
INDIAN CONTRACTS: ROLE OF FREE CONSENT AND FACTORS RESPONSIBLE FOR VITIATING CONSENT

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Abstract:

Free consent is one of the essential elements of valid contract. Parties to a contract may agree upon the same thing in the same sense, and along with the same; consent received must be free from any compulsion or pressure. If the consent of one of the parties is not free consent, i.e., it has been caused by one or other of the above stated factors the contract is not a valid one. When consent to an agreement is caused by fraud, coercion, misrepresentation or undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. If, however, the consent is caused by mistake the agreement is void. Such a contract where the consent of a party or parties to the contract is caused by any of the elements as mentioned such as Fraud, Misrepresentation, Coercion or Undue Influence shall be called a Voidable Contract and shall be enforceable only by the option of the aggrieved party or parties and not at the option of the other or others.

Keywords: Free consent, Contract, Coercion, Fraud, Undue Influence, Misrepresentation

Introduction:

Section 2(h) of the Indian Contract Act, 1872, defines the term "contract" as 'an agreement enforceable by law.' An 'agreement' is a promise and a 'promise' is an accepted proposal. A contract arises from an agreement, which arises mostly through the process of negotiation between the parties, one making the offer and the other accepting it. A contract may be oral or in writing. But in certain special cases the Act lays down that the agreement, to be valid, must be in writing or/and registered, viz. an agreement to make a gift must be in writing and registered (Sec. 25). According to Anson: "A contract is a legally binding agreement between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or others." Salmond said: "It is an agreement creating and defining obligations between the parties." While, according to Pollock: 'Every agreement and promise enforceable at law is contract.' "To consummate a contract there must be mutuality as well as a meeting of the minds of parties." 'Mutuality' means equality of rights between the parties. Either party should've equal right to enforce the contract. For example, where one of the parties to a contract is a minor, there is no mutuality. Further, in a contract there is a consensus ad idem i.e. 'meeting of minds'. "A contract, like a tort, is not unilateral." In a tort, a wrong is committed by one person against the other. The Act does not affect any usage or custom of trade (not inconsistent with the provisions of the Act) (Sec. 1). A minor amendment in Sec. 28 of the Act was made by the Indian Contract (Amendment) Act, 1996. The general principles of the law of contract are laid down under Secs. 1 to 75 of the Act. To the extent that the Indian Contract Act deals with a particular subject it is exhaustive upon the same and it is not permissible to import the principles of English law dehorn the statutory provisions. The decisions of the English courts possess only a persuasive value^[1]. Where no statutory provision to the contrary is in existence in the Indian Contract Act, the courts in India have generally been guided by the Common Law of England. Although English Common Law permeates the Indian Contract Act, every new development of the Common Law may not necessarily fit into the scheme and words of our statute then it will be the duty of the courts in India to read the statute naturally and to follow it^[2] mainly on English Common Law consisting of judicial precedents. The Act is not exhaustive as it does not deal with all the branches of the law of contract. There are separate Acts which deal with contracts relating to negotiable instruments, transfer of property, sale of goods, partnership, insurance, etc. Before 1930, the Act also contained provisions relating to contracts of sale of goods and partnership.

Offer

The first essential for creating a contract is a valid offer or proposal^[3]. As per Sec. 2(a), an offer or proposal has the following ingredients:

- (i) One person signifies to another
- (ii) his willingness to do or abstain from doing anything
- (iii) with a view to obtaining the assent of that other.

Acceptance

A proposal when accepted, result in an agreement. It is only after the acceptance of the proposal that a contract between the two parties can arise. When the person to whom the proposal is made, signifies his assent thereto, the proposal is said to be accepted. There are two essential requirement of a valid acceptance: firstly, acceptance should be communicate by the offeree to the offeror. Secondly, acceptance should be absolute and unqualified.

Communication of Acceptance

Acceptance express or implied – Acceptance may be in the form of express words (written or spoken) or may be signified through conduct (implied or tacit viz. cashing of a cheque). In every case, there should be some external manifestation or over act of acceptance.

Consideration

Section 2(d) of the Indian Contract Act defines consideration as follows: “when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstain 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.”

This definition is wider and more comprehensive then is accepted in English courts. The three ingredients of this definition of consideration are:

- (1) that the act or abstinence, which is to be a consideration for the promise, should be done at the desire of the promisor,
- (2) that it should be done by promise or any other person,
- (3) that the act or abstinence may have been already executed or is in the process of being done or may still be executor i.e. it is promised to be done.

