

# LEGALFOXES LAW TIMES

## COMPREHENDING THE DOCTRINE OF BLUE PENCIL AND ITS APPLICABILITY IN UK AND INDIA

By Mihir Kakade

### Abstract

It is a very well-known fact that the utopian society of humans doesn't exist. Since early times humans have been committing errors, whether it be Angering Genghis Khan that led to brutal annihilation of many people or a British soldier not shooting Adolf Hitler after having him within his iron sights, that inevitably led to World War 2. Mistakes have been part of human characteristics. There are some mistakes that are not severe and can be corrected accordingly. Humans have been entering some form of contractual agreements with one another for many ages, whether it be for their society at large or private gains. This Article focuses on the Doctrine of Blue Pencil and its application in UK and India. It begins with a brief introduction of the concept and development of contractual law. Further, it emphasizes on the need for the doctrine in law and exploring the fundamental origin and meaning of the doctrine. The applicability of the rule is explained with help of two landmark cases. The cases lay foundation for applicability of the rule in United Kingdom and India. However, like all rules and doctrines, this doctrine's limitations have been detailed. The Blue Pencil rule is somewhat similar to the Severability principle, the difference between the two has been pondered upon. Finally, concluding remarks are provided for the Blue Pencil rule.

### I. Introduction

Editors often make mistakes or correction when writing scripts. They ought to keep pace with changing scenarios affecting their writing ranging from social to economic changes. They make use of 'The Blue Pencil' for any changes, it is used by copy editors or sub-editors to point out necessary corrections in a written copy. The reason to use a blue pencil is that it wouldn't show in some lithographic or photographic reproduction processes; these are recognized as non-photo blue pencils.

The contract law is a branch of private law governing the relationships amongst individuals. It is the common ground and meeting point of law, ethics, philosophy and economics. The institution of contract is the product of moral and economic factors. when moral ideas progress economic forces change, the institution of contract is bound to be influenced by such changes and the law ought to keep pace with changing times. However, a contract is even entered with the state in fields such as marriage, labour relations, transport, banking, rent control and other commercial activities.

There are times that Within the sphere of contracts and restrictive covenants, certain errors can arise due to illegality. Under such situations rather than declaring the entire contract void and unenforceable thereby causing harm to the parties, a 'blue pencil' is used to alter, remove or add words to the clauses causing issues. It is a rare circumstance where a contract will be completely illegal and certain portions may be completely lawful. The question then arises is that whether illegal parts can be separated from the contract and then can such a contract be enforced. Nearly all cases take place in context of restraint of trade, still the following principles are applied to contracts<sup>1</sup>. The Doctrine of blue pencil is useful for courts and the parties concerned as these errors of illegality can be remedied without the loss of the entire contract or restrictive covenant in question. The doctrines application differs from state to state depending upon their legal system.

## II. Development of contractual law

A contract is defined as "a promise, or promises mutually exchanged, setting up, against the promisor or promisors, duties of performance which the law will recognize or enforce at the

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<sup>1</sup> 9 Lord Hailsham, Halsbury's Laws of England 297 (4th ed. 1973 - 1987).

instance or for the benefit of the promise or promises, or of a third party intended to be benefitted.”<sup>2</sup>

The roman law of contracts was developed with recognition of several categories of promises to be enforced than making a any criteria for enforcing promises. It was known to the English, nonetheless their influence slowly disappeared with breaking of the then roman political system. Due to this English courts had to revamp and construct the law. The courts succeeded in a staggering manner keeping in view the fact that when they began, contract law of the English was progressive than primitive societies<sup>3</sup>.

Contracts are governed and enforced by courts of law on the principle that promises are sacred. The thought is given validity with the argument that mechanisms to secure expectations of people is important to maintain a rational society. The modern law of contract owes its origins to the 19<sup>th</sup> century is based on foundations of wills and reliance theories. The theory of wills as stated by Charles wills<sup>4</sup> argues that contractual obligations are virtue to the wills of parties contracting. The reliance theory disallows the unjust enrichment; a party who depended on others promise needs to be compensated based on expectancy value. This theory is mainly is favoured by the English law as the English contract is focused on wealth contracts requiring monetary consideration as essential element for creation of binding contracts<sup>5</sup>. The English common and statute law came into India by charters of 18<sup>th</sup> century established by the courts in three presidency towns of Calcutta, madras and Bombay. The charter Act of 1833 provided a legislature for British India and made laws known as acts. This included the Indian contract Act, 1872 within it. The Indian contract law has several of its principles and provisions adopted from the English contract act.

