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Evolving Concept of Bailment Concerning the Indian Contract Act, 1872

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The world is an ever-evolving place; society keeps continuously changing over time, and humans adapt when not causing the changes themselves. When it comes to technology, humans are the ones who evolved it. It has grown to the extent that no one can imagine their life without the use of technology. This steady digitalization of the world has introduced new concepts in every aspect of life, including the law. Law, just like society, is dynamic. The law needs to change and evolve to suit the society it is made for. Through the years, we have seen various new provisions of laws that would not have been included previously. Amendments, bills, and repulsions of laws have helped it fit into the contemporary world. Even though the law has to change, a part of it also includes evolution. This study will discuss how the practices being done today, even though not mentioned in the legal acts, are relevant to them. Contemporary bailments of modern society are something that might have never been imagined when the term bailment was coined. These bailments of the contemporary world may not fit perfectly with all the sections provided regarding bailments in the Indian Contract Act, which tackles rather specific situations. Still, as established, the law is dynamic. Cloud Storage, Non-Fungible Tokens and Cryptocurrency, Surrogacy, Pre-paying in online shopping, and more such modern innovations are the new bailments of today. This research paper will solely focus on how the meaning of bailment has made space for these new bailments over the years.

Keywords: *bailments, contemporary, evolution, Indian contract act.*

INTRODUCTION

The general understanding of the concept of bailment is defined in the Indian Contract Act of 1872. Section 148 states that, *'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. The person delivering the goods is called the 'Bailor'. The person to whom they are delivered is called the 'Bailee'*.¹

For a better understanding of the concept by the reader, the ICA² has related examples along with every aspect of bailment. When this concept was defined and put into record as bailment as per Indian Law, these illustrations were perfectly straightforward. When we read about these situations today, after 150 years, the examples or illustrations mentioned in the Indian Contract Act fail to cover the new types of bailments that the 21st century has given rise to. Today, with the world launching new inventions at an exceedingly fast pace, we engage in bailments almost every day without even realizing it. Using this definition of bailment, put in the contemporary perspective, is when a whole new set of bailments appear. In this paper, the authors discuss a few of today's contemporary bailments. The paper will discover an area that is so far untouched, but this study will only scratch the surface of a complex concept new to India. In the coming years, it is only possible to move forward with these bailments and witness the further advancement of the commonly understood concept of bailment.

This mere Act of transferring the possession of goods from the owner to another person while retaining the ownership has multiple aspects connected to it. The Indian Contract Act of 1872 puts down the law concerning bailments. There are specific duties that a bailor has against the bailee and vice versa. The sections of the Act concerning the rights of the bailor against the bailee

¹ Indian Contract Act 1872, s 148

² Indian Contract Act of 1872

are Sections 150³, 153⁴, 154⁵, 163⁶, 151⁷, 152⁸, and 170⁹ respectively. The bailor and the bailee have certain rights against each other, which stop either of the parties from taking undue advantage. The Act also lays down the duties of bailor and bailee further in sections 164¹⁰, 158¹¹, 160¹² and 161¹³. This Act explains in detail, through provisions of law, what rights the bailee and the bailor have against each other in the sections

OBJECTIVE

This research study explores a few of the many types of bailments produced in the last decade. This will be done considering the very essence of the constituents of a bailment. By drawing out this new, possibly undiscovered perspective, the authors aim to research how the newly introduced practices constitute bailments. The definition and the provisions of the law taken into consideration while drawing out this perspective will be the Indian Contract Act 1872.

