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THE INDIAN CONTRACT ACT

(ACT IX OF 1872)

Preamble

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows :—

Preliminary

Short title.

1. This Act may be called **The Indian Contract Act, 1872.**

Extent. Commencement.

It extends to the whole of India except the State of Jammu and Kashmir; and it shall come into force on the first day of September, 1872.

Enactments repealed.

Nothing herein contained shall affect the provision of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract,[1] not inconsistent with the provisions of this Act.

Law anterior to Contract Act: Introduction of English Law into India.—By the Charter of 1661 and 1726 the English Law has deep impact on the Indian Legal System. However, the English Law applied whenever the Indian Law was deficient or wanting. In 1774 the Mayor's Court at Calcutta was replaced by the Supreme Court. The Regulating Act of 1773 and the Charter of 1774 were silent as to the law which the Supreme Court was to apply to Indians. Consequently, S.17 of the Act of Settlement, 1781 directed that questions of inheritance and succession, and all matters of contract and dealing between the parties should be determined, in the case of Mahomedans and Hindus by their respective laws, and where only one of the parties should be a Mahomedan or Hindu by the laws and usages of the defendant. Similar provisions were introduced in course of time in Madras and Bombay when these town came to have first the Recorder's Courts and then the Supreme Courts.[2] This system continued upto the enactment of the Indian Contract Act, 1872.

Applicability of the Act.—The second clause of sec. 1 of the Act says in the most general terms that the Act is to extend to the whole of India except the State of Jammu and Kashmir. These words are large enough to include all Courts and persons of all denominations. The third clause of sec. 1 provides that nothing contained in the act shall affect the provisions of any statute not thereby expressly repealed. The schedule of the Act enumerates the enactments repealed by the Act, but this enumeration does not

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[1] The words "not inconsistent with the provisions of this Act" are not to be connected with the clause "nor any usage or custom of trade". In the section as cited by the Judicial Committee there is no comma after "contract": *Irrawaddy Flotilla Co. v. Bugwandas* (1891) L.R. 18 I.A. 121, 127; 18 Cal. 620, 627.

[2] See Prof. M.P. Jain, *Outlines of Indian Legal History* (4th ed) Pp. 361-362.

include the provision in the statutes of 1781 and 1797 directing Hindu law to be applied to Hindus and Mahomedan law to Mahomedans. In *Madhub Chunder* v. *Rajcoomar Doss*[3] this circumstance gave rise to a question as to the applicability of the Contract Act to Hindus. The parties were Hindus and the case came before the High Court of Calcutta in the exercise of its Original Civil Jurisdiction. On behalf of the plaintiff it was contended that s. 27 of the Indian Contract Act did not apply and the case was governed by s. 17 of the Statute of 1781. The effect of contention as to the applicability of s. 17 of the Statute of 1781 was that the agreement was not rendered void under section 27 of the Contract Act since the Hindu law of contract did not render the agreement in restraint of trade void. However, it was held that the Act applied to Hindus in view of general words used in cl. 2 of s. 1. Regarding non-repeal of the Statute of 1781, it was said that it was not necessary to repeal it, as the Supreme Court to which it applied had been abolished and there was nothing left to which it could apply.

Scope of the Act.—The Contract Act does not profess to be a complete code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than 'define and amend certain parts' of that law. The third clause of sec. 1 saves the provisions of other statutes, regulations, customs of trade, and incidents of any contract, which are not inconsistent with the provisions of this Act. This also indicates that this Act does not profess to be a complete code. The Act deals with particular contracts in separate chapters, but the Legislature has not dealt exhaustively with any particular chapter or sub-division of the law relating to contracts.[4] To the extent that this Act deals with a particular subject, it is exhaustive and it is not permissible to import the principles of English law independent of the statutory provisions contained in this Act.[5]

How far native Law of Contracts is still in force.—As the Contract Act is not exhaustive, cases may occur which are not covered either by the Contract Act or by any special enactment relating to contracts. In such cases the High Courts in the exercise of their original jurisdiction are bound to apply the Hindu law of contract to Hindus and the Mahomedan law of contract to Mahomedans. An instance of such a case is the Hindu rule of *damdupat* according to which interest in excess of principal cannot be recovered at any one time. This rule is in force in the Bombay State[6] and in the presidency-town of Calcutta,[7] but it is not recognized outside that town[8] nor in the Madras State.[9] Such cases are however very rare and for all practical purposes the native law of contract has been superseded by the Contract Act and special enactments relating to particular contracts.

Saving of usage or custom of trade, etc.—The true and appropriate office of a usage or custom of trade is to interpret the otherwise indeterminate intentions of the parties and to ascertain the nature and extent of their contracts, arising not from the express

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[3] (1874) 14 B.L.R. 76.

[4] *Irrawaddy Flotilla Co.* v. *Bugwandas* (1891) L.R. 18 I.A. 121; 18 Cal. 620, 628, 629, cited in (1929) L.R. 56 I.A. at p. 178. "The Act, so far as it goes, is exhaustive and imperative"; *Mohori Bibee* v. *Dharmodas Ghose* (1903) L.R. 30 I.A. 114, 125; 30 Cal. 539, 548. See also *Ramdas* v. *Ajarchand & Co.* (1916) L.R. 43. I.A. 164, 170; 40 Bom. 630, 636.

[5] *Satyabrata* v. *Mugneeram*, A.I.R. (1954) S.C. 44 (47).