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<sup>2</sup> I C.G. Weeramantry, *The Law of Contracts*, 82, (Stamford Lake Publication, 2012).

<sup>3</sup> *History of the Indian Contract Act 1872*, Law Teacher (Nov 2013), <https://www.lawteacher.net/free-law-essays/contract-law/history-of-the-indian-contract-act-1872-contract-law-essay.php?vref=1>, (31 January 2021).

<sup>4</sup> Charles Fried, *Contract as Promise – A Theory of contractual obligation*, (Harvard University Press, Cambridge, Massachusetts, and London, England, 1981).

<sup>5</sup> Thushanthiga Kumarasoorier, *How Are We Using the Blue Pencil? a Critical Analysis of The Application Of “Blue Pencil Rule” in illegal contracts in Sri Lanka*, 10 IJBEL, Aug 2016.

### III. Need for the Doctrine

The question does arise as to why the doctrine is needed, and what would be its usage. To understand this, it is important to know that the principle underlying the doctrine of blue pencil is correctional in nature. This is because it seeks to remove, alter or change the offending clauses or words present within a contract.

The need for the usage of doctrine mainly arises due to illegality in the contract or non- complete agreements in dispute between the parties. It is amongst the major reasons affecting the validity of contracts. As a result, a contract between the parties can be entirely illegal or partly illegal. This can have major repercussions on the position of the parties in terms of the contract and may cause a substantial amount of mutual damage to them. It avoids such problems and issues the doctrine comes to the rescue. Nonetheless, according to contract law, when there is illegality the entire contract is deemed to be void ab initio. When this happens, the legal repercussions can be seen by use of blue pencil rule. It seeks to severance as per doctrine of severability or alteration of the objectionable promise or fundamental elements of a promise in order to deem the contract legal. Hence by this rule, illegal parts can be removed or altered to enforce the contract. Nevertheless, it is to be borne that severability principles cannot apply to doctrine of consideration. Thus, in a circumstance where a promise is illegal consideration then the entire contract is invalid as per law<sup>6</sup>

### IV. Origins and meaning

Blue pencil generally owes its origins to editors' actions of cutting out or editing portions of a text during proof reading with use of a blue pencil. Within the dictionary it basically means to edit, revise, or correct with or as if with a blue pencil; especially, to censor<sup>7</sup>. However, under the ambit of law, it has a similar application upon contracts. It seeks to remove illegal parts of contracts for subsistence of other parts deemed to be legal in nature. For a long time, the

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<sup>6</sup> Hopkins v. Prescott (1847) 4 C.B 578.

<sup>7</sup> Readers digest universal dictionary 179 (Readers Digest Association Limited, 1<sup>st</sup> ed. 1998).

severability rule was utilized, where courts were able to sever the illegal part from legal and enforce the legal portions. The problems with this rule were that it prevented any sort of alteration or change to the illegal portion, as on many occasions' severability wasn't an option. Thus in 1843 in the case of *mallan vs may*<sup>8</sup> a new rule was formulated; at the time the rule was not given a definite name but came to be soon known as the blue pencil rule.

It wasn't until when Lord M.R Stendale in the case of *Attwood v Lamont*<sup>9</sup> coined the term 'blue pencil'. Moreover, this case formulated the rule known as the blue pencil rule in order to test severability of contracts. This legal rule known to many countries allows removal of illegal part from the legal part and having the legal portion of a contract to stand and be enforced. The offending clauses are thereby invalidated by running a blue pencil upon the said parts.

The rule was utilized and further evolved in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co Ltd*<sup>10</sup> where the court held that the said covenant is valid as long as it relates to business or trade of the manufacturer of guns, gun mounting or carriages, gunpowder explosives or ammunition but was wide within its application for 25 years. Hence, the court accordingly struck down the portion by running blue pencil upon it. According to Black laws dictionary, it defines doctrine of blue pencil as "judicial standard for deciding whether to invalidate the whole contract or only the offending words"<sup>11</sup>.