CONVENTIONAL FORMS OF BAILMENT

Lease: Section 69 in The Indian Contract Act 1872,¹⁴ *'Reimbursement of person paying money due by another, in payment of which he is interested. – A person interested in the payment of money that another is legally bound to pay and who, therefore, pays it is entitled to be reimbursed by the other. – A person interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.'* The legal framework governing personal property leasing agreements should be reviewed to contextualize the current concerns. The starting point of reference is an examination of the fundamental nature of a personal property lease. It is a 'bailment for hire,' which consists of a bailment for the mutual advantage of the parties in which

³ Indian Contract Act 1872, s 150

⁴ Indian Contract Act 1872, s 153

⁵ Indian Contract Act 1872, s 154

⁶ Indian Contract Act 1872, s 163

⁷ Indian Contract Act 1872, s 151

⁸ Indian Contract Act 1872, s 152

⁹ Indian Contract Act 1872, s 170

¹⁰ Indian Contract Act 1872, s 164

¹¹ Indian Contract Act 1872, s 158

¹² Indian Contract Act 1872, s 160

¹³ Indian Contract Act 1872, s 161

¹⁴ Indian Contract Act 1872, s 69

the bailee-lessee agrees to pay compensation to the bailor-lessor for the use of the property for a period of time.¹⁵ Moreover, return the property to the bailor-lessor at an agreed-upon time. Although personal property leases will be regarded in this section as bailments for hire, that phrase is not always identical to 'personal property lease' and may be more or less broad.¹⁶ Unfortunately, recognizing a personal property lease as a bailment for hire does not result in a clear and consistent legal discipline that remedies reoccurring legal challenges. On the contrary, a perusal of bailment treatises and cases finds little that, on the surface, resembles current commercial equipment leasing agreements. In recent years, 'it has been customary to examine legal concerns through the lenses of general contract law, real estate, landlord-tenant law, and, most recently, the Code. Nonetheless, while existing bailment law provides no panacea in the present setting, the existing law would be significantly more reasonable and predictable if courts recognized the nature and character of personal property leases as bailments for hire more frequently in the historical context.'¹⁷

A review of state legislation reveals that extensive legislative coverage of personal property leasing is different. Several states, legislation, and regulations govern various elements of personal property leasing.¹⁸ There are other examples of statutory handling of bailments in general and bailments for hire in particular. However, no comprehensive statutory treatments of personal property leasing agreements are comparable to Article 2. This is not unexpected given the relatively recent growth in complexity and surge in the importance of leasing to secure equipment utilization. For many years, the sale of products has been the principal player in the theater of commercial transactions, and the Code's breadth and substance are mostly a direct descendent of standard legislation enacted before 1933. Goods leasing is becoming a star in its own right.

Mortgage: A mortgage is defined in Section 58 of the Transfer of Property Act of 1882 as 'the transfer of an interest in specific immovable property for the purpose of securing the payment

¹⁵ CHARLES W. MOONEY, JR., 'Personal Property Leasing: A Challenge' (1981) 36(4) *The Business Lawyer* 1605-1629 <<https://www.jstor.org/stable/40686312>> accessed 20 February 2024

¹⁶ *Compare Home Insurance Co v Board of County Commissioners* [1949] 88 Ohio App 91, 97 NE2d 231

¹⁷ *Puritan Leasing Co. v August* [1976] 16 Cal.3d 451, 546 P.2d 679

¹⁸ Consumer Leasing Act 1976

of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.¹⁹ Section 160 of the Indian Contract Act also complements the concept of Mortgage.²⁰ The transferor is referred to as a mortgagor, and the transferee is referred to as a mortgagee; this same principal and interest on which disbursement is assured for the time being are referred to as mortgage money, and the file (if any) by which the transfer is completed is referred to as a mortgage-deed. Mortgages are only granted for immovable items such as a house, a building, land, machinery, and plants. The mortgagee has the right to access the property that has been mortgaged to him. It is essential to have a documented contract. In addition, two witnesses must testify, and the testimony must be recorded. In the case of a mortgage, the mortgagee must file a lawsuit to obtain ownership of the property and sell it to collect the debt amount. The lender has the right to the items mortgaged under a mortgage, while the borrower has sole possession.

