CHAPTER 1

PREAMBLE AND FORMATION OF A CONTRACT

The first Chapter will focus on the preamble of the Contract Act, 1872 (*Act No. IX of 1972*) and the formation of a contract generally. The governing Act in Bangladesh in the field of law of contract is the Contract Act, 1872. It starts with a preamble. It is the traditional mode of the law passed by the parliament that it starts with a preamble which basically contains the object of that particular law. The Contract Act, 1872, is not an exception to this general rule since it also contains a preamble.

Preamble: Object of the Contract Act, 1872:

The Preamble to the Act states that the objects of the Contract Act, 1872, are-

i. *to define certain parts of the law relating to contracts; and*

ii. *to amend certain parts of the law relating to contracts.*

The object implies that this is not a law first of its kind in this field in Bangladesh. Because it speaks also about amendment of certain parts of the law relating to contracts. So it is understood from the wording used in the Act that already there were some laws in this field but this is a new

version of its kind which ensures certain amendment of the existing laws in this field and as such ensures a set of better laws in the codified form relating to contracts.

Scheme of the Contract Act, 1872:

The contents of the Act can be divided into two broad categories:

1. **General laws relating to contract;**
2. **Laws relating to some particular types of contracts.**

Again each of these categories can be divided into three broad parts:

1. **General laws relating to contract.**
   a. *Formation of contract;*
   b. *Performance of contract;*
   c. *Breach of contract and remedies.*
2. **Laws relating to some particular types of contracts.**
   a. *Contracts of indemnity and guarantee;*
   b. *Contracts of bailment and pledge;*
   c. *Contract of agency.*

So, the first part relating to contract is about how is a contract formed, after a contract is formed the question of performance of that contract arises. Sometimes law excuses certain performances and if not then either the parties will perform their respective contractual obligations or the party who fails to perform accordingly will be held liable for

breach of contract. So the last part relates with the breach of contract and the remedies thereby.

Scope of the Contract Act, 1872:

The Contract Act, 1872, is not exhaustive and where the Act does not cover the case with which the Court has to deal, the Court is bound to follow the principles of the English Common Law, i.e., the rules of justice, equity and conscience.[1] The Contract Act, 1872, does not say anything about the place where the contract is made and it is no part of the ordinary law of contract.[2]

Conflict of laws:

Where the contract is made in one jurisdiction and is to be performed in another jurisdiction or other countries, or is sued upon in a jurisdiction where it was not made or to be performed, it becomes necessary to determine the law of which legal system will govern the contract, or any particular aspect of it. Our Act is silent on this issue.

FORMATION OF A CONTRACT

What is a contract?

It is mentioned in section 2(h) of the Contract Act, 1872, that

'an agreement enforceable by law is a contract'.

This is the simple definition of the term 'contract' given by the Act. So, accordingly it means that whenever the agreement acquires the qualification of enforceability by law then it becomes a contract. In other words, the agreements may be of two types:

---

[1] 56 B 101: 1932 (Bom) 168: 62 (Cal) 612: 39 CWN 461: 1946 (Nag) 114.
[2] 58 C 5931 (Cal) 659.

1. Agreements enforceable by law; and
2. Agreements not enforceable by law.

The agreements which are enforceable by law only those can be the contracts, and never the others which are not enforceable by law. There may be plenty of agreements, some of which are enforceable by law. Suppose, an agreement to purchase 1-kg heroine is not enforceable by law and as such it cannot be a contract, but an agreement for the purchase of a computer is enforceable by law and as such is a contract. In this regard, we can reach to a conclusion that ***all contracts are agreements, but all agreements are not contracts***. Because, to be a contract it must be an agreement first of all, so a contract is necessarily an agreement. But an agreement is not necessarily a contract, suppose the above agreement to purchase heroine is not a contract since it is not enforceable by law. So, all contracts are agreements but all agreements are not contracts. It was observed in *Abdul Gani Sheikh Vs. Jagadish Chandra Mridha and others*[3] that—

> "the alleged agreement between the parties is not a contract as all contracts are agreements, but all agreements are not contracts and such agreement cannot be enforced as it is an illegal agreement and its enforcement would tantamount to sub-lease defeating the clause 10 of the lease deed."

However, in fact, the definition of the term 'contract' given in section 2(h) is not exhaustive one, because it does not give a clear idea about a contract, since the two terms *'agreement'* and *'enforceable by law'* used by the law have not been clarified here. So for a clear idea about a contract we have to depend on at least two other definitions, of **(i)** agreement

---

[3] 2 BLC 121.

and **(ii)** enforceability by law, even in fact this will not suffice, because this attempt will further make us dependent on some other necessary definitions. Let us start the effort with the definition of 'agreement'.

Section 2(e) provides that—

> every promise and every set of promises forming the consideration for each other is an agreement.

By a proper dissection of the definition we get two constituent elements of an agreement:

1. Promise; and
2. Consideration.

It was held in *Bangladesh Muktijoddha Kalyan Trust represented by the Managing Director Vs. Kamal Trading Agency and others*[4] that the consensus ad idem or meeting of minds of the parties is required to constitute an agreement.

Now, what is consideration and what is promise?

What is consideration?

Section 2(d) while defining the term 'consideration' provides that–

> 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.

---

[4] (1998) 50 DLR (AD) 171.