[6] *Dhondu* v. *Narayan* (1863) 1 B.H.C. 47; *Harilal* v. *Nagar* (1896) 21 Bom. 48; *Saundanappa* v. *Shivbasava* (1907) 31 Bom. 354.

[7] *Nobin Chunder* v. *Romesh Chunder* (1887) 14 Cal. 781.

[8] *Het Narain* v. *Ram Deni* (1883) 12 C.L.R. 590.

[9] *Annaji Rou* v. *Ragubai* (1883) 6 Mad. H.C. 400; *Subramania Aiyar* v. *Subramania Aiyar* (1908) 18 Mad. L.J. 245.

stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character.[10] The term "usage of trade" is to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants which is part of the law of the realm and is to be collected from decisions, legal principles, and analogies and, according to the opinion now received, can still be increased by proof of living general (not merely local) usage.[11] A particular usage remains unaffected by the provisions of the Act even though it may be inconsistent with those provisions. The words "not inconsistent with the provisions of the Act" apply only to the immediately preceding words "any incident of any contract" and are not connected with the words "usage or custom of trade".[12] But a general or universal usage pervading all trades has no binding force if it is inconsistent with the provisions of the Act. Such general usage is equivalent to a general law and no such general law or usage in contravention of the general law laid down by the Contract Act can be consistent with the validity of the Act itself.[13]

Not inconsistent with the provisions of this Act.—A stipulation in a contract of guarantee that the surety shall not have the benefit of sec. 133 has been held to be inconsistent with the Act.[14]

Evidence as to usage of trade.—Section 92(5) of the Indian Evidence Act, 1872, enacts that though the terms of a contract have been reduced to writing, oral evidence may be given of any usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of that description. A mercantile usage is provable by a number of particular instances showing a given course of business and a general established understanding respecting it.[15] It does not need the antiquity, uniformity or notoriety; it may still be in its growth; but it should be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.[16] Certainty and reasonableness are the other characteristics of such a usage.[17] That section, however, requires that such incident shall not be inconsistent with the express terms of the contract.[18] This section of the Contract Act also requires that it shall not be inconsistent with the general provisions of the Contract Act.

Sections referring to usage or custom of trade.—Section 190 enacts that an agent cannot delegate his authority to another unless allowed by the "ordinary custom of trade". Similarly, an agent is bound, in the absence of directions from the principal, to conduct business according to "the custom which prevails in doing business" of the same kind at the place where the agent conducts such business (s. 211). It may here be observed that the expression "usage or custom of trade" used in sec. 1, as well as the sections referred to above, relates to a particular usage as distinguished from a general

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[10] *The Schooner Reeside*, (1837) 2 Sumn. 567.

[11] See *Bechuanaland Exploration Co.* v. *London Trading Bank* (1898) 2 Q.B. 658, *Edelstein* v. *Schuler & Co.* (1902) 2 K.B. 144.

[12] *Irrawaddy Flotilla Co.* v. *Bugwandas* (1891) 18 I.A. 121, 127, 18 Cal. 620, 627; *In re McCorkindale* (1881) 6 Cal. W. N. 1.

[13] *Moothora Kant Shaw* v. *The India General Steam Navigation Co.* (1883) 10 Cal. 166, 185.

[14] *Chitguppi & Co.* v. *Vinayak Kasinath* (1921) 45 Bom. 157, 22 Bom. L.R. 659.

[15] *Mackenzie* v. *Dunlop*, 3 Macq. H.L. cas. 22.

[16] *Jago M. Ghosh* v. *Manikchand*, 7, Moor. I.A. 263: 4 W.R. 8 P.C.); *Manek Lal* v. *Suryapur Mills* (1928) A. Bom. 487.

[17] *Manek Lal* v. *Suryapur Mills, supra.*

[18] See *Ruttonsi Rowji* v. *Bombay United Spinning and Weaving Co.* (1917) 41 Bom. 518, at pp. 538, 540.

or universal usage. A general usage pervading all trades has no binding force if it is inconsistent with the provisions of the Act. A general usage is equivalent to a general law, and no general law or usage in contravention of the general law laid down by the Contract Act can be consistent with the validity of the Act itself.[19]

The Transfer of Property Act. IV of 1882, sec. 4, provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act.

Foreign Contract.—A contract in which two or more countries are concerned in respect of its performance, questions arise as to the law of which country would govern such a contract. In the first instance, the law which would govern such a contract would be the law expressed by the parties themselves in the contract.[20] In the absence of an expressed intention, the rule to apply is to infer an intention from the terms and nature of the contract and the general circumstances of the case.[20] Such circumstances may be (i) the country in which the contract was entered into,[21] or (ii) where the payment was to be made.[21] In such a contract, if a payment is to be made, it should be of the legal tender governing the country in which payments is to be made.[22]

Act not retrospective.—The provisions of this Act do not apply to contracts made before the Act came into force.[23]

Interpretation clause.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise :

(c) The person making the proposal is called the "promisor," and the person accepting the proposal is called the "promisee":

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise:

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement :

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[19] *Moothora Kant Shaw* v. *The India General Steam Navigation* Co. (1883) 10 Cal. 166, 185.

[20] *Dhanrajmal Gobindram* v. *Shamji Kalidas & Co.*, A.I.R. (1961) S.C. 1285: 64 Bom. L.R. 169. (Contract provided application of Indian Arbitration Act and jurisdiction to Bombay High Court.)