Valet: Section 149 of the ICA 1872²¹ Delivery to Bailee is mentioned in the explanation below. Rent is one of the oldest forms of bailment as it satisfies all the general criteria for executing a bailment contract. The bailor here rents his goods by handing over his immovable property to the owner for consideration, to which both parties agree. When handing over the said property to the tenant, the bailor must disclose all its faults.²² The same observation has been made in the case of *Shri Thimarayyapa v Shri Shathap*²³ where the court while passing the judgment, had said that it is the duty of the owner as the bailor of the good to disclose the faults that could harm the other party. For instance, if A takes a dress on rent from B, then it is the duty of B to disclose to A any circumstances where there can be a possibility of wardrobe malfunctioning or if a particular accessory of the said dress is missing and is a crucial part of the said dress. It is also the duty of A to return the dress to B after the said purpose of the bailment has been completed¹⁶

In case the goods are rented in a proper condition but the bailee has caused damage, then it becomes the bailee's duty to help the bailor recover from the damages caused by negligence on

¹⁹ Transfer of Property Act 1882, s 58

²⁰ Indian Contract Act 1872, s 160

²¹ Indian Contract Act 1872, s 149

²² *Ibid*

²³ *Shri Thimarayyapa v Shri Shathappa* Misc App No 10612/2010

his part.²⁴ In a situation where the good bail is not returned, the bailor is entitled to recover his losses from the bailee.²⁵ For instance, Rita gives her car for valet parking at B's restaurant, and if the driver who took the car for valet does not return it back, then Rita is entitled to receive damages for the loss of her car.

UNCONVENTIONAL FORMS OF BAILMENT

Non-Fungible Token and Cryptocurrency: In order to understand the bailment in the currently growing field of NFT and Cryptocurrency, it is important to first understand what NFTs and cryptocurrencies are, how exactly they work, and what kind of bailments they produce.

A non-fungible token may seem like a self-explanatory term, but it is more complex than what catches the eye. To truly understand it, one must start by determining the difference between fungible and non-fungible. Fungible items are those items that are replaceable and do not have some artistic value to them, but they do not hold any distinguishing feature and can be exchanged for something that does. For instance, if a person has 10 rupees in Mumbai, it would hold the same value as a 10 rupee note in Delhi. Though the 10 rupee is valuable, it does not hold any artistic value or different monetary value from the other 10-rupee notes, making it fungible. Cryptocurrency is fungible. On the other hand, non-fungible tokens are those tokens that have some distinguishing factor, a unique value of their own and are irreplaceable. For example, if a person customizes his jacket from a French luxury brand, it is non-fungible because he is the only owner of the jacket, and no other piece other than what he owns exists. This covers the basic difference between the two.

NFTs and cryptocurrency work through a blockchain, which is simply a public ledger. This blockchain is maintained by hundreds of computers all over the world working together to record and publicize every single transaction that takes place using cryptocurrency. It records all Bitcoin transactions and maintains a public record of them for anyone in the world to see. This is similar to how a bank records a customer's activity to determine if he has enough money

²⁴ Indian Contract Act 1872, s 151

²⁵ Indian Contract Act 1872, s 161

left in his account. On the blockchain, no valid record or transaction can be altered, and anybody can verify the transactions that have been recorded.

NFTs are sometimes misunderstood as a type of cryptocurrency. They are merely digital assets that may be bought with Bitcoin. The only thing that crypto and NFTs have in common is that they both have a digital record maintained on a blockchain. Each token in the NFT system has a distinct value and cannot be swapped for another of the same value. The worth and transparency of bitcoin are clear, and one may swap one bitcoin for another.

Cryptocurrency: Bailment has taken place in the field of cryptocurrency by means of lending and borrowing loans. There are three parties involved here: the borrower, the lender, and the third-party platforms who help in dealing with the facilitation of this agreement. One of the essential principles of any bailment is the presence of a tangible good, but since the parties here are loaning and receiving loans in cryptocurrency, there is no exchange of physical goods. This is in contrast to the way bailments have taken place for years. However, since the accelerated digitalization of the world, the developments in crypto are taking place at an unusually high rate; it would not be a surprise if we see more such transactions in the future. The asset here is the crypto token, which will be in the possession of the lender until the borrower clears out the loan either in cryptocurrency or in real cash. Section 148²⁶ discusses bailment as ‘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.’ In this case, the delivery and deposit are both digital in nature.

NFTs: The contract of pledge as defined under Section 172²⁷ takes place for NFTs. The pawnor, in such cases, does not lend the goods to the bailee but transfers the NFT to the pawnee's account. The seemingly unconventional way of digitally transferring goods in order to secure a loan can be considered as the way in which bailments will take place in the future.

