapter on bailment apply in the absence of any agreement to the contrary, section 151 is without any such phrase. This silence is meaningful, indicating clearly that the section is not subject to agreement to the contrary.[27]

This is also the scheme of legislation in the Indian Partnership Act, 1932, and the Transfer of Property Act, 1882. This uniformity suggests that the power to contract to the contrary is not lost necessarily only by an "express prohibition" to that effect, but also by the use of other suitable language which under the scheme of legislation of an enactment would negative contractual freedom.

The argument can well be advanced that the language of section 151 is strong enough to eliminate a contrary contract. It clearly

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25. Indian Partnership Act, 1932, § 10:

> Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

There does not seem to be any decided case dealing with the enforceability of an exemption clause under this section.

26. Although the section does not "expressly prohibit" an agreement against redemption, it, undoubtedly, gives to the mortgagor a statutory right of redemption which cannot be defeated or clogged by any agreement between the mortgagor and the mortgagee.

27. See the remarks of Sankaran-Nair, J. (dissenting), in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co. Ltd*, [1909] I.L.R. 32 Mad. 95 (1908):

> [T]he fact that, in the chapter IX relating to Bailment, whenever a rule of law is intended to operate only in the absence of a contract to the contrary it is expressly so stated—(see sections 163, 165, 170, 171 and 174)—leave no doubt . . . that a bailee's liability cannot be reduced by contract below the limit prescribed by section 151. In fact, throughout the Act, whenever the legislature intended that the provisions of the Act should be enforced only in the absence of a contract between the parties they have said so. (See sections 109, 113, 116, 121, 93, 94, 95, 202, 219, 221, 230, 241, 253, 256, 261, 265).

Id. at 120.

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states: "In all cases of bailment the bailee is bound...." Thus section 151 lays down a standard of care and diligence on the part of the bailee which cannot be dispensed with by any agreement to the contrary. In other words, notwithstanding any agreement to the contrary, the standard prescribed in this section must prevail and apply to a bailment transaction. A dry cleaner, therefore, cannot provide an escape clause from the liability imposed by a statute.

The second argument that under section 152, the bailee's liability can not only be enlarged but also reduced by a special contract is without any force. The language of the section, carefully read and rightly interpreted, clearly shows that the bailee's liability can only be enhanced and not diminuted. The section, in fact, means: The bailee, in the presence of any special contract, is responsible for the loss, destruction or deterioration of the thing bailed, even if he has taken the amount of care of it described in section 151.[28]

In addition, the pointed reference to section 151 in section 152, and the announcement of section 151 that "in all cases of bailment the bailee is bound" provide irresistible conclusions that (1) section 152 is subject to section 151, and that (2) section 151 applies "in all cases of bailment" thereby negativing contractual freedom to restrict or extinct liability for negligence.

The last argument that persons competent to contract can enter into such contract of bailment "as they think fit"[29] cannot be literally accepted. Doubtless, persons *sui juris* could enter into any bargain of bailment, but this can only be done subject to law. The theory of the protagonists of the exemption clause seems to be that the contractual freedom being the foundation of law of contract, the contracting parties could not be stopped from agreeing to absolve one of them from liability in negligence.

Truly speaking, this is remniscient of a philosophy of *laissez-faire* representing individualism in the extreme. It is, therefore, utterly unsuitable as an instrument of social adjustment of the conflicting claims of an economically developing society like India. In the nineteenth century, Sir Henry Maine, noting the development of progressive societies, remarked that "the movement of the progressive societies has hitherto been a movement from *Status to Contract*."[30] This aphorism of Sir Maine was valid in his own time. It is submitted that now the pendulum is swinging backward, and there is an increasing attack by law on the concept of contractual freedom. An insight into the post-independent legislation in India in the fields of labour, marriage, dowry, shop establishments, and rent control and eviction from premises

28. *Compare* this expression with the language of section 151.
29. *Supra* note 23.
30. Maine, *Ancient Law* 165 (1868, rep. 1963).

