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“JUDICIAL EVOLUTION OF CONTRACTUAL DELIVERY.”

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I. ABSTRACT:

“In this paper, the authors aim to enquire into the judicial evolution of contractual delivery, under various subheadings to bring into consideration the aspect of actual delivery contrasted with notional delivery. The authors have tried, through this paper, to understand the complexity in determining the actual point of delivery in a number of situations under Indian law as well as Common law. The concept of delivery under common law is introduced briefly; under Indian law, we have briefly considered delivery under Sale of Goods while discussing it under bailment and pledge at length.

A comparison has been drawn between actual and constructive delivery. An attempt has been made to explain the ambit of delivery and what may or may not be put under that umbrella. While addressing each of these topics the paper also brings to notice the process of evolution that has taken place over years on the topic of delivery and the understanding of the same.”

II. RESEARCH METHODOLOGY:

The research process employed by the authors gives this paper a structure where principles and theories are laid out and substantiated using case laws and precedents set under various jurisdictions. These case laws have been studied and understood in the light of these very principles providing a comprehensive understanding of the same. A tabular compilation of

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the same, listing details of the relationship between the parties in the case as well as the point of delivery - wherever delivery has been determined - has also been made and attached herein.

III. INTRODUCTION:

The term 'delivery' in the legal realm contains multiple definitions which are dependent upon the context in which the word has been employed. However, there lies a universal element of transfer of possession independent of which context the term is being used in. In law, there are two kinds of delivery that are contemplated; actual delivery and constructive delivery. The concepts of actual and constructive delivery are being explored within the ambit of the law of sales for the purpose of this paper.

Black's Law dictionary defines actual delivery as giving real possession of the thing sold to the vendee or his servants or special agents who are identified with him in law and represent him. Constructive delivery has been defined as a general term comprehending all those acts although not truly conferring a real possession of the thing sold on the vendee, have been held, by the construction of law, equivalent to acts of real delivery.¹

From a plain reading of the aforesaid definitions, it can be discerned that actual delivery involves physical transfer of possession of the respective goods whereas constructive delivery includes notional transfer of possession; the goods might still physically lie with the owner but an act has been performed in pursuance of an existing legal obligation that has the effect of putting a person in possession of the goods. Such distinction is necessary to appreciate cases in which it is unfeasible to physically transfer possession, or when the goods are meant to remain in the possession of the owner for some special and specific purpose.

In a situation where the goods in question are heavy-duty and bulky, such as equipment and machinery it is not practical to expect the physical transfer of possession and in such a situation constructive delivery or, symbolic delivery comes into play.

¹What is DELIVERY? definition of DELIVERY (Black's Law Dictionary)The Law Dictionary, <https://thelawdictionary.org/delivery/> (last visited Oct 15, 2018).

IV. THEORETICAL ASPECT OF CONSTRUCTIVE DELIVERY:

In law, the concept of constructive delivery is much broader than the concept of actual delivery and is usually construed keeping in mind the facts and circumstance surrounding the case. For example, in the case of bailment of heavy machinery and equipment which is being stored in a warehouse, if the key to the warehouse is handed over to the bailee it tantamounts to ‘constructive delivery’.

A key inference that can be made about constructive delivery from the manner in which it is construed is that constructive delivery, especially with regards to contracts involving buyers and sellers does not create any primary legal relations between the parties, it merely acts as an addition to the already existing legal relations.

Going back to the warehouse example, in that instance, the handing over of the key is deemed as constructive delivery, but it is not upon this delivery that legal rights arise, legal rights between the bailor and bailee already exist because of the contract of bailment, pursuant to which the delivery is being made.²

V. CHAPTER 1: DELIVERY UNDER COMMON LAW:

Traditionally, delivery under common law required the liability to fall on the carrier of goods to take reasonable care and to exercise due diligence as was prevalent in the trade practices. The first attempt at formulating a ‘mercantile law’ per se was made under The Factors Act of 1889, which was eventually followed by the most recent statute in the late 20th century.

V.I THE NEMO DAT RULE:

The Sale of Goods Act of 1979 regulates contracts as a codified statute listing the relevant principles under common law. Delivery may be defined as the transfer of possession from one party to another in order to fulfill a contract; it is largely spoken about in Part IV of the Act.³ Delivery under Common Law has a strict adherence to the nemo dat rule⁴, which

² Samuel Stoljar, *The Delivery Of Chattels*, 21 *The Modern Law Review*, 27–42 (1958).

³ Sale of Goods Act(1979), No. 30, Acts of Parliament, 1930 (India).

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dictates that no one can give what he does not initially possess, and so delivery must take place from the party that possesses the goods to the party that is contractually accepting the goods. This rule highlights the importance of the preservation of property⁵, but often it tends to discount the concept of constructive delivery due to its provision of physical possession.