²⁶ Indian Contract Act 1872, s 148

²⁷ Indian Contract Act 1872, s 172

In case the pawnor is unable to clear the amount for which he takes a loan for his NFT, the pawnee receives it for a hugely discounted price. This seems a bit different from the general contract of a pledge as the pawnee usually receives selling rights in order to recover from the loss caused due to non-payment of debt as mentioned under Section 176²⁸.

Aside from loans, the other form of bailment that takes place is renting out NFTs. The owner lists out his NFT for rent on a third-party platform. When a prospective customer shows interest in renting the NFT, these platforms help connect the owner and the possible tenant of the NFT. They use this NFT for a short period of time and make profits from it. They then proceed to give the NFT back to their owner when their rental period expires. The payment of this NFT to profit off for a period of time, the bailee or the person who held the property has the same duties discussed under Section 162 of the ICA²⁹. The third party involved may or may not benefit from the whole rental transaction that takes place. They act as a safe space for the owner to rent their assets because of the smart contract that takes place between all three parties involved.

CLOUD STORAGE

The era of smartphones and new technological devices launching every year has given rise to a new form of bailment, one which would not have been imagined when mapping down the provisions of bailments in the Indian Contract Act in 1872³⁰. These devices, which may be laptops, phones, watches, or any other new tech you have in your hand, all have limited storage. They provide you with a certain gigabyte of storage in the device, in which you may store pictures, videos, songs, novels, documents, files, and all such data that usually was stored in the form of books up until the late 1900's. In recent years, we have witnessed the fast growth in technology. As the storage of your devices falls short of storing all of your data as the world rapidly shifts online, cloud storage comes as a solution.

Amazon Web Services, the world's most used cloud storage platform, defines it as '*a cloud computing model that stores data on the Internet through a cloud computing provider who manages and*

²⁸ Indian Contract Act 1872, s 176

²⁹ Indian Contract Act 1872, s 162

³⁰ Indian Contract Act 1872

*operates data storage as a service. It's delivered on demand with just-in-time capacity and costs and eliminates buying and managing your own data storage infrastructure. This gives you agility, global scale, and durability, with 'anytime, anywhere' data access.'*³¹ This means cloud storage is a virtual space that stores all of your data so that your device can be used for more important things, like creating more of that data. This form of storage is unlimited, and it holds your belongings forever; you will be able to access your data whenever you want. You can download your pictures or documents from the cloud when they are needed and use them; this makes you the bailor and the cloud storage the bailee.

This is the very concept of a bailment stretched out on a humongous platform. Pushing the limits put on the basic meaning of a bailment, cloud storage is something that can act as a bailee forever. This type of storage eliminates the 'data storage infrastructure,' which means one does not need to maintain an album of their pictures, CDs of their movies or songs, or even educational and fictional books; all this will be available with one tap on your device.

In the past two years, the world has been forced to completely shift online. And as difficult as that might have been in the earlier generations, the shift did not cause too much inconvenience in the matters of workers of billion-dollar companies working from home. This was because the majority of the work done by these billion-dollar companies was already online, may it be Amazon, Apple, Google, or any other establishment, all of their documents and data were stored in the cloud for their employees to access from the comfort of their homes. Cloud storage is also an extensive source of income for these companies; the illusion of unlimited space on the cloud is restricted, and these huge corporations only provide their users with certain space that can be used up to the maximum, after which a price is put on the cloud space. Consumers of cloud storage purchase their first cloud space when they buy their device and set up an account with the service provider. Then, when that cloud storage is full, that's when extra payment is required; this acts as the consideration of the bailment.³²

³¹ 'What is cloud storage?' (*Amazon Web Services*) <<https://aws.amazon.com/what-is-cloud-storage/>> accessed 14 February 2024

³² Indian Contract Act, 1872, s 2(d)

Cloud Storage has rapidly spread across the globe in recent years; it keeps your property safe until you need it. It is replacing the space-consuming data storage practices that the world has been engaged in for years. Everything is now in the cloud at all times, available to you whenever it is needed; this, of course, has its advantages and disadvantages. It has completely evolved the general meaning of bailment that was once understood; in the case of cloud storage, the possession transfers to the service provider who stores your data in the cloud, but the ownership remains with you. This is one of the newly invented types of bailments in this contemporary world.