Over the years the doctrine has gone through several modifications depending on its applicability in common law jurisdictions. Some of them have a strict blue pencil rule thereby not permitting courts to write again overboard non-compete agreements. The strict approach allows courts to sever the overboard provisions and enforce the remaining portions, whereas the liberal approach allows rewriting of provisions overboard.

## V. Applicability of the rule

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<sup>8</sup>[1843] 11 M.&W. 653.

<sup>9</sup>[1920] 3 K.B. 571.

<sup>10</sup>[1894] A.C. 535.

<sup>11</sup>BLACK'S LAW DICTIONARY (Bryan A. Garner 10<sup>TH</sup> ed.2014).

It has been known that courts rarely enforce agreements that are unreasonable in part<sup>12</sup>. When an agreement made by an employer is unreasonable in nature, then such an agreement would be either invalidated or the offending portion would be removed out. This doctrine in large part founded on understanding that there is not always a sinister purpose behind an overboard restrictive covenant<sup>13</sup>. The applicability of the rule differs from state to state, there have been various interpretations regarding applicability of the rule. The courts have understood that blue pencil severance may be used sparingly and in scenarios where the portion under contention of being removed is severable and isn't part of the main body of the restrictive covenant<sup>14</sup>. It is necessary to understand that the rule ought to be applied when the real construction of the clause cannot stand the reasonability test without addition by way of writing or deleting few words from the said clause in consideration<sup>15</sup>, nonetheless the usage shouldn't be in a way so as to have a completely different meaning.

First circuit<sup>16</sup> of the united states of America has developed a Three pointer approach. 1) All or Nothing approach which removes the entire restrictive covenant if any portion is unenforceable. 2) blue pencil approach that permits courts to enforce reasonable terms given the fact the covenant remains grammatically sound once the unnecessary portion is struck out and 3) partial enforcement that seeks to reform and enforce the restrictive covenant to the reasonable portion unless there exist circumstances that indicate bad faith on behalf of the employer.

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<sup>12</sup>Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompetition Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 142–45 (2008).

<sup>13</sup> Reddy v. Cmty. Health Found, 298 S.E.2d 906, 914 (1982).

<sup>14</sup>Mason v. Provident Clothing and supply co. Ltd, [1913] AC 724.

<sup>15</sup> The Littlewoods Organisation Limited v. Paul Melvin Harris, [1977] EWCA Civ J0803-1.

<sup>16</sup>Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463,1469(1st Cir. 1992); Durapin, Inc. v. Am. Prods. Inc., 559 A.2d 1051, 1058 (R.I. 1989).

The court of another jurisdiction belonging to another country also established a threefold test<sup>17</sup> to see the applicability of the blue pencil rule.

1) the unenforceable provision can be removed without the need of adding or changing the words of what portion subsists.

2) whether the remaining portion continues to be supported by enough consideration?

3) the deletion of unenforceable part wouldn't cause issues to the nature of the contract so that it doesn't become a contract which the parties never entered at all.

nevertheless, this test depends on type of severability that can be utilized within the present circumstances. Lord Bridge was of the view that, when textual severance is possible the 3-fold kicks in, but when it isn't possible the courts will need to then alter or modify the agreements in such a way so that it enables severance<sup>18</sup>. The court ought to do this if it is effecting no change in substantial purpose and effect of the impugned legislation<sup>19</sup>. Whereas a different view by lord lowry does exist, that says that an instrument which was on its face ultra vires can be considered to be held using blue pencil only when textual severance could happen and what then remains was left also passed the substantial severance test<sup>20</sup>. By understanding the above 2 rules propounded by courts of different nations it can be concluded that 3 schools of thought exist 1. all or nothing, 2. Strict rule of blue pencil and 3. Liberal rule of blue pencil.

#### 1. All or nothing rule

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<sup>17</sup>Beckett Investment Management Ltd & Ors v Glyn Hall & Ors, [2007] EWCA Civ 613.

<sup>18</sup>Daymond v. South West Water Authority, [1976] 1 All. E.R 39.

<sup>19</sup>A.W. Bradley, Judicial enforcement of *ultra vires* byelaws: the proper scope of severance 293-300(P.L. 1990).

<sup>20</sup> Dunkley v. Evans [1981] 1 W.L.R. 1522.