Capacity to Contract

Section 10 of the Contract Act requires that the parties must be competent to contract. Sec. 11 defines who are competent to contract. According to Section 11,

“Every person is competent to contract who is of the age of majority according to law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”

The main point to note is that, since the passage of the Minors’ Contracts Act 1987, it is possible for a void contract to be ratified on the minor’s attaining majority. If this is done, then the contract will take effect as normal with full enforceability on both sides. If the contract remains void at the time when a dispute arises, the position is more complicated. The Infants Relief Act 1874 declared most such contracts ‘absolutely void’, but this was an inaccurate representation of reality, and has been repealed by the Minors’ Contracts Act. The position now is that a contract which has been fully executed will be effective to transfer the ownership of any money or other property which has changed hands under it. A minor who purchases non-necessary goods for cash is not entitled to demand to be allowed to return them. If the minor has performed, it seems that he or she will be able to claim damages from the adult party. The law also provides protection for those who make contracts while under some mental disability. There are, of course, degrees of mental disability, unlike the position in relation to minors, where the person is either under 18 or over 18. Lord Brightman summed up the position as follows:

..... the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract made by a person of sound mind, and is not voidable by the lunatic or his

representatives by reason of 'unfairness' unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane.

Role of Free Consent in Making of a Contract

A mere consent is not enough for a valid contract. One of the essentials of a valid contract mentioned in Sec, 10 is that the parties should enter into the contract with their free consent. **Consent defined** – Two or more persons are said to consent when they agree upon the same thing in the same sense. According to Sec. 14, consent is said to be free when it is not caused by –

- (1) coercion (Sec. 15), or
- (2) undue influence (Sec, 16), or
- (3) fraud (Sec, 17), or
- (4) misrepresentation (Sec. 18), or
- (5) mistake, subject to the provisions of Secs. 20, 21

Where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

S. 19 deals with effect of flow in consent caused by coercion, misrepresentation and fraud. S. 19 A deals with effect of flow in consent caused by undue influence. In both sections the contract becomes voidable.

Voidable of agreement without free consent – When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to contract, whose consent was caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Illustration

A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

Section 19A. Power to set aside contract induced by undue influence – When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Factors Vitiating Consent

1. Coercion

An agreement to which the consent is caused by coercion is voidable at the option of the party whose consent was so caused. The examples of duress so far considered have all involved an act which is in some respects a breach of law. It involves a crime, or a tort, or a breach of contract. A clear illustration of coercion would be consent obtained at the point of pistol, or by threatening to cause hurt, or by intimidation. The threat of suicide amounts to coercion within Section 15. A party may avoid a contract when it has been led to conclude it by the other party's imminent and serious threat of an act: (a) which is wrongful in itself, or (b) which it is wrongful to use as a means to obtain the conclusion of the contract, unless in the circumstances the first party had a reasonable alternative. The type of threat intended to be covered by (b) is something which, while lawful in itself, is 'not a proper way of obtaining the benefit sought'. The example given is of a threat by an employee to expose an employer's affair, unless the employer pays increased wages – in other words, blackmail. In **Ranganayakamma v. AlwarSetti**^[4] the question before the Madras High Court was regarding the validity of the adoption of a boy by a widow, aged 13 years. On the death of her husband, the husband's dead body was not allowed to be removed from her house for cremation, by the relatives of the adopted boy until she adopted the boy. It was held that the adoption was not binding on the widow as her consent had been obtained by coercion.²

In **ChikkanAmmiraju v. ChikkamSeshama**^[5] the question before the Madras High Court was that whether coercion could be caused by a threat to commit suicide. In this case A, a Hindu, by a threat of suicide, induced his wife and son to execute a release deed in favour of A's brother in respect of certain properties claimed as their own by the wife and son. The question before the court was whether a threat to commit suicide could be considered to be an act forbidden by the Indian Penal Code. It was held by Wallis, C.J. and SeshagiriAyyar, J. that a threat to commit suicide amounted to coercion within the meaning of section 15 of the Indian Contract Act and therefore the release deed was voidable.

2. Undue Influence

Undue influence is said to be a subtle species of fraud. Sometimes the result is brought about by fear, coercion, or other domination. For example, where spiritual advisor (guru) induced the plaintiff; his devotee, to gift to him the whole of his property to secure benefits to his soul in the next world, it will be deemed to be undue influence. **Philip Lukka v Franciscan Association**^[6]. In all cases where there is active trust and confidence between the parties or the parties are not on equal footing, it can be said that one party is able to dominate the will of the other. A person in authority is definitely able to dominate the will of the person over whom the authority is held. The authority may be real or apparent. An employer may be deemed to be having authority over his employee, an income-tax authority over the assessee, a police or judicial officer over the accused, etc. Fiduciary relationship means a relationship of confidence and trust. Examples of fiduciary relationship are solicitor and client, trustee and beneficiary, spiritual advisor and devotee, medical attendant and patient, parent and child, husband and wife, creditor and debtor, master and servant etc. There was held to be undue influence in **Diala Ram v. Sarga**^[7] also. In that case the defendant who was already indebted to the plaintiff, a money-lender, took a fresh loan from the plaintiff and executed a bond agreeing to pay exorbitant rate of interest [37.5 percent p.a.], and also agreed to deliver bhoosa (wheat husk) in addition thereto. The presumption of undue influence was raised.