Under common law, in cases where there is a third party involved as a buyer, the courts consider it important for there to be transfer of property - even if it is only constructive delivery - from the first party to the second, even though the second party may later bail the goods back to the first party.⁶

V.II CONSTRUCTIVE DELIVERY:

Constructive delivery does not find codification anywhere in the statute, although Section 24 of the Sale of Goods Act 1930 talks about the transfer of the ‘documents of title to the goods’ that is often construed to mean constructive delivery as decided in *City Fur Manufacturing Company Ltd. v. Fureenbond London Ltd.*⁷, provided this transfer is authorised and both the parties have bona fide intentions.

Common-Law also identifies that there may be several points at which delivery takes place, for example, if a consignment is being transported, the delivery could be said to have taken place when the goods were loaded on a truck, or when the truck is padlocked and the first party has no access to, or when they were received by the other party, and so these points are usually set out in an agreement.

VI. CHAPTER 2: DELIVERY UNDER COMMON LAW:

Common law has a huge influence in determining laws in India; therefore an understanding of delivery under common law is a must in order to proceed under the various subheading

⁴ Louise Merrett, *The Importance of Delivery and Possession in the Passing of Title*, 67 Cambridge Law Journal, 376–395 (2008).

⁵ Greenwood v Bennett 586 All ER (1973).

⁶ Mitchell v Jones 24 N.Z.L.R. 932, 935. (1905).

⁷ City Fur Manufacturing Company Ltd. v. Fureenbond London Ltd. 1 All E.R. 799 (1937).

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that determines delivery under sections of the Indian Contracts Act, 1872, and the Sale of Goods Act, 1930, extracted from the same.

VI.1 DELIVERY UNDER BAILMENT:

The etymological meaning of the term bailment is to ‘hand over’. A bailment is a delivery of a thing entrusted for some special object or purpose upon a contract, express or implied, to conform the object or purpose.⁸ To constitute a contract of bailment a change of possession is mandatory⁹. A conveyance which involves a change of possession and change of ownership does not give rise to bailment. The moment delivery has been proved, a contract of bailment arises. To illustrate, mere assent of a guest at a place of public entertainment to allow the coat or other valuables of the guest to be taken into the custody of the servant maybe be adequate evidence of delivery pursuant to a bailment.¹⁰

In Indian law, a bailment is a special form of contract defined under S.148 of the Indian Contract Act. In order to comprehend the full capacity of the concept of delivery, averment must be made to a special kind of bailment known as a pledge which is contained in S.172 of the Act. The primary distinction between bailment and pledge is the object of the contract. If the purpose of the contract is for the delivered goods to act a security for a loan or for the fulfillment of an obligation, such contract is tantamount to a contract of pledge.

A contract of bailment can be affected even without the owner ever taking possession of the goods, as long as the title of the goods remains with the owner. This ties with the distinction that is made between actual and constructive delivery.

In a situation where there is a change in the possession of goods without any change in their actual and visible custody, a case of constructive delivery is made out.¹¹ Delivery is the essence of bailment and delivery to the bailee may be made by performing any act which has the effect of putting the goods in possession of the intended bailee or of any other person

⁸ Bhadbade, Nilima. *The Indian Contract and Specific Relief Acts*. 14th ed., vol. 2, Pollock and Mulla.

⁹ Asaram v Hyderabad Government AIR (1952) Hyd 78.

¹⁰ Ultzyen v Nichols 1 QB 92 (1894).

¹¹ Bhadbade, Nilima. *The Indian Contract and Specific Relief Acts*. 14th ed., vol. 2, Pollock and Mulla.

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authorised to hold the goods on behalf of the bailee. Upon the delivery of intended goods, a contract of bailment arises which is sufficient to establish a relationship of bailor and bailee between the parties involved.¹²

VI.II DELIVERY UNDER PLEDGE:

The subject matter of a pledge is goods that are capable of constructive or actual delivery. Delivery is a necessary element in the making of a pledge¹³. A contract of pledge does not mandate for the delivery of pledged goods and advance of the money to happen simultaneously. A pledge may be effectuated by delivery subsequent to the advance. A contract of a pledge is exhausted upon satisfaction of the debt and the Pawnee is bound to redeliver the pawned goods thereafter.

VI.II.I DELIVERY IN THE CONTEXT OF TRANSFER OF POSSESSION:

Constructive delivery, in the context of pledge, is conventionally activated by a symbolic act such as handing over the keys of the warehouse where the goods are stored. Constructive delivery is best understood in the context of *Bank of Chittoor v Narasimbulu*. In this case, certain cinema equipment was pledged against a promissory note and the said equipment was allowed to remain in the physical possession of the pledgers since the equipment was required to run their business. The Court opined that it is not necessary the bailee himself be in possession of the goods. A bailor, holding possession of the goods pledged on behalf of the bailee is read as constructive delivery and thus constitutes bailment.

The litmus test for determining if constructive delivery has taken place is to ascertain under whom the dominion and control of the respective good rests. In other words, if the goods are still in the physical possession of the owner but the person to whom the goods have been delivered has control over them, it can be construed as constructive delivery. A situation in which the goods are in the custody of an authorised third person, who holds such goods for the owner, constructive delivery occurs when an order from the owner to the third person to hold the goods for the Pawnee is meted out and such instruction is succeeded by an acknowledgement by the third person that he holds the goods for the Pawnee.