This rule is also known as the no modification approach, as it basically precludes the application of blue pencil in any manner. It states that if any part of the contract appears to be illegal, then the entire contract would happen to be declared void.<sup>21</sup> When courts make attempts to alter or change the clauses of an agreement for applying the blue pencil rule, it causes hindrance in application of wills theory. One must understand that courts' modifications would lead to a different type of liability upon the parties, in contradiction to the original will of parties. Because of this, courts should opt to refrain from either rewriting or striking the overboard provisions within agreements. Hence the 1<sup>st</sup> thing the courts what the courts need to do is determine if the restrictive portion is reasonable or not,<sup>22</sup> if not the courts will not alter or remove the provisions but rather refuse enforcement in entirety.

## 2. Strict rule of blue pencil

The strict approach allows the courts to sever the illegal portions, but prevents alterations or rewrites in any manner. Further, the only thing courts can do within this method is to strike the unenforceable portion and thereby enforce what is left in the agreement. The enforcement is permitted if such an agreement can be reasonably limited after the unenforceable portions have been severed.<sup>23</sup> The strict rule needs to be applied cautiously so as to not change the nature of the agreement than what was originally intended or render the agreement completely useless by ceasing its remaining clauses completely. The courts hence need to look in detail if this rule can be applied or not by looking into the structure of the agreement.

## 3. liberal rule of blue pencil

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<sup>21</sup>Thushanthiga Kumarasoorier, *How Are We Using the Blue Pencil? a Critical Analysis of The Application Of "Blue Pencil Rule" in illegal contracts in Sri Lanka*, 10 IJBEL, Aug 2016.

<sup>22</sup>Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 Neb. L. Rev. (2007).

<sup>23</sup>*Broadway & Seymour, Inc. v. Wyatt*, 944 F.2d 900 (4th Cir. 1991).

the third rule also recognized as reasonable modifications approach, seeks to alter or remove the unenforceable portion of the agreement to reasonably limit restrictions discovered within the agreements<sup>24</sup>. Liberal rule has greater application since it gives a great leeway to change agreements substantively, as courts can utilize the rule to modify an illegal part of an agreement and enforce it to the extent that it would be reasonable. Courts however upon alteration or rewriting must have a consensus in contracting the portion so that it is no broader than what is reasonably needed to subsist the provisions.<sup>25</sup> What this means is that the original nature of the agreement shouldn't be changed than the intended one, as it was for the parties when they agreed upon.

## VI. Application In the U.K

The applicability of the doctrine in the UK is essential to understand, as it was 1<sup>st</sup> coined and further developed there itself. Under the English law, doctrine of severance is used in situations where contracts are void at the common law on public policy and in cases void by statute. The doctrine is used for two purposes mainly, 1<sup>st</sup> it so extracts the illegal portion of the contract thereby making the remaining operative in nature. This test has been formulated and laid down in the case of *Goodinson v. Goodison*<sup>26</sup>. The 2<sup>nd</sup> is to modify the illegal portion in such a way that the entire contract is legal and enforceable.

In circumstances where the consideration is illegal and if such illegality aids the substantial portion of the said consideration the contract is deemed void. Still if it is directed towards a subsidiary part of the contract severance is permitted. As for the 2<sup>nd</sup> scenario the courts look for textual severability. Hence the courts of law at first look within the contract as to whether the contract framed by the parties to it can be divided into independent portions. However, if it is possible, the blue pencil doctrine can be used to sever out offending parts. English law prevents

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<sup>24</sup>*Supra* note 15.

<sup>25</sup> *Bess v. Bothman*, 257 N.W.2d 791, 794 (1977).

<sup>26</sup>[1954] 2 All ER 255.

modifications on the court's discretion. Therefore, it is well established that the English law makes use of the strict blue pencil rule<sup>27</sup>.

In *Rose and Frank Co v. JR Crompton and Bros Ltd*<sup>28</sup> The memorandum of understanding consisted of a clause that seemed to try to exclude jurisdiction of courts. The blue pencil rule was applied and the clause in question was removed and the remaining agreement was legal. This served to establish the fact that the memorandum of understanding was not intended by parties to be binding at law.

