INTRODUCTION

The first essential of every contract is that there should be agreement upon its terms. Agreement is constituted by an offer made by one party and accepted by the other which expresses the terms of the agreement. For these purposes the law requires a specific type of agreement – a bargain. Agreement by offer and acceptance is the standard method of forming a contract. The parties to a contract must be of the same mind, that there must be “consensus ad idem.” A party cannot, of course, be made to enter into a contract against his expressed will and without his consent.

Business and commercial organizations enter into numerous contracts with its customers, clients and consumers everyday due to enormous increase in the volume of business. When a large number of contracts have got to be entered into by giant commercial organizations, it is practically not possible for these commercial entities to draft and prepare a separate agreement for each of its customer or clients. It is also not possible for them to negotiate over the terms and conditions of the agreement with their customers. To save time and for the purpose of convenience it was felt necessary to draft and prepare an agreement in standard form. These contracts in standard form became very popular due to its usefulness. Contractual terms are set out in standard forms which are nowadays used for all contracts of same kind. Such standard terms are often settled by a trade or business association for the use of its members for contracting with its customers. One of the basic object of these standard form contracts is to save time and energy, otherwise the work of insurers, carriers, bankers and other
giant commercial organizations would become impossible if all the terms of every contract they made had to be newly settled for each transaction.

In standard form contracts, generally the terms of the contract are pre-drafted by one of the parties and the other party having inferior bargaining position is supposed to sign on the dotted line without having any opportunity to get the terms changed or altered to suit his needs. The party in inferior bargaining position has no time to read the terms of contract then the party in superior bargaining position taking the undue advantage of the situation stipulates such terms in the contract which suits him most, and mostly the party in superior bargaining position stipulates such terms in the contract which either limits the liability or exclude him from any liability under the contract.

Thus the use of exemption and exclusion clauses in the standard form contract without any reasonable notice or any knowledge to the other party in inferior bargaining position or in no bargaining position at all is nothing but the exploitation of the individual and abuse of superior bargaining power of the big and giant commercial suppliers of goods and services when contracting with the individuals. These commercial organizations usually draft the standard terms in ways highly favourable to themselves both by means of clauses which excludes or limits their liability for failure to perform or for defective performance and also by the provision in the standard form contract which confers rights on them.

The Constitution of India provides social and economic justice for all the citizens of India. It protects freedom of profession, occupation, trade and business. It also provides that in economic system there should not be
concentration of wealth and resources in the hands of a few persons. Article 39 of the Constitution of India provides for certain principles of policy to be followed by the State. Article 39 (b) says that the State shall in particular, direct its policy toward securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 39(c) of the Constitution of India also provides that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Consensus ad idem is one of the essential requisites of the formation of a valid contract. The entire basis of a valid contract is that it should be freely and voluntarily entered into between the parties with equal bargaining power. But this principle and the philosophy behind this principle fails when it becomes practically impossible for the individuals to have equal bargaining due to numerous use of standard form contracts these days by the commercial organizations. There is no provision in the Indian Contract Act, 1872 which could deal the menace created by the unfair, unreasonable and arbitrary exclusion and exemption clauses in the standard form contracts. In the absence of any general provision in this regard the courts too are unable to give relief to the party in inferior bargaining position.

The problem which needs to be examined is that what principles have been developed by the courts in interpreting and applying the constitutional and other statutory provisions in relating to freedom of contract and misuse of standard form contracts through unfair, unreasonable and arbitrary exemption and exclusion clauses in the garb of free consent.
The purpose of present study is to ascertain as to how far the courts in India and other countries including the United Kingdom tried to strike a balance between the right of “freedom of contract” and the restrictions thereon to prevent misuse and menace of unfair unreasonable and arbitrary, exclusion and exemption clauses in consumer contracts especially those which are in standard form.

1. **SELECTION OF TOPIC:**

Business and commercial organizations enter into numerous contracts with its customer, clients and consumers everyday due to enormous increase in the volume of business. When a large number of contracts have got to be entered into by giant and leviathan size commercial organization, it is practically not possible for these commercial entities to draft and prepare a separate agreement for each of its customer or clients. It is also not possible for them to negotiate over the terms and conditions of the agreement with their customers. To save time and for the purpose convenience it was felt necessary to draft and prepare an agreement in standard form. Nowadays the use of these standard form contracts are very common in every business, trade and industry. Thus the purpose for selecting this topic for research is to critically analyse its importance and its misuse by stipulating harsh, oppressive and one-sided excluding and limiting terms in it by the party in the stronger bargaining position.