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provides convincing illustrations in support of this view. According to a noted jurist:

> In view of modern conditions we can no longer say that the sphere of individual self-assertion is increasing and ought to be increased. For various reasons the law has interfered seriously with contractual liberty ....Apart from the law, we sometimes see that powerful suppliers may require a customer to contract on dictated terms or not at all ....The abstract legal theory of a contract as an agreement arrived at through discussion and negotiation must be supplemented by a realistic study of its actual operation in the world today.[31]

One is reminded of the remarks of Mr. Justice Sankaran-Nair:

> It has also to be remembered that the English law attaches an importance to freedom of contract which is not recognised in India where people are accustomed to have their relations regulated not by contract, but by law to a greater extent than in England.[32]

Mass illiteracy, the printing of the conditions in a language not necessarily known to every literate customer, the ignorance about the legal effects of a negligence clause among the customers and the way their consent is obtained to the printed conditions are perhaps the best reasons to exclude the power of a protective clause from the parties in India. Surely, freedom of contract cannot be permitted to absolve a contracting party from his basic liability to maintain a minimum standard of care which is essential for the existence of a civilized society. Thus, the argument that person *sui juris* should be competent to provide for a negligence clause cannot be accepted.

In the *Lily White* case, the court rightly held that the dry cleaner's liability for negligence could not be restricted on the ground of public policy. Such a clause is not in the public interest, nor is it essential for a dry cleaner who must always be prepared to maintain a standard of efficiency and care. A contrary view, as suggested in the judgment, would encourage "abstraction of clothes, which may be committed by the employee of a firm ... though the firm itself may be blameless with regard to the actual loss."[33] Even if this be not so, it is obvious that the upholding of a negligence clause will tend to decrease the standard of care and diligence in dry cleaning the garments. This may ultimately give rise to a cause for grouse and quarrel between the dry cleaners and the customers. Such an unhappy position cannot be accepted in law. The restrictive or the exemptive clause, even if

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31. Paton, *A Text-Book of Jurisprudence* 407 (3d paperback ed. Derham 1964).

32. *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*, [1909] I.L.R. 32 Mad. 95, 128 (1908).

33. A.I.R. 1966 Mad. at 14. Recently, this writer conducted a short survey on the subject in the city of Jaipur, collected receipts from dry cleaners which contained protective clauses. One of the dry cleaners was frank to admit that it was not unlikely that a dry cleaner, lured by a customer's dress, may desire to have it and then invoke the protective clause in defence.

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provided by the parties, will be struck down by the courts on the ground of public policy under section 23 of the Indian Contract Act.[34]

Again, even if there were no codified principles of law of contract governing the problem at hand, it is submitted that the principle of *Ex aequo et bono* — equity, justice and good conscience — would still require that the dry cleaner, or any other bailee in similar condition, should not be enabled under the cloak of protective clause to escape liability for negligent work executed by himself or by his employees.

The Indian courts cannot and should not uphold a restricting or exempting negligence clause in favour of the dry cleaners. The decision of the Madras High Court in the *Lily White* case is pragmatic, functional, realistic and in keeping with the provisions of the law. It demonstrates the role a court can play through the instrumentality of public policy even in the field of contract. In independent India, the courts are called upon to show a more positive approach and to avoid an agreement if the public interest would justify this, even if the agreement was entered under freedom from coercion, undue influence, fraud and misrepresentation. Of course, the development of the notion of "public interest" from time to time and its application to the factual situations has to be left to the enlightened conscience of the judiciary.

In any revision of the Indian Contract Act, 1872, which may be made pursuant to the recommendations of the Law Commission of India (1955), the liability of a bailee under section 151 should not be made "subject to contract to the contrary" or words of similar import. On the other hand, if found necessary, the expression in this section may be strengthened to express the view that this section is not subject to contract to the contrary.

*I. C. Saxena**

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34. Relevant part of section 23 of the Indian Contract Act, 1872, is quoted above in the text. Also see the preamble of the Constitution of India which announces that the object of the Constitution is "to secure to all its citizens : Justice, social economic and political . . . ." The Constitution establishes a social welfare state in India. The courts in the country, therefore, cannot ignore to give "social and economic" justice according to the requirements of the circumstances of the case and the public interest. This would, obviously, suggest that a negligence clause in favour of the dry cleaners cannot be upheld to render uneven the scale of economic justice between a dry cleaner and a customer.

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