The court again in the case of *mason v. provident clothing and supply co. ltd*<sup>29</sup> observed that the blue pencil rule can be used on certain occasions and only in circumstances where the part under contention being subject to clear severance, trivial and doesn't form the main part of the said restrictive covenant. The rule ought to be applied when the clause under question fails the test of reasonability without adding or deleting some word from the clause, importantly it should not be used in a way so as to change the entire meaning<sup>30</sup>. Lord Bridge had stated that an appropriate test of substantial severability should be utilized. Nevertheless, it would have two forms of substantial severability test. 1<sup>st</sup> when textual severance can happen, the text takes this form: is the valid text unaffected by, and independent of the invalid text?

2<sup>nd</sup> when textual severance cannot happen, the courts ought to change the text to achieve the required severance. However, courts can only do this if it doesn't change the entire meaning and purpose of the clause or legislation in contention<sup>31</sup>. Lord Lowry presented a polar opposite finding by stating that an instrument on its face being ultra vires can be upheld by making use of the blue

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<sup>27</sup>Thushanthiga Kumarasoorier, *How Are We Using the Blue Pencil? a Critical Analysis of The Application Of "Blue Pencil Rule" in illegal contracts in Sri Lanka*, 10 IJBEL, Aug 2016.

<sup>28</sup>*Rose and Frank Co v. JR Crompton and Bros Ltd*, [1924] UKHL 2.

<sup>29</sup>*Mason v. Provident Clothing and supply co. Ltd*, [1913] A.C 724.

<sup>30</sup>*Polly peck (holdings) Plc. And others v. Trelford and others*, [1986] 2 W.L.R. 845.

<sup>31</sup>*Daymond v. south west water authority*, (1976) 1 All E.R 39;

pencil rule, given the fact that textual severance can happen and if what remained also passed substantial severance test<sup>32</sup>.

In the case of *Goodlife foods ltd v. hall fire protection ltd*<sup>33</sup> concerned a particular clause that sought to not include any harm as such arising from sale and usage of products. As per section 2(1) of The Unfair Contract Terms Act, 1977, when there is any attempt to exclude liability of personal injury or death, such a clause or section is deemed to be invalid pursuant to this section. The court made use of the blue pencil rule and deleted the section of the clause pertaining to personal injury or death, thereby leaving the remaining as it is. The rule ought to be used so far as it doesn't change the true nature of the agreement or clauses.

## VII. Application in India

The Indian contract law traces its origins from the English law. It adopts various principles and provisions set forth in it, because of this, various contractual theories, doctrines, principles are carried forward in the Indian law. They have been applied time to time, by taking into account the Indian social scenario and the legal provisions present. One such is the doctrine of blue pencil. The doctrine of blue pencil has extensive application in India; it applies to contract act, non- compete agreements and arbitration clauses. Blue pencil rule is used by courts to enforce legal parts and unenforced the illegal portion. The words which are not binding or go well with the entire contract are declared invalid. Often, there is alteration of a contract where some parts are altered which is illegal, but with the assistance of the blue pencil rule. This alteration can be deemed to be invalid and not binding in nature.

In P. Ramanatha Aiyar's *Advanced Law Lexicon*,<sup>34</sup> stated that blue pencil doctrine is a judicial standard for deciding to annul the whole contract or only the part that is offending. The rule seeks to remove only the illegal words by running over a blue pencil through them, as opposed to adding, changing or rearranging words.

<sup>32</sup> *Dunkley v. Evans*, (1981) 1 W.L.R. 1522.

<sup>33</sup> *Goodlife foods ltd v. hall fire protection ltd* [2017] EWHC 767 (TCC).

<sup>34</sup> 1 P. Ramanatha Aiyar's, *Advanced Law Lexicon* 553-554 (3rd ed. 2005).

The contracts in India have been governed by the Indian contract, 1872, which is based upon the principles of English common law. It is a comprehensive legislation dealing with several aspects relating to contracts within it. The act provides for discharge of contract. Though the act doesn't specifically mention the doctrine of blue pencil, rather the rule is spread amongst its provisions.

#### 1. Section 24 of The Indian Contract Act, 1872

This section stipulates situations when agreements can be declared void. The view is that this section adopts the blue pencil rule<sup>35</sup>. It says that on one hand if a portion of a consideration for one or more object is unlawful, then the agreement is void. Conversely if anyone or any such portion of several considerations for an object is unlawful, then even in such a case the agreement is void. This is not an absolute proposition without any exceptions existing within it. In certain scenarios the illegal portion cannot be severed off from the legal one since they are so intertwined with one another<sup>36</sup>. To explain this much better we can consider an example to that effect.