As held, 'the rightful possession of goods by one who is not the owner. It is the element of lawful possession, however, created, and the duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based upon a contract in the ordinary sense or not.'³³ The transfer of possession of the property in cloud storage does not take place in the ordinary sense, but it does take place virtually. The corporation that provides these services as a bailee must have the duties, rights, and liabilities of the same.

SURROGACY, FROZEN EMBRYOS, AND BAILMENT

In a normal form of bailment, one party bails the goods for a specific purpose to the other party, and after a while, these goods are returned. What makes bailment different from ownership is the authority over the goods bailed. In the case of ownership, the goods are transferred along with the ownership rights, but in bailment, the goods are transferred without the change in ownership. We all know the difference between ownership and bailment, but what happens when the good bailed is a living thing? More importantly, the good bailed is your child. In this research paper, we will be looking at surrogacy from the aspect of bailment.

Surrogacy: Surrogacy is comparable to a Bailment Agreement, in which the surrogate (bailee) undertakes to carry out the wishes of the intended parents (bailor) on the condition that the commodities bailed (embryos/gametes in the form of a baby) are returned to the intended parents once the task (delivery) is completed (Bailor). The bailee does not have any legal rights

³³ *Zuppa v Hertz* [1970] 1 NJ 364

over the things bailed to her, just as she does not have any legal rights over the kid begotten by her, as stated in the Bailment Contract. Both sorts of relationships have the same requirements for the parties: a minimum number of parties (2), a major, a sound mind, not being disqualified by law, and voluntary consent.³⁴ In the same way that the bailee functions as a custodian of the assets bailed, the surrogate acts as a custodian of the baby she plans to carry and deliver on behalf of the intended parents in surrogacy. The surrogate has no rights to the kid and is not allowed to keep it after birth. Consideration is not required in a Bailment Contract, as it is in a Surrogacy Contract.³⁵ Furthermore, the sorts of bailment we use correspond to the forms of surrogacy we use. Altruistic surrogacy is bailment for the sole advantage of the bailor, while commercial surrogacy is bailment for the mutual profit of the Bailor and the Bailee. When a person is granted commodities for a 'specific purpose,' it is referred to as a bailment contract.³⁶ Surrogacy works similarly in that the surrogate is injected/implanted with the intended father/mother embryo/gametes solely for the goal of 'procreating' a child for them. Parties engage in a contract of bailment for 'Goods,' which are described as 'any kind of movable property other than actionable claims and money' in the commercial aspect. The Act also states that in order for something to be classified as 'goods' under the legislation, it must be movable, marketable, and merchantable. When we look into surrogacy, we find that all three elements are present in the materials.

Frozen Embryos: In an IVF procedure, the eggs of the women are taken out, and the fertilization process takes place outside of the body of the woman. When medical experts take out these eggs, they are taken out for the specific purpose of evolving the eggs into possible humans. Here, the ownership of the eggs lies with the parents and not with the medical institute, which has carried out the process of taking out the eggs and cryopreserving them. The same was observed in the case of *York v Jones*³⁷, when the hospital contended that they would not return the goods to the bailor, i.e., not return the frozen embryo to the parents. If we consider the Indian Contract Act

³⁴ Indian Contract Act 1872, s 11

³⁵ Shagufta Anjum, 'The Bailment of Womb (Altruistic or Commercial): Hidden Psychological and Legal Torments' (2017) 4(2) IJIRAS <http://www.ijiras.com/2017/Vol_4-Issue_2/paper_72.pdf> accessed 14 February 2024

³⁶ Indian Contract Act 1872, s 148

³⁷ *York v Jones* [1989] 717 F Supp 421 (ED Va)

in this aspect, then they are found to be in violation of Section 160³⁸. The Federal Court had observed the same in this case and had said that the ownership rights of the embryo lie with the parents and that the hospital, being a mere bailor of the goods, is not entitled to give any directions in the changes that are to be made in it. However, in extraordinary circumstances where the parents are not able to continue with the process, legal issues come into the picture. In a recent case in China, where both the parents died in a car accident, leaving the embryo orphaned in the process, the court had observed that the surrogate has the authority to give up the child in case there is no person willing to come forward in the family. In this case, the paternal grandparents had come forward and willingly agreed to act as the guardian of the unborn child. Hence, it can be said that IVF is a contract of bailment as well.