[21] *State Aided Bank of Travancore Ltd.* v. *Dhrit Ram*, A.I.R. (1942) P.C. 7; *Se Se Oil* v. *Gorakhram*, 64 Bom. L.R. 113 (118).

[22] *City of Auckland* v. *Alliance Assurance Co.* (1937) A.P.C. 54 (59).

[23] *Omda Khanum* v. *Brojendro* (1874), 12 B.L.R. 451, 458; *ib.* p. 472, on appeal.

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:

(g) An agreement not enforceable by law is said to be void :

(h) An agreement enforceable by law is a contract.

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Agreement.—The effect of clauses (a) to (f) is that an agreement is a promise or a set of reciprocal promises; that a promise is formed by the acceptance of a proposal; and that there must be a promisor who makes the proposal and a promisee who accepts it. In the case of reciprocal promises each party is a promisor as to the promise he makes and a promisee as to that which he receives; he is both proposer and acceptor, promising to become liable and accepting the other's liability. The mutual proposals of the two parties become promises by mutual acceptance; whatever may have happened before the promises are exchanged is merely preliminary negotiation, and does not enter into the legal analysis of the transaction.

There must be an offer or a proposal which the person accepting has had an opportunity of considering, and which, when he accepts he knows, will form a binding contract. In other words, the proposer and the acceptor must agree upon the same thing and in the same sense. Unless that is done, where each of them is, so to speak, making an offer or a cross offer, it is not a contract. So in *Tinn* v. *Hoffman and Company*[24] on 28th November, 1871, the defendants wrote to the plaintiff offering to sell a certain quantity of iron at a certain price. That very day the plaintiff wrote to the defendants offering to buy the same quantity of iron at the same price. The letters crossed in the post. The plaintiff contended that there was a concluded contract. But the Court held that the defendants were not liable by the simultaneous offers, each being made in ignorance of the other. Blackburn, J. said;[25] "when a contract is made between two parties, there is a promise by one in consideration of the promise made by the other, there are two assenting minds, the parties agreeing in opinion and one having promises in consideration of the promise made by the other—there is an exchange of promise. But I do not think exchanging offers would, upon principle, be at all the same thing." The necessity of the communication of the offer or proposal and its consequent acceptance seem to be the reason why identical cross-offers do not make a contract. Similarly the promise or offer being made on each side in ignorance of the promise or offer made on the other side, neither of them can be construed as an acceptance of the other. The aforesaid rule is essential in order not to cause inconvenience in mercantile business and to leave no doubt in the minds of either party on the matter. The subsequent sections provide for methods of communication, acceptance and revocation. It will be noticed that upon reading clauses (e) to (j), that an agreement is a wider concept or a genus of which a contract is a species. Every contract is an agreement but every agreement is not a contract.

Proposal and Promise.—The word "proposal" is synonymous in English use with "offer". But the language of these definitions appears to confine "proposal" to an offer

[24] (1873) 29 L.T. 271. [25] (Ibid p. 279.).

to be bound by a promise. Before parties enter into a contract, usually preliminary negotiations take place between them. A person may ask for some information or supply some information and invite the other to make an offer or make a definite offer. In order to ascertain whether a particular statement amounts to an offer or an invitation to offer, the test would be the intention with which such statement is made. Does the person who makes the statement intend to be bound by it as soon as it is accepted by the other or he intends to do some further act, before he becomes bound by it? In the former case, it amounts to a proposal or offer and in the latter case, it amounts to an invitation to offer. An invitation to traders to make tenders,[26] an invitation by a company to the public to subscribe for its shares,[27] display of goods for sale in shop windows[28] and advertising auction sales[29] are instances of invitation to the other to offer to buy or sell, as the case may be. In such cases, the invitor retains to himself the right to do some other act (such as to accept or reject tender, to allot or not to allot shares, to refuse to sell or to withdraw or postpone auction sale) before he is bound by its acceptance. A quotation of prices is not an offer but an invitation to a customer to offer to buy.[30] In case of a proposal or offer, the person making it intends to be bound by it (without doing any further act on his part) as soon as it is accepted by the other and on such acceptance it becomes a promise which is the foundation of an agreement under clause (e). He does not reserve to himself any such right as is done in the case of an invitation to offer.

The practice of executing deeds in the English form and the legal doctrines exclusively applicable to such instruments have never been introduced in India. It is difficult at first sight to say, without doing some violence to language, that in the common affairs of life a promise is always an accepted proposal. Take the case of a man offering to sell and deliver goods on credit then and there, to another who at first does not want the goods, but is finally persuaded to take them at a price named by the seller. Here the seller delivers the goods and receives in exchange the buyer's promise to pay for them. Now the buyer's promise has never been a proposal; the seller offered to sell, and the buyer accepted the offer by taking the goods and pledging his credit. It may be said, however, that the buyer must be deemed to adopt the seller's terms at the last moment before delivery of the goods. For the seller will not deliver them unless he knows that he will get the buyer's promise to pay for them; and the only way in which he can be sure of this is the existence of a proposal from the buyer to become liable for the price, which proposal will become a promise on the goods being delivered. These reasons appear to be sound and sufficient on principle to justify the language of the Act.

Promise and Consideration.—The technical use of the word "promise" in the Act is far narrower than the popular use. Express words of promise may be and often are in law no more than a proposal.[31] In common life many promises are made, and regarded

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[26] *Spencer* v. *Harding*, (1870) 5 C.P. 561.