*'A' promises to supervise, on behalf of 'B', 'B' is a legal manufacturer of indigo, and an illegal trafficker of other articles. 'B' promises to pay to 'A' a salary of 10,000 rupees a year.*<sup>37</sup>

This agreement is termed as void, because of the object of A promise and consideration for B promise which in part is unlawful. Apart from that the exception rule is also present, as both the illegal and legal portions are very much intertwined with one another. The entire agreement would collapse upon removal of any illegal part.

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<sup>35</sup> Meena R.L, Text book On contract Law including Specific relief 132 (Universal Law Publication Co. 2008).

<sup>36</sup> Bharat chugh, To sever or not sever! Understanding blue pencil rule of severability under contract law, Rahul's IAS- The Official Blog (Dec. 24, 2017), <https://rahulsiasblog.com/2017/12/24/to-sever-or-not-to-sever-understanding-the-blue-pencil-rule-of-severability-under-contract-law/>.

<sup>37</sup> Indian Contract Act, 1872, Illustration to § 24.

However, for a clear understanding of applicability of the blue pencil rule, section 57 and 58 of the Indian contract acts can also be read. These sections show a class of cases which can be considered truly severable and therefore capable of being under the blue pencil.

### 2. Section 57 of The Indian Contract Act, 1872

This section of The Indian Contract Act, 1872 stipulates reciprocal promises. A reciprocal promise is when a promise is exchanged for a promise, here a promisor and promisee take some obligation to complete towards each other. The persons may have entered a contract to do legal acts, but once the contract was established on certain conditions, they agreed to do illegal acts. Under such scenarios the earlier acts are valid and the latter acts are held to be void. Considering an example, *A promises to supply coats to B. B then promises to sell such coats on black market for better profits.* In this case A's promise to B is valid, but B's promise to sell coats on the black market are invalid.



### 3. Section 58 of The Indian Contract Act, 1872

The section mentions a possibility to make a contract with an alternative promise. If one part of the alternative promise is legal and other is illegal, then under such cases only the legal branch can be enforced. Considering an example to the same, *A promises to pay back her loan to B, but such payment of loan is being done by money illegally acquired.* Thus, the promise to pay back the loan is valid, but the promise to pay by black money is invalid.

From the above sections it is clear that they can come under the blue pencil rule for modification or termination of contracts accordingly. The blue pencil rule has been invoked in cases of business and profession, agreements concerning restraints on trade or in modern understanding as one would consider 'non- compete agreements', where restraint of any manner is illegal is suitably excised and remaining contract given effect to. In fact, blue pencil has its genesis to cases where employers would impose restraints on their employees and the courts would enable a balancing act thereby segregating the good from bad.

In certain cases, the doctrine of severability has been used for pensioner's benefit. It retains any portion of the relevant memorandum making the same applicable to pensioners regardless of their date of their own retirement<sup>38</sup>.

The courts have evolved and utilized the blue pencil rule in contracts by holding that in an agreement clause can be separable. This happens when one clause is void and need not amount to other clauses to fail<sup>39</sup>. This rule has been applied by holding that the sub clause in contention was separable from the main clause which made a reference to an arbitrator imperative. It is necessary to note the sub- clause that appears to be void will not in any way affect the rights of the parties to adopt the recourse of arbitration, thereby not making a reference to an arbitrator any less an alternative remedy<sup>40</sup>.

In India the blue pencil doctrine is applicable to covenants dealing with restraints of trade or non-compete agreements as well as to arbitration clauses. *Sunil Kumar Singhal and another v. Vinod Kumar*<sup>41</sup> It has held that within the arbitration clauses the offending parts can be separated with use of blue pencil rule. Courts of law have applied the doctrine to contracts where some clauses illegal, redundant or opposed to the public policy laid down<sup>42</sup>. In another such case it was held that if a contract for sale of property of 8 flats is illegal and void, due to being contrary to building regulations and the master plan, such agreement for sale with lower number of flats if remitted under section 12 is then enforceable.<sup>43</sup>

Indian courts also consider the views held by lord bridge of the blue pencil rule, substantial severability is pertinent. This can be seen in the supreme court case of *Shin satellite public co ltd*

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<sup>38</sup>D. S. Nakara v. Union of India, (1983) AIR 130.