RECOMMENDATIONS

Bailment is a concept that has been sufficiently covered under Indian law. However, there is always room for improvement. Starting from the conventional forms of bailments, this paper has majorly discussed the types of bailments that Indian law does not provide. In this rapidly evolving world, concepts such as Cryptocurrency, NFTs, and Cloud Storage are evidently more common than they were when the Indian Contract Act came into force. Therefore, taking these concepts into consideration and owing to their increased use in Indian society, the law needs to accommodate them.

Indian laws, especially the Indian Contract Act, with regard to this analytical paper, need to modernize in order to keep up with the trends of the world.³⁹ This will combat any misuse due to the mere non-existence of clear laws on these contemporary topics. Further, there is an urgent need to keep up with international standards in order to cross the developing line and officially take the status of a developed country. We see countries such as the United States have

³⁸ Indian Contract Act 1872, s 160

³⁹ Nikita Tambe, 'All you need to know about India's Cryptocurrency Bill' (*Forbes*)

<[180](https://www.forbes.com/advisor/in/investing/cryptocurrency/cryptocurrency-bill/#:~:text=Cryptocurrencies%20as%20a%20payment%20medium,is%20done%20at%20investors'%20risk.> accessed 20 February 2024</p></div><div data-bbox=)

regulations such as the US Government Cryptocurrency Regulation⁴⁰, which specifically deals with the transactions and the use of cryptocurrency in the country.⁴¹ Although India has a bill proposed to regulate the use and intricacies of cryptocurrency, this is yet to be voted upon.

In addition to this, Indian laws must make way to involve dispute resolution opportunities in its laws. Alternate dispute resolution is not only a viable option for family disputes but also an increasingly famous and reliable method to deal with commercial issues. The Indian Contract Act provides for the option of dispute resolution through arbitration briefly under the exceptions of Section 28 of the Act.⁴² However, realizing the need to uplift and promote arbitration, further steps must be taken to spread awareness and facilitate the ADR process.

CONCLUSION

The developments in this growing modern civilization make everything around it develop. This contemporary world introduces new aspects to the already existing legal provisions. Along with the above-discussed bailments, many more such practices can also be constituted as bailments.

The habits that we do every day, without knowing that they are also one of the many forms of these contemporary bailments. The practice of prepayment of the goods we purchase from an online platform is a bailment until the goods are delivered. In this case, the company from whom the purchase was made becomes the bailor, and the purchaser becomes the bailee until the goods are delivered to your doorstep. The practice of purchasing a subscription from online OTT platforms to watch movies and series, we become the bailor as the property of the makers of the film is in our possession through a third-party platform. This continues until the subscription ends. All of these concepts may not perfectly fit into the definition of bailment, but law is nothing

⁴⁰ Wayne Duggan, 'How Does The SEC Regulate Crypto?' (*Forbes*, 30 June 2023) <<https://www.forbes.com/advisor/investing/cryptocurrency/sec-crypto-regulation/>> accessed 20 February 2024

⁴¹ Anne Coughlan and Nik Fahrer, 'Crypto Update – Regulation & Reporting' (*FORVIS*, 20 April 2023) <<https://www.forvis.com/getmedia/71cc6d2d-9f40-4c9e-b278-ba4354d2bce3/1Q-2023-Crypto-Update-Regulation-and-Reporting.pdf>> accessed 20 February 2024

⁴² Indian Contract Act 1872, s 28

but dynamic. Law evolves to stay relevant; during this day and age of digitization and rapid growth, there is indeed plenty of scope for the law to develop.