In **ManaliSinghal v. Ravi Singhal**^[8] there was a family settlement between a husband and wife on 4th Nov., 94 for the payment of maintenance to the wife, after the husband deserted the wife and decided to live separately. Subsequently, since January, 1997 the husband failed to pay the agreed amount of maintenance to the wife (plaintiff No. 1) and school fees of their daughter (plaintiff No. 2). The said settlement for payment of maintenance had been made in the presence of equal number of persons representing both husband and wife and they also signed the settlement. The amount of maintenance payable was written in words and figures in hands of husband. Under these circumstances, it was held that the said settlement had been made with the free will of the husband without any coercion or undue influence and, therefore, he was bound to abide by the settlement.

3. Fraud

An agreement to which the consent is caused by fraud is voidable at the option of the party whose consent was so caused. According to Sec. 17, "Fraud" means and includes any of the following acts done with "intent to deceive" or to induce a person to enter into a contract.

- (i) the suggestion that a fact is true when it is not true and the person making the suggestion does not believe it to be true,
- (ii) active concealment of a fact by a person who has knowledge or believe of the fact,
- (iii) promise made within any intention of performing it,
- (iv) any other act fitted to deceive, or
- (v) any such act or omission as the law specially declares to be fraudulent (viz. according to Transfer of Property Act, the seller of immovable property must disclose to the buyer any material defect in the property of the seller's title)

Thus, the essentials of fraud are that there should be a "false statement of fact" by a person who himself does not believe the statement to be true (however a mere expression of opinion do not

amounts to fraud). Further, there must be a “wrongful intention” i.e. an intention to deceive and induce the other party enter into the contract. Intentional misrepresentation is of the essence of fraud.

Silence – Fraud or Not

Ordinarily, ‘passive concealment’ or mere silence is no fraud, as a contracting party is not obliged to disclose each and every thing to the other party. Merely because a person does not disclose the defects in the goods sold by him, there is no fraud. There are, however, some exceptions to this. First, the maker of the statement must not give only half the story on some aspect of the facts. Secondly, if a true statement is made, but then circumstances change, making it false, a failure to disclose this will be treated as fraud. Further, certain contracts, such as those for insurance, in **Carter v Boehm**^[9]are treated as being ‘of the utmost good faith’ and as requiring the contracting party to disclose all relevant facts and if the party remain silent, it is fraud. In an insurance contract if there is an obligation to disclose material facts even if the other party has not asked about them. Thus, in **Lambert v Cooperative Insurance Society**^[10]a woman who was renewing the insurance on her jewellery must disclose that her husband had been convicted in conspiracy to steal. The fact that she had not mentioned this fact would clearly mean that when her jewellery was stolen the insurance company was entitled not to compensate her under the policy. The obligation is to disclose such facts as a reasonable insurer might have treated as material.

4. Misrepresentation

A contract the consent to which is induced by misrepresentation is voidable at the option of the deceived party. Misrepresentation means misstatement of a fact material to the contract. When a person makes a false statement which he himself believes to be true, and he does not intend to deceive the other party, there is “misrepresentation”. The law relating to misrepresentation is concerned with the situation in which a false statement leads a contracting party to enter into a contract which would otherwise not have been undertaken. It provides in certain circumstances for the party whose actions have been affected to escape from the contract or claim damages. There are a number of possible actions. The contract may be rescinded under the common law. Damages may be recovered under the Misrepresentation Act 1967. The tort actions for deceit, or negligent misstatement,¹⁸ may provide alternative bases for the recovery of damages. The basic requirements that are necessary in order for there to be a contractual remedy for a misrepresentation are as follows. The false statement must have been made by one of the contracting parties to the other; it must be a statement of fact, not opinion or law; and the statement must have induced the other party to enter into the contract. These elements will be considered in turn. In **Derry v. Peek**^[11] the directors of a company stated in the prospectus of the company that they had been authorised to run tramways with steam power. Sanction from the Board of Trade had yet to be obtained as a matter of course. The Board of Trade refuse to grant the permission for the use of steam power. In an action by a shareholder against the directors for fraud, it was held that there was a mere misrepresentation but no fraud as the statement had been made without any intention to deceive. **Noorudeen v. Umairathu Beevi**^[12] is an illustration where the transaction was set aside on the ground of fraud and misrepresentation. The defendant, who was plaintiff’s son got a document executed from the plaintiff describing it as hypothecation deed of the plaintiff’s property. In fact by fraud and misrepresentation the document executed was a sale deed of the plaintiff’s property. The plaintiff was a blind man and the sale was for an inadequate consideration. The possession of the property was also not given to the defendant. It was held that such a deed, which was got executed by fraud and misrepresentation, was rightly set aside