<sup>39</sup> Babasaheb Rahimsaheb v. Rajaram Raghunath (1931) 33 BOMLR 260.

<sup>40</sup>Shin Satellite Public Co. Ltd. v. Jain Studios Limited, AIR 2006 SC963.

<sup>41</sup>(2007) Indlaw ALL 2702.

<sup>42</sup> Cipla Ltd. v. Anant Ganpat Patil and Ors, 2008(1) ALLMR526.

<sup>43</sup>Canara Bank v. K.L. Rajgarhia, 2009(157) DLT344.

*v. Jain studios ltd*<sup>44</sup>, the court cited judgements of English courts cases such as *Goldsoil v. Goldman*<sup>45</sup>, *Attwood v. Lamont*<sup>46</sup>, *Leases Manprop Ltd v. O' Dell & Ors*,<sup>47</sup> and *Kall – Kwik Printing v. Frank Clearance Rush*<sup>48</sup> arrived to the point that the legal position in India is not different to the English Law. Whilst considering the view that substantial severance is possible given the circumstances, C.K Thakkar J utilized the liberal approach of blue pencil rule by relying on the precedents established in certain cases.<sup>49</sup> This decision by the court has stood test of time and stands authoritative till today<sup>50</sup>

In addition to this, it provided a litmus test for deciding if an agreement or order is substantially severable and not within textual severability. Duty is cast upon the court to cut and separate technical or trivial portions by holding onto the main portion thereby giving effect to latter. But it is to be given effect only if it is legal and enforceable. The courts should also consider the question whether the parties to a contract could have agreed upon valid terms of a contract had they known other terms were unlawful. On consideration if the answer turns out to be positive the severability rule is applied and valid parts would then be enforced.

### VIII. Limitations on the doctrine of blue pencil

"OUR MISSION YOUR SUCCESS"

The blue pencil rule has certain limitations to its usage and cannot be applied to contracts and restrictive covenants across the board. The primary criticism of the strict rule of blue pencil is that it is very mechanical in nature by placing unnecessary importance on the fact that covenants are separate and glorify form over substance<sup>51</sup>. Justice Bobbitt in his dissenting opinion in a

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<sup>44</sup> AIR 2006 SC 963.

<sup>45</sup> (1914) 2 Ch. 603.

<sup>46</sup> [1920] 3 K.B. 571.

<sup>47</sup> (1969) 2 All ER 849.

<sup>48</sup> (1996) FSR 114

<sup>49</sup> Babasaheb Rahimsaheb v. Rajaram Raghunath, (1931) 33 BOMLR 260; Union Construction Co (P) Ltd v. Chief Engineer, Eastern command, Lucknow and Anr, (1960) AIR 72

<sup>50</sup> Cilpa Ltd v. Anant Ganpat Patil and Ors 2008 (1) BomCR 78; Rakesh Jain v. M/S Wellwon Builders (India) Pvt. Ltd, (2011) 4 Arb LR 160 All.

<sup>51</sup> Jon P. McClanahan and Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants not to Compete in North Carolina*, 90 N.C.L. Rev. 1931 (2012).

leading case warned the use of strict blue pencil rule, the enforceability of a covenant can turn on whether the covenant had divisions of territory making use of the conjunction or in place of and. It is an immaterial choice of word and should not have any bearing on a covenant's enforcement.<sup>52</sup>

This fact has been emphasized a lot that the courts should not use the rule to change the meaning and nature of agreement between the parties. The clause that remains after use of blue pencil rule should reflect the original meaning and intentions as it was when the parties originally entered. It is also important that the clause that prevails does make logical sense and is not redundant and unreasonable. If the purpose of using blue pencil is to make a contractual clause illogical or unreasonable, then it shouldn't be used at all. There are cases the blue pencil rule has been heavily criticized, as the test cannot be applied to an unenforceable definition within a non-compete covenant. This is because any modifications would lead to unwanted changes in other provisions of the contract<sup>53</sup>

The all or nothing rule is inconsistent with the freedom of contract principles. This can be understood in a scenario when the court refuses to enforce a non-compete, it is done regardless the fact that the said non-compete is one component of a bigger contract and presumably one which the employer compensated the employee. It creates a windfall for employees, as they are not required to give any consideration, they got in exchange for agreeing a covenant<sup>54</sup>. The same approach of all or nothing rule may not operate as a deterrent for overreaching of employers. This causes the reasonableness standard is a fuzzy one not capable of hard and fast guidelines<sup>55</sup>.