Analyzing the above definition we get the following ingredients of consideration:

i. It is an act or abstinence. That means it may be positive or negative. It is worth mentioning here that the law uses the word ***'something'*** in connection with the terms, 'act or abstinence' to constitute a consideration. Thus the law does not confine the requirement of such act or abstinence within any particular types or nature, rather makes it open using the term something which means in fact everything.

ii. It is done at the desire of the promisor. So, if it is done at the desire of any third person that will not be a consideration. Conversely, if anything is done at the desire of the promisor, then that will be a good consideration irrespective of the nature of the thing done, even that may be legal or illegal, adequate or inadequate. Thus the key condition here is not the nature of the act or abstinence rather the desire of the promisor.

iii. It may be of three forms, has been done, or is being done or is promised to be done at some future time. Thus consideration may be past, present or future.

What is promise?

Section 2(b) says that 'a proposal when accepted becomes a promise'. If we analyze this definition of 'promise' then we see that to constitute a promise two components are essential:

1. Proposal; and
2. Acceptance.

That means first of all a proposal is necessary and then that must be accepted to have a promise. So, ***now the questions are towards proposal and acceptance***:

What is proposal?

Section 2 (a) says—

> 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.

Here two constituent sectors of an offer are found. *First*, to be an offer there must be a signification of one's willingness to another. *Secondly*, the signification must be made with a definite object that that is intended to have the consent from the person to whom it is addressed. As such, we see that, generally, here no new terminology to be defined has been used by the law and accordingly it can be identified at the starting point of the definition of a contract.

What is acceptance?

After an offer is found there must be an acceptance to reach the stage of *promise*. Section 2 (b) says—

> when the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted.

Thus the essence of the acceptance is the assent or consent that is coming from the offeree. It simply speaks of giving one's consent to the offer as it is made by the offeror and as such it will be a valid acceptance to convert an offer into a promise.

Since we have got by this time at least a starting point, so now, let us take an effort to summarize the whole chain towards the meaning of contract. Accordingly, a contract is constituted by an agreement and enforceability by law, and an agreement is constituted by promise and consideration, and a promise is constituted by offer and acceptance, and we observed the definition of consideration also. The deficiency of this summary based on the above discussion is that it only analyzed one of the two components of the contract, that is, agreement and kept silence about enforceable by law. In order to analyze the phrase 'enforceable by law', we have to concentrate on section 10 that speaks about the issue, that is, when does an agreement become enforceable by law. Section 10 says—

> All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

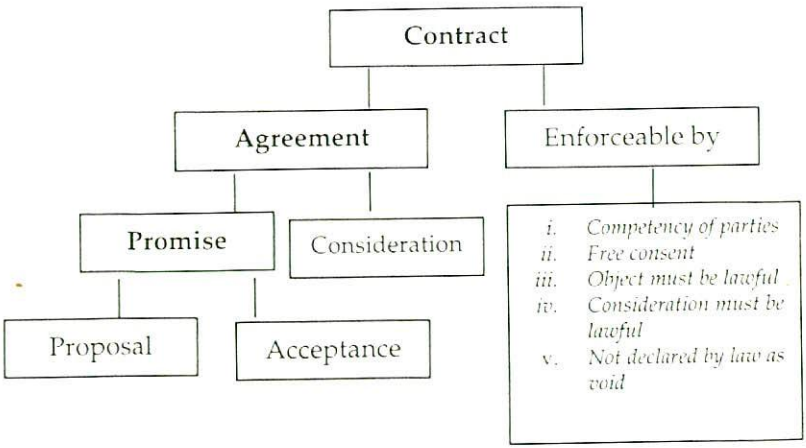
We have seen earlier in the first precise definition of the contract that an agreement enforceable by law is a contract, that means to be a contract an agreement must be enforceable by law. So it can be expressed from another dimension that an agreement which is a contract is, of course, enforceable by law. So, since section 10 of the Act lays down in the agreements which are contracts, this in fact says when does an agreement become enforceable by law, and accordingly we get the answer that to be enforceable by law, i.e., to be a contract, an agreement must fulfill the following conditions:

1. the parties must be competent;
2. the consent of parties must be free;
3. the consideration must be lawful;

4. the object must be lawful; and
5. the agreement must not expressly declared void by law.

So, these five conditions are the further conditions to be satisfied to convert an agreement into a contract. Accordingly, there may be an agreement by the incompetent parties without free consent and it is immaterial whether the consideration or object is lawful or not. Thus, if two persons agree to have a transaction the ultimate object of which is smuggling that will be nevertheless an agreement though that cannot be a contract. Again, if a person of unsound mind enters into a business transaction that may be an agreement though that will not be a contract. But that particular agreement cannot be a contract without satisfying the above conditions.

It would be convenient if the above components are projected through the following diagram:



The above drawn diagram shows the formation of a contract. Each of the above constituent elements of contract will be discussed in detail in the following Chapters. Before starting that elaborate discussion about formation of a contract let us now concentrate on different types of contracts. We can categorize contract from various dimensions and perspectives.

Types of contracts:

It is possible to classify the types of contracts from two perspectives, i.e. as regards the modes of creation and as regards the enforceability and validity.

As regards the mode of creation:

Express and implied contract: In fact, we get the idea to divide contract in these two divisions from section 9 of the Act , which says that in so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

1. *Express contract:* If the offer and acceptance of a contract are made in words, i.e., either expressed orally or in words, the contract will be deemed to be an express one. For instance, A tells 'I would like to sell this car for Tk. 3 Lacs' and B replies 'I agree'—this is an express contract. Thus express contract may be of two types:

    i. *Written contract; and*

    ii. *Oral contract*

2. *Implied contract:* If the offer and acceptance of a contract are made otherwise than in words, it

will be treated