2. **STATEMENT OF RESEARCH PROBLEM AND HYPOTHESIS:**

Standard form contracts are very common due to its usefulness. Contractual terms are set out in standard forms which are nowadays used for all contracts of some kind. Such standard terms are often settled by a trade or
business association for the use of its members for contracting with its customers. In standard form contracts, generally the terms of the contract are pre-drafted by one of the parties and the other party having inferior bargaining position is supposed to sign on the dotted line without having any opportunity to get the terms changed or altered to suit his needs. The party in inferior bargaining position has no time to read the terms of the contract then the party in superior bargaining position taking undue advantage of the situation stipulates such terms in the contract which suits him most either by limiting his liability or excluding his liability under the contract.

The problem of our research work is to study about the legislative steps taken by the Legislature till date regarding to curb the menace of excluding and limiting terms in standard form contracts and to ascertain as to how far the courts in India and in other countries including the United Kingdom tried to strike a balance between the right of freedom of contract and the restriction thereon to prevent misuse and menace of unfair, arbitrary, harsh, oppressive and one-sided exclusion and exemption clause in consumer contracts especially those which are in standard form.

3. **OBJECTIVES OF THE STUDY:**

The enforcement of the standard form contracts in general is justified by the assumption that both the parties have adopted the standard form contract. This fictional consent is consistent with the objective character of law of contract in general. Freedom of contract entitles everybody to conclude a contract with a freely chosen person and freely determine the provisions of the contract without arbitrary or unreasonable legal restrictions. In this regard, judicial enforcement of contracts derives from the
notion of freedom of contract. Accordingly, all contracts generally are enforceable. This feature of the law of contract is expressed in the Latin maxim, *pacta sunt servanda*. The effect of this maxim is existent in both United Kingdom and India. It requires the enforcement of contractual obligations created in circumstances, which are consistent with freedom of contract.

The main object of the present study is to examine the use and the misuse of the standard form contracts in India and also to analyse that whether the present statutory provisions relating to contract are sufficient to meet any situation and are capable to do justice, or there is dearth and scarcity of the statutory provisions in this field, and if so to make suitable suggestions in this regard.

4. **RESEARCH METHODOLOGY:**

The main purpose of the present study is to examine the use and the misuse of the standard form contracts in India and also to analyse that whether the present statutory provisions relating to contract are sufficient to meet any situation and are capable to do justice or there is dearth and scarcity of the statutory provisions in this field, and if so to make suitable suggestions in this regard. Methodology of present research work is based on the doctrinal method. An effort is made to study the case law enunciated by the Supreme Court of India and various High Courts of India and the English Courts. An effort is also made to study the Reports of the Law Commission of India and as well as of the U.K. and to ascertain the attitude of the courts regarding the principles of the law of contract and its interpretation in relation to standard form contracts. The present study is
designed to examine the role of judiciary and to study the judicial response in India in relation to standard form contract. Apart from the case law study, the other materials relied on are the Reports of the Law Commissions, Discussion paper and the statutory provisions relating to commercial law in India and of other countries especially of U.K. and U.S.A.

5. PRESENTATION OF THE STUDY:

To cover all aspects, the entire work is arranged in six chapters.

Chapter I deals with the meaning definition, nature and the scope of the standard form contracts. It also discusses other aspects of standard form contracts the usefulness and the misuse of the standard form contracts.

In Chapter II the researcher has discussed the different types of excluding and limiting terms, meaning of exemption clauses, law regarding exemption clauses and principles of construction of exemption clauses. It also discusses the principle and circumstances of fundamental term and fundamental breach of contract.

In Chapter III he has made an effort to survey the statutory provisions in India in the field of law of contract and also the other provisions who could deal the problems created by the standard form contracts. This chapter also analyses the statutory provisions in other countries in relation to the law to deal with unfair terms in contracts especially of United Kingdom, United States of America.

In Chapter IV he has endeavoured to discuss and analyse the Reports of the Law Commission of India and the recommendations contained in it to enact laws to deal the problem of unfair terms. An attempt has also been made to analyse the Reports very minutely.
Chapter V deals with judicial protection and treatments. In this chapter an effort is made to study and analyse the case law enunciated by the English courts and the Supreme Court of India and also the judgments of different High Courts of India. For Indian cases only those cases have taken up for study where the contractual document is in standard form, and its term creates the "cause of action."

Last Chapter VI deals with conclusion and suggestions. In this chapter the researcher has made an effort to recapitulate the chief points of the discussion discussed earlier along with a few suggestions in the light of present position.