5. Mistake

Consent obtained by mistake is also not free consent. Mistake or error makes the contract void i.e. it is not enforceable at the option of either party. Mistake may operate upon a contract in two ways : it may defeat the consent altogether or it may mislead the parties as to the purpose which they contemplated. The former case falls under Sec. 13 (‘Two or more persons are said to consent when they agree upon the same thing in the same sense’ i.e. consensus ad idem). If the mistake prevents the consent itself, then

there is no consensus ad idem and thus no contract. However, the general reluctance to allow mistakes to affect a contract does not, of course, prevent the parties themselves agreeing that a mistake will allow the party who has made the mistake to rescind the contract. This is not unusual in relation to consumer contracts made with large chain stores. These organisations often feel able (presumably because of their volume of business, and their strength of position in the market) to allow customers who have simply changed their minds to exchange or return goods even though they are in no way defective. It may, for example, relate to the subject matter, the identity of the other contracting party, or the specific terms of the contract. Three particular types of mistake may be identified. In the first, the parties are found to have reached agreement, but on the basis of an assumption as to the surrounding facts which turns out to be false.

(i) Mistake as to identity

In **Boulton v Jones**^[13], Jones sent an order to Brocklehurst for the purchase of certain goods. By the time this order reached, Brocklehurst has sold his business to Boulton. Boulton supplied the goods to Jones. Jones refused to pay on the ground that he had never placed an order with Boulton and had never intended to make a contract with him. Held that Jones had never made any agreement with Boulton and he was not bound to pay for the goods.

(ii) Mistake as to Subject-matter

Where the parties, due to a reasonable mistake of fact, have different subject matters in mind, the agreement will be void for the want of true consent. In **Raffles v Wichelhaus**^[14], the defendant bought of the plaintiff a quantity of Surat Cotton "to arrive ex Peerless from Bombay". Two ships with the name Peerless sailed from Bombay, one in October, which the defendant had in mind and the other in December which the plaintiff had in mind.

Limitations

- (i) **Mistake of both parties:-** To make an agreement void on account of the mistake, the mistake must be common or mutual. Sec. 22 says that a contract is not voidable merely because of the mistake by one of the parties (unilateral mistake).
- (ii) **Mistake of fact not of law:-** Sec. 21 declares that a contract is not voidable because it is caused by a mistake as to any law in force in India, viz. A and B makes a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of Limitation.

Conclusion:

Contracts are usually described in three ways which are valid, void and voidable. Valid Contract is an agreement which is enforceable at the law courts. Those agreements which are not enforceable at the law courts, i.e., for the enforcement of which legal recourse cannot be taken, are known as Void Contracts. In between the valid and the void contracts are the voidable contracts. Such contracts are the outcomes of Flaw in Consent. As we have already read that, "an agreement can be called a contract provided it is made with the Free Consent of the parties, competent to contract for a lawful consideration and for a lawful object and is not expressly declared to be void". When we analyse this statement we come to know that to be a contract, an agreement must be made with the Free Consent of the parties to the contract. So we find the importance of "Free Consent" which is very much necessary for the validity of the contract. The genuineness of the consent implies that the parties to the contract must mean the same thing in the same sense and not only that but they should mutually agree voluntarily. If their minds do not meet at the same thing in the same sense voluntarily, then their consent shall not be called Free or Voluntary. The consent in such case might have been obtained under Fraud or Misrepresentation or Coercion or undue influence. In such a case the party giving his consent under any of these four elements shall have a right to withdraw his consent.

References

1. Satyabrata Ghose v Mugneeram Bangur & Co. AIR 1954 SC 44
2. Bhagwandas v Girdharilal AIR 1966 SC 543
3. The term 'offer' has been used in English law and the term 'proposal' under the Indian law
4. I.L.R. (1889) 13 Mad. 214.
5. According to Pollock and Mulla, Indian Contract and Specific Relief Acts 9th Ed., p. 134, by obstruction the removal of the corpse the possible offence tried to be committed was under section 297, Indian Penal Code, which provides punishments to a person for wounding the feelings of a person by offering indignity to any human corpse. The authors also think that the case could well have covered under section 16 of the Indian Contract act as the widow's consent had been obtained by undue influence.
6. AIR 1987 Ker.204
7. I.L.R. (1918) 41 Mad. 33
8. A.I.R. 1927 Lah. 536 (2)
9. (1766) 3 Burr 1905
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13. (1857) 27 LJ Ex 117
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