[27] *Hebb's Case* (1867) L.R. 4 Eq. 9; *Harris's Case* (1872) L.R. 7 Ch. App. 587; *Wall's Case* (1872) 42 L.J. Ch. 372.

[28] *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists*, (1953) 1 Q.B. 401.

[29] See page 23.

[30] *Mylappa Chettiar* v. *Aga Mirza Mohammed Shirazee* (1919) 37 Mad. L.T. 712; *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.*, (1953) 1 Q.B. 401; *cp Secretary of State* v. *Madho Ram* (1928) Lah. 493, 502.

[31] Thus a letter requesting a loan of money, and promising repayment with interest on a certain day, is not a promissory note but a mere proposal for a loan: *Dhondbhat* v. *Atmaram* (1889) 13 Bom. 669; *Narayanasami* v. *Lokanibalammal* (1897) 7 Mad. L.J. 200.

as normally binding between one person and another, without any "view to obtaining the assent of that other" to the contents of the promise. In common speech no one thinks of acceptance by the promisee as being an essential condition which must be satisfied before a declaration of intention amounts to a promise. Apart from the peculiar case of a promise made by deed, English law will not enforce a promise unless it was given for value, that is, not necessarily for an adequate value, but for something which the law can deem of some value, and the parties treat as such by making it a subject of bargain. The value so received in exchange for the promise may consist in present performance, for example, the delivery of goods, or it may itself be the promise of a performance to come. These elements are embodied in the definition of consideration by cl. (d) of our section.

Definition of Consideration.— The terms of the Indian definition must now be examined. The conception of 'consideration' in English Law is some 'detriment' to the promisee (in that he may suffer something or give something of value) or some 'benefit' to the promisor (in that he receives something of value). 'Detriment' to the one person and 'benefit' to the other are the same thing looked at from two different angles. Usually each party enters into a contract in order to obtain consideration promised by the other (seller wanting to realize the price of his goods and the buyer desiring to get goods of value). Adopting the said conception, the farmers of this Act have made some departures which will be noticed hereafter.

"At the desire of the promisor".—The act or omission to do or promise to do constituting the consideration must have been done at the desire or request of the *promisor*, as when a person contracts a marriage in consideration of a promise of a settlement.[32] An act done at the desire of a third party is not a consideration. Thus a promise by the defendants to pay to the plaintiff a commission on articles sold through their agency in a market constructed by the plaintiff, not at the desire of the defendants, but of the collector of the place, is void under sec. 25, being without consideration.[33] Nor can it be supported under cl. 2 of that section, which enacts that an agreement without consideration is void, unless it is a promise to compensate a person who has already voluntarily done something for the promisor. The expression "voluntarily" appears to be used in that section in contradistinction to the words "at the desire of the promisor".[34] In respect of a claim upon a pro-note it was held that as the moneys were advanced not at the request of the promisor but in fulfilment of an undertaking given by the father of the promisee to the father of the promisor, there was no consideration within the meaning of the said expression "at the desire of the promisor".[34] In another case where a drawer's bank credited the amount of a dishonoured cheque to the payee's bank and debited the amount to the drawer and the payee's bank paid the amount to the payee, upon the drawer's bank demanding payment from the drawer, it was held that the payment by the drawer's bank when there was no balance in account, was not done at the instance or request of the drawer and hence there was no consideration for such payment by the drawer's bank to the payee's bank.[35] A voluntary subscription, even if repeated, is not in itself evidence of a promise to subscribe.[36]

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[32] *Nanjunda Swami Chetti* v. *Kanagaraju* (1919) 42 Mad. 154, 159, See *Vishveshwar* v. *Sadashiv* (1925) 27 Bom. L.R. 1456.

[33] *Durga Prasad* v. *Baldev* (1880) 3 All. 221.

[34] *Sindha Shri Ganapatsingji* v. *Abraham* (1895) 20 Bom. 755, 758; *Raja of Venkatagiri* v. *Krishnayya* (1948) A.P.C. 150: 50 Bom. L.R. 517.

[35] *Hyderabad State Bank* v. *Ranganath* (1958) A. Andhra 605.

[36] *Jiban Krishna Mullick* v. *Nirupama Gupta* (1926) 53 Cal. 922.

In *Combe* v. *Combe*[37] wife started proceedings for divorce and got a decree nisi against her husband. The husband then promised to give her £100 p.a. as permanent maintenance. The wife did not in fact apply to the Divorce Court for maintenance, but this forbearance was not at the husband's request. The decree was made absolute. The annual payments were not made and the wife sued the husband for his promised sum on the ground that she had given consideration for the husband's promise by forbearing to apply to court for maintenance order in her favour. But it was held by the Court of Appeal that the husband had not requested her to forbear and her action could not be said to have been in return for his promise to pay.

Questions may arise whether the thing done by the plaintiff claiming under a promise was in fact done at the desire of the promisor so as to amount to consideration. In *Kedar Nath* v. *Gorie Mahomed*[38] the defendant had agreed to subscribe Rs. 100 towards the construction of a town hall at Howrah. It was in evidence that the plaintiff—promisee—the secretary of the municipality—had entered into contract with the contractor for the purpose of building the town hall and thus had undertaken liability to pay him. The plaintiff sued the defendant as he failed to pay the subscription. The Calcutta High Court held that though the promise was to subscribe to a charitable institution and there was no benefit to the defendant—promisor, still it was supported by consideration as the plaintiff had suffered a detriment in having undertaken a liability to the contractor on the faith of the promise of the defendant. But where the promisee has done nothing, there is no consideration.[39]

"Promisee or any other person".—In modern English law it is well settled that consideration must move from the promisee.[40] In *Tweddle* v. *Atkinson* an agreement was entered into between the respective fathers of the husband and wife that each should pay a sum of money to the husband and that the husband should have power to sue for such sums. After the death of both the fathers, the husband sued the executors of the wife's father for the money promised to him. It was held that action would not lie as no consideration had moved from the husband, the promisee and so the promise was, as far as he was concerned, a gratuitous one. Under the Act, however, consideration may proceed from the promisee *or any other person.*

But though under the Act the consideration for an agreement may proceed from a third party it does not follow that the third party can sue on the agreement. There has been some divergence of opinion on this point and the cases are collected in a Full Bench decision of the Madras High Court.[41] The best statement of the law is that of Rankin, C.J. in *Krishna Lal Sadhu* v. *Pramila Bala Dasi*.[42] His Lordship said: "Clause (d), section 2, Contract Act, widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in Indian in certain cases in which the English law would regard that party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of *nudum pactum*. Not only, however, is there nothing in section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract but this notion is rigidly excluded by the definition of 'promisor' and 'promisee'."

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[37] (1951) 2. K.B. 215.

[38] (1886) 14 Cal. 64.

[39] *Abdul Aziz* v. *Mazum Ali* (1914) 36 All. 268 A.I.R. (1914) All. 22; See *Doraswamy* v. *Arunachala*, A.I.R. 1936 Mad. 135.

[40] *Tweddle* v. *Atkinson* (1861) 1 B & S. 393 123 E.R. 762 overruling *Dutton* v. *Poole* (1678) 2 Lev. 210.

[41] *Subbu* v. *Arunachalam* (1930) 53 Mad. 270, 124 I.C. 55 (1930) A.M. 382.

[42] (1928) 55 Cal. 1315 (1928) A.C. 518.

The English law is the same and Lord Haldane said that it was a fundamental principle of English law that only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract.[43] In *Dunlop Pneumatic Tyre Ltd.* v. *Selfridge & Co Ltd.*[43] the appellants were manufacturers of motor car tyres. They sold to a firm of Factors, Messrs Dew Co, a number of tyres on the understanding that the tyres should not be sold under a certain price. The respondents bought the tyres from Dew & Co. and in their contract of sale bound themselves to observe the above condition as to minimum price; they also promised that they would pay £5 by way of damages to the appellants for every tyre sold in breach of this understanding. However, the respondents sold some tyres below the stipulated price to some customers. Appellants sued respondents for breach of their agreement with Dew & Co. The House of Lords held that the respondent's promise was not binding to them as nothing moved from the appellants and hence the appellants were stranger to the respondents' promise. Secondly, the respondents had entered into agreement only with Dew & Co., and not with the appellants and so the appellants were stranger to a contract between the respondents and Dew and Company. In *Beswick* v. *Beswick*[44] the rule that a person who is a stranger to contract cannot sue was again applied by the House of Lords. (1968) A.C. 58 = (1967) 2 All. E.R. 1197. In a case[45] from Malaya where the provisions of the Indian Contract Act prevail, the Privy Council, after considering various Calcutta, Madras, Bombay and Punjab decisions, approved the decision of the Bombay High Court.[46] The Privy Council held that although the provisions of sec. 2 (d) enabled consideration to move from another person than the promisee, that did not affect the law as to the enforcement of contracts by third parties.[45] Paras *(a)*, *(b)*, *(c)* and *(e)* of sec. 2 support the English conception of a contract as an agreement on which only the parties to it can sue.[45] In a recent case, the House of Lords in England held that the principle of consideration moving from a promisee is quite distinct and different from the rule that party to a contract can alone sue.[47] In *Jamna Das* v. *Ram Autar*[48] the Privy Council held upon the provisions of sec. 90 of the Transfer of Property Act that a purchaser's contract to pay off the mortgage debt could not be enforced by a mortgagee who was not a party to the contract. In *Jamna Das* v. *Ram Autar*[48], *A*, owner of property borrowed Rs. 40,000 by executing a mortgage in favour of mortgagee, *B*. Subsequently, *A* sold the property to *C* for Rs. 44,000 and allowed *C*, the purchaser, to retain Rs. 40,000 of the price in order to redeem the mortgage if *C* thought fit. *B* sued *C* for the recovery of the mortgage money but the Privy Council disallowed his claim as *B* was not a party to an agreement between *A* and *C*. In *Mangal Sen* v. *Muhammed Ilussain*[49] a sub-lessee who agreed to pay the lessor's dues to Zamindar was held not liable in a suit by Zamindar for the payment of amount due. 38a (1915) 37 All. 115.

The following are the exception to the rule that a stranger to a contract cannot sue:—

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[43] *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1915) A.C. 847 cited in *Vandepitte* v. *The Preferred Accident Insurance Co.* (1933) 64 Mad. L.J. 133, 143 I.C. 79 (1933) A.P.C. 11.

[44] (1968) A.C. 58 = (1969) 2 All E.R. 1197.

[45] *Kepong Prospecting Ltd.* v. *Schmidt* (1968) A.C. 810.

[46] *National Petroleum Co. Ltd.* v. *Popatlal* (1936) 38 Bom. L.R. 610: (1936) A. Bom. 344.

[47] *Scruttons Ltd.* v. *Midland Silicones Ltd.* (1962) A.C. 446: (1962) 1 All E.R. 1: (1962) 2 W.L.R. 186.

[48] (1912) 34 All. 63: 39 I.A. 7; *Surat Prasad* v. *Ram Lal* (1947) 25 Pat. 269: (194') A.P. 131: 230 I.C. 224.

[49] (1915) 37 All. 115.

I. Trust or Charge:—

A person in whose favour a charge or trust over some specific property is created may enforce it though he is not a party to the contract, In an old case of *Gregory and Parker* v. *Williams*,[50] Parker owed money both to Gregory and Williams, He agreed with Williams to assign to him the whole of his property if Williams would pay the debt due to Gregory. The property was duly assigned but Williams failed to perform his promise. He was held liable to pay to Gregory in terms of his promise with Parker.

This equitable exception was applied in India by the Privy Council in *Khwaja Muhammad* v. *Hussaini Begum*.[51] The appellant executed an agreement with the respondent's father that in consideration of the respondent's marriage with his son, both being minors at the time, he (appellant) would pay to the respondent Rs. 500 p.m., in perpetuity towards the betel-leaf expenses called Kharchi-i-pandan. The appellant charged certain properties for the payment and empowered the respondent to enforce it. The husband and wife separated and suit was brought by the plaintiff-respondent for the recovery of the arrears of the expenses payable by the father-in-law, appellant—defendant. It was held that the respondent, although no party to the agreement, was entitled to claim the allowance as the agreement charged specially immovable property for her allowance.

Another Instance of a trust in favour of a third party is found in the facts of another Privy Council decision of *Rama Uma Nath* v. *Jang Bahadur*.[52] Here U was given the entire estate by his father and he agreed with his father to pay a certain sum of money and a village to J, an illegitimate son of his father, It was held that this created a trust in favour of J, an illegal son.

In *M.C. Chacko* v. *State Bank of Travancore*[53] the Supreme Court did not find an intention to create a change or trust in favour of the Respondent Bank. The father of appellant executed letters of guarantee holding himself liable for the overdraft account which the appellant as the Managing Director of H. Bank had with the respondent bank. Subsequently, the father of appellant executed a deed of partition giving away his properties to appellant and referred to his letters of guarantee with the respondent bank stating that if any amount had to be paid under letters of guarantee, the appellant (i.e. Managing Director of H. Bank) and properties allotted to him were to be answerable for that amount. It was held that the deed of partition did not show an intent to create a charge in favour of the respondent bank. The deed of partition merely set out an arrangement between the father and other members of his family regarding his liability under letters of guarantee, The letters of guarantee created merely a personal obligation and intention to create a personal debt into a secured debt in favour of the respondent bank could not be inferred from a deed. No charge or trust was created.

2. Marriage settlement, partition or other family arrangement:—

Where an agreement is made regarding marriage, partition or other family arrangement and a provision is made for the benefit of a person, he may take advantage of the agreement although he is not a party to the agreement. so in *Shappu Amal* v. *Subramanyan*[54] two brother, on a partition of the family properties, agreed to pay Rs. 300 in equal shares to their mother for maintenance. It was held that the mother, though a stranger, could enforce the promise. Similarly, in *Sundararaja* v. *Lakshmi Ammal*[55] a

[50] (1817) 3 Mer. 582 = 36 E.R. 224.

[51] (1910) 32 All. 410=37 I.A. 152 = 12 Bom. L.R. 638.

[52] A.I.R. 1938 P.C. 245.

[53] (1970) 1 S.C. R. 658.

[54] (1910) 33 Mad. 238; See also *Veeramma* v. *Appayya* A.I.R. 1957 A.P. 965.

[55] (1914) 38 Mad. 788 = 24 I.C. 943. See *Tulk*

sister was allowed to sue for her marriage expenses provided by a partition deed (between her brothers) to which she was no party.

3. Acknowledgement or Estoppel :—

Where the promisor has by his conduct, whether by acknowledgment or part payment or estoppel, created a privity between himself and the stranger he cannot be permitted to plead that action will not lie at the instance of stranger. So A having received money from B for payment over to C, admits to C receipt of the money. A is deemed to constitute himself as agent of C can get from A.

4. Covenant running with the land:—

Person who purchases land with notice that the owner of land is bound by certain duties affecting land, is bound by those duties although he was not a party to an agreement. 45 So a person may be able to enforce a covenant affecting land made by his predecessor in title and a person who acquires land with notice that it is burdened by a restrictive covenant may be bound.

5. Assignment:—

Assignment is a process whereby right to enforce a contract is vested in someone (other than original creditor) without the consent of original debtor.

6. Statutory Exceptions:—

Sometimes the statutes cast a duty for the benefit of a third party to the contract. He can get the advantage though he is a stranger to the contract e.g. third party risk is compulsorily to be taken in the motor vehicles.

Past, Present, Prospective Consideration.—The words "has done or abstained from doing" refer to something already done. This is known as past consideration. The words "does or abstains from doing" refer to something done or omitted in presenti. This is known as present consideration. The words "promises to do or to abstain from doing" refer to something to be done in future. This is known as prospective consideration.

A consideration which consists in performance, past or present, is called 'executed consideration', and in so far as it consists in promise in future, it is said to be 'executory consideration'. Executed consideration consists of an act or actual forbearance against a future promise. Executory consideration is in fact a promise for a promise.[56] In 'executed consideration', the liability is outstanding on one side only as the one party has already performed his part. In 'executory consideration', the liability is outstanding on both sides. In other words, it must involve legal obligations which can be compelled to be performed or enforced in a court of law.[57] An actual forbearance to exercise a right may be a good executed consideration, provided it be at the promisor's request.[58] A promise to forbear from exercising a right may be a good executory consideration.

Past consideration.—The words "has done or abstained from doing" are a recognition of the doctrine of past consideration. They embody the rule in *Lampleigh* v. *Brathwait*,[59] that a past consideration to support a promise must be moved by a previous request. The general principle is that the consideration is given and accepted in exchange for the promise. As the consideration and promise are simultaneous, the consideration must always be present. A consideration if past may be the motive but cannot

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v. *Moxhay* (1843-60) All. E.R. Rep. 9; *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* (1949) 2 All E.R. 179.

56 *Union of India* v. *Mls. Chaman Lal & Co.* (1957) A. S.C. 652.

57 *Taluk Board, Koilpatti* v. *Chinnapathanpiar* (1936) A. Mad. 709.

58 See footnote (63).

59 (1615) Hob. 105; Smith L.C. 11th Ed. 141.

be the real consideration of a subsequent promise. But if services have been rendered in the past at the request or desire of the promisor the subsequent promise is regarded as an admission that the past consideration was not gratuitous and which is evidence of the amount of the reasonable remuneration on the faith of which the services were rendered.[60] So in *Sinaña* v. *Abraham*[61] the plaintiff rendered services to the defendant at his desire during his minority and continued those services at his request after his majority. This was held to be a good consideration for a subsequent express promise by the defendant to pay an annuity to the plaintiff, but it was admitted that if the services had not been rendered at the desire of the defendant the case would have fallen within sec. 25 of the Act.

In *Thomas* v. *Thomas*,[62] it was pointed out that the conditions on which the executors allowed the plaintiff to reside in the testator's house during her life were that the plaintiff agreed to pay the ground rent and to carry out repairs to the house; those conditions constituted the real consideration. Pious respect for the wishes of the testator did not move from the plaintiff and hence that was not the consideration although that had been the motive also on the part of the executors.

"Or does or abstains from doing": Forbearance as consideration.—The essence of consideration is that the promisee takes on himself some kind of burden, or "detriment," as the English authorities call it. Where the consideration is a present performance and not a promise, the detriment may consist either in actually parting with something of value, or in undertaking a legal responsibility or in foregoing the exercise of a legal right. Thus the performance which constitutes a consideration may be negative as well as positive, provided that the promisee's abstinence from exercising a right was undertaken at the request of the promisor. If at the defendant's request the plaintiff promise to abstain from exercising a right the contract is formed by reciprocal promises under sub-section (f). But if the plaintiff makes no promise but merely abstains from exercising his right such abstention is good consideration,[63] and is an acceptance of defendant's proposal—sec. 8. In *Alliance Bank* v. *Broom*[63] the defendant owed to the plaintiffs, who pressed him to give security. The defendant promised to do so, but he did not expressly ask for forbearance nor did the plaintiffs promise it. It was held that the defendant was bound by his promise to give security as the plaintiffs did in effect give and the defendant received, the benefit of some degree of forbearance.[64] Lord Macnaghten later explained such cases on the ground that the debtor impliedly requests forbearance.[65] And where the defendant has made an offer to pay in consideration of forbearance, with some other alternative offer, the plaintiff's forbearing to sue in fact is a sufficient acceptance of the first alternative.[66] If it is asked at what moment the proposal conveyed by such a request becomes a promise the answer is that it does so whenever the other party has in fact forborne his rights for a time which the Court considers long enough to amount to a reasonable compliance with the request. It will be found that many cases in which forbearance to sue is said to be consideration for a promise are

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[60] Re casey's Patents (1892) 1 Ch. 104, 115, per Bowen, L.J.

[61] (1895) 20 Bom. 755; cf. (1918) 20 Bom. L.R. 441.

[62] (1842) 114 E.R. 330.

[63] See *Alliance Bank* v. *Broom* (1864) 2 Dr. & S. 289 as a good example of this class. See also *Fanindra Narain* v. *Kacheman Bibi* (1918) 45 cal. 774.

[64] ibid. p. 292.

[65] *Fullerton* v. *Provincial Bank of Ireland* (1903) A.C. 313.

[66] *Wilby* v. *Elgee* (1875) L.R. 10 C.P. 497.

really cases of reciprocal promises. In such cases the consideration is not the forbearance but an express promise not to sue or a promise implied from such forbearance.[67]

The most usual and important kind of forbearance occurring in practice is that which is exercised or undertaken by way of compromise of a doubtful claim. It is a question of some importance within what limits the abandonment or compromise of a disputed claim is a good consideration. This topic is dealt under sec. 25 of the Act.

"Or promise to do or to abstain from doing something": Mutual promises.—These words, supplemented by sub-secs (e) and (f), convey in a somewhat indirect and inconspicuous manner the extremely important proposition that a contract may be formed by the exchange of mutual promises, each promise being the consideration for the other. In this case neither promise is of any value by itself but each of them derives its value from the exchange which makes them both binding.

It is obvious that the consideration cannot be wholly executed on both sides. For where performances, and performances only, are exchanged, of which a sale of goods over the counter for ready money is a familiar example, nothing remains to be done by either party, and there is no promise at all and nothing for the law to enforce.

The proposal to give a promise for a promise is accepted by giving the promise asked for, and thereupon, if there be no special ground of invalidity, the two parties are both bound, each being both promisor and promisee. But for the counter-promise or "reciprocal promise" as the Act has it, neither party's "signification of willingness" could become a promise within the definition of the Act.

"Such act or abstinence or promise is called a consideration for the promise": Further requirements.—It will be observed that, according to the terms of the definition, it is only required that something should have been done, forborne, or promised at the request of the promisor.

One would expect the Act to say somewhere that, in order to have legal effect, a consideration must not only be something which the promisor asked for and got, but must be "good" or "valuable", that is to say, something which not only the parties regard, but the law can regard, as having some value. This is a fundamental rule in the Common Law. Had the Act abrogated it, the consequences would have been extensive; but it seems to be beyond doubt that such was not the intention and that the silence of the Act cannot be taken as altering the English law as it stood settled in India. The principle may be broadly expressed thus: The law will not enforce a promise given for nothing and if it is apparent to the Court on the face of the transaction that an alleged consideration amounts to nothing (not merely to very little), then there is no foundation for the promise, and we say either that there is not any consideration or that there is an "unreal consideration." In sec. 23 it is declared that certain kinds of considerations are not lawful. In sec. 25 agreements made without consideration are declared to be void. It is not anywhere stated in terms that consideration is not lawful, or otherwise not sufficient if it is not "good" or "valuable" in the sense, which those terms bear in English law.

Sub-ss (e) to (j) : Agreement and contract.—The question in each case is: Is this an enforceable agreement? Or a concluded and binding contract? If there is an essential term which has yet to be agreed ad there is no provision, vision, express or implied, for its solution, that is the parties have to meet each time and decide the same, there is no binding contract. Where an agreement left the terms of price, date and quantity of deliv-

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[67] For example, *Amin Chand* v. *Guni* (1929) 119 I.C. 766, (1929) A.L. 466.

ery of the goods to be agreed in future, there is no binding contract. In such cases there is a distinction between an agreement or contract where in the agreement is wholly executory on both sides and the one which has been executed on one side or the other. By sub-sec (e) an agreement is either a promise or a group of promises[68] and, therefore, it would seem that an executed consideration is not reckoned as part of the agreement. This is not according to the current use of language, which treats an agreement as an act of both parties, whether a legal obligation is incurred by one or both of them. A unilateral contract is not the less a transaction between two parties to which both must contribute something. Sub-sec. (f) agrees with common usage.

The distinction between "agreement" and contract made by sub-sec. (h) is apparently original. The conditions required for an agreement being enforceable by law are contained in Chapter II of the Act, ss. 10 *et seq.* where it will also be seen that the absence of any such condition makes an agreement void, and certain defects will make a contract voidable. The duties of parties to a contract are set forth in Chapter IV of the Act.

In one case *A* agreed to sell *B* his land on the bargain paper being made through a Vakil two days after the date of the agreement and on execution of the bargain paper further steps were to be taken; no bargain paper was executed and the court held that there was no enforceable contract[69] This case emphasises the distinction between an agreement and a contract. The test is enforceability.

Void Contract.—In a recent case[70] the Privy Council observed that sub-sec. (j) did not declare every unenforceable contract void but only those unenforceable by law, and by those words meant not unenforceable by reason of some procedure or regulation, e.g. Limitation Act, but unenforceable by substantive law. "For example", observed their Lordships, "a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by sec. 2 (g), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by sec. 2 (j). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void. The words "unenforceable by law" would mean unenforceable by substantive law. The said expression does not refer to procedural law like Civil Procedural law like Civil Procedure Code or Limitation Act."[70] Instances of void contracts are provided for in sections 20, 23, 24, 25, 26, 27, 28, 29 and 30.

Distinction between void and voidable contracts.—A voidable contract takes its full and proper legal effect until it is set aside, while a void contract is a nullity and no right would accrue thereunder from its commencement.

Voidable Contract.—A contract brought about as a result of undue influence (sec. 19A), coercion, fraud or misrepresentation (sec. 19) would be voidable at the option of the person whose consent was caused by any one of the aforesaid factors. If the party entitled to avoid the contract does not affirm it, fails to avoid it, within a reasonable time, he will be estopped from avoiding it if the other party has altered his position to his prejudice or a third party has acquired *bona fide* some rights. A contract which is avoided

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[68] See *Abaji Sitaram* v. *Trimbak Municipality* (1903) 28 Bom 66, at p. 72.

[69] *Govind Laxman* v. *Harichand* 25 Bom. L.R. 531 (P.C.).

[70] *Mahanth Singh* v. *U Ba Yi* (1939) 66 I.A. 198, 41 Bom. L.R. 742, 181 I.C. 1, (1939) A.P.C. 110. *Vishwanath* v. *Deokabai* (1948) Nag. 50, (1948) A.N. 382.

by one party is not binding on the other party as there would then arise lack of mutuality.[71]

[71] *Municipal Corporation of Bombay* v. *S. of S. for India*, 35 Bom. L.R. 568: 58 Bom. 660: A.I.R. (1934) Bom. 277.