¹² N.R Srinivasa Iyer v New India Assurance Co Ltd (1983) 3 S. C. C 458.

¹³ Sunil Kumar Gupta v Punjab & Sind Bank (2006) AIR Utr 26, I (2007) BC 353.

VI.II.II DELIVERY IN THE CONTEXT OF DOCUMENTS OF TITLE:

Documents of title can be pledged and give rise to a valid contract of pledge. A landmark case which stretched the ambit of delivery, *Morvi Mercantile Bank Ltd v Union of India*, allowed for a valid pledge by the deposit of railways receipts. A bank that endorses money against the delivery of a railway receipt is a Pawnee and the Bank in the capacity of a Pawnee may sue the railways to make good on the loss of goods. The bone of contention, in this case, is whether the delivery of railway receipts can be equated with the delivery of goods so as to constitute delivery pursuant to a contract of pledge. The dissenting opinion, in this case, adheres to a conventional definition of the term delivery and limits its interoperation to an effective change of possession being mandatory for a pledge to existing.

VI.III DELIVERY UNDER SALE OF GOODS ACT, 1930:

Section 2(2) of the Sale of Goods Act defines delivery as the voluntary transfer of possession of goods from one person to another. In special forms of contracts that were explored, delivery was understood differently because it involved just the transfer of possession and not the transfer of ownership. In contracts of sale, the actual transfer of possession or notional transfer of possession can happen but it must be accompanied by a transfer of ownership to amount to a contract of sale. In the Sale of Goods Act, three kinds of delivery are contemplated, each with distinct attributes. The first kind of delivery is actual delivery wherein the goods are physically given to the buyer. The second kind of delivery is constructive delivery which arises when the transfer is affected without a change in possession or custody of the goods.

Constructive delivery might arise in three circumstances, the first being that the seller is in possession of the goods and agrees to keep them on behalf of the buyer, the second is that the buyer is in possession of the goods and the seller agrees that the buyer is the owner of the goods and the third situation is when a third person in possession of the goods and acknowledges to the buyer that the third person is holding the goods on behalf of the buyer.

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For valid constructive delivery in which a third party is present, all three parties; the buyer, seller and third party must concur.¹⁴

The third kind of delivery is symbolic delivery, where an act is done that has the effect of putting the buyer in possession of the goods. A condition attached to symbolic delivery is that an act that would only partially provide access to the buyer for the goods would not constitute delivery at all. The buyer must have the ability to exercise total control and have unrestricted access to fall under the purview of such delivery. A distinct characteristic of symbolic delivery is that it is usually related to the sale of goods that are bulky, cumbersome and for which physical delivery might prove to be difficult. Delivery, as envisaged under the Sale of Goods, is not exhaustive and is accommodative of multiple scenarios that might arise in a contract of sale.

VII. CHAPTER 3: EXTENT OF CONSTRUCTIVE DELIVERY:

Over the years, the ambit of delivery under contractual bailment and pledge has been stretched to include a wide variety of situations where the actual or notional transfer of possession can be construed. The legal relationship between bailor-bailee and pawnor-pawnee stem from this very transfer of goods and so the understanding of delivery helps us create rights, duties and resultant liabilities. In the context of banks, goods hypothecated with the bank would be considered as being in possession of the bank because even though actual physical possession of the goods is with the borrower, constructive possession lies with the bank because possession of goods by the owner is in the capacity of an agent of the bank. The locus of control over the goods remains with the bank.

In recent times, the concept of constructive delivery has gained momentum and was reiterated in the case of *Empire Trading Co. vs. Express Hi-Tech Pvt. Limited* wherein the execution of a deed of hypothecation in favour of the bank constituted constructive delivery of the pledged goods to the bank despite actual possession not being given to the bank. Actual delivery is no longer a sine qua non for creation of a contract of pledge; the court has

¹⁴ Bhuwarka Brothers Ltd. vs Dunichand Rateria (1952) AIR Cal 740, 56 CWN 685

widened the purview to include notional delivery as well. The judiciary in interpreting the term delivery has been extremely cautious to understand the implications that flow from enforcing the same, in the interpretation of the statute as well as case laws we see a vast growth in this understanding.

VIII. CONCLUSION:

The concept of delivery has evolved over time and with the growth of jurisprudence, it too has seen an immaculate shift in dimensions. The ambit has been stretched to include a wide variety of situations constituting delivery, especially with regard to notional delivery. Understanding the transfer of possession is an important step in determining the steps that constitute performance of a contract, hence delivery plays a vital role in contract law.

A cause of action for breach of contract often flows from delivery, or the lack thereof, and so an understanding in being able to determine the same is essential in the practice of contract law. In conclusion, constructive and actual delivery have both undergone a change in the evolution of contract law and keeping in mind both case law and statute, we are able to appreciate the performance of contracts in a requisite manner.

The Indian Contracts Act as well as the Specific Relief Act provides us with a pre-existing purview of contractual delivery that jurists have tried to stretch time and again; keeping in mind this purview is interpreted at various instances to create the essentials of delivery.