Further, this rule creates uncertainty in the law as the courts are faced with a problem of its applications. The issue that comes up before the courts is that, whether to enforce a restrictive covenant or not. While its reasonable that the courts would enforce a restrictive covenant based on its equity, the decision should be on the fact whether the covenant is reasonable. However,

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<sup>52</sup> Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. at 256, 120 S.E.2d at 747 (1961).

<sup>53</sup> Francotyp-Postalia Ltd v. Whitehead, (2011) EWHC 367.

<sup>54</sup> Supra note 50.

<sup>55</sup> Id.

this tension would be pronounced in places that use the all or nothing rule, as there is no way for the court to enforce any portion of the covenant against anyone unless it finds it reasonable.

The supreme court of India acknowledged the limitations of the doctrine of blue pencil by stating that a contract ought to be severed with great caution. Only when the severability is feasible and the contract capable of subsisting after the running blue pencil over it, that this action should be embarked upon.<sup>56</sup>

### IX. Doctrine of Blue pencil and doctrine of severability

Doctrine of severability is mostly applied to determine validity under the constitutional law. It propounds that when any provision or clause of an act is inconsistent with the constitution or fundamental rights that provision or clause it ought to be removed. The removal should be such that the act must survive upon removal of the illegal part. The whole act in question should not be void only the offending portion can be void and if the rest of the which is valid can continue to exist after severance of the void part. The doctrine also has application in other fields including contracts. One of the basic rules of contract law is that the unlawful portion is illegitimate and thus can't be enforced. But several contracts have a part that is unlawful and rest lawful, under such circumstances the courts separate the unlawful from the lawful portion and enforces the legal part.<sup>57</sup> This is known as concept of severability rule, still it only gives power to remove such part and not alter or change it. Nevertheless, if the severability rule cannot apply the whole contract in question can cease to exist being void or illegal in nature. Due to lack of this ability, a new approach was necessary to counter the problems. In the case of *mallan v. may*<sup>58</sup> a new concept was developed to deal with this issue. Though it wasn't given a name as such it later came to be known as the blue pencil rule. The blue pencil rule allows no changes, severance or alteration of words or clauses that are considered to be illegal and unenforceable.

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<sup>56</sup>Shin satellite public co ltd v. Jain studios ltd, AIR 2006 SC 963.

<sup>57</sup>Varun Agarwal, *What is the Doctrine of Blue Pencil?*, White code. Legal (Jul. 19, 2020), <https://whitecode.legal/more/NzE3/What-is-the-Doctrine-of-Blue-Pencil> (Jan.20, 2021).

<sup>58</sup> supra note 7.

The difference that arises between the blue pencil rule and severability is that under blue pencil rule severance as well as alteration is permitted regarding the illegal parts, so that the contract continues to survive upon its legal parts. On the contrary severability seeks removal of the offending portion from the legal ones to have the contract in question to subsist. Thus, the severability rule has this limitation in it.

### **X. Conclusion**

The doctrine of blue pencil is a legal concept adopted and developed by nations following common law principles. The usage and approach of the doctrine differ from nation to nation as they have developed the rule depending on their legal systems. The development and origin of the doctrine were formulated on the basis of the English law of contracts. The doctrine has been advantageous as it allows the court to declare a part of the contract as void or unenforceable and remaining as enforceable. The courts can sever the illegal part and order the parties to follow the legal and enforceable portion. In other cases where upon severance the contract would completely fall, the courts are empowered to alter or change the clauses or portion that is declared as illegal so as to make them legal and enforceable. It is duty of the courts to uphold the contract where it can unless circumstances prevail where it cannot. The blue pencil rule comes to the aid and saves the parties to the contract. However, the foremost argument against it is that it grants arbitrary power to the courts to alter the contracts and restrictive covenants between parties. When using the blue pencil rule to remove the illegal part or altering it, there are also certain limitations upon the doctrine to the point that it cannot be applied in all cases. It is necessary that courts follow the doctrine with caution, and parties keep a watch that any severance or alteration does not change the original will of the parties as agreed when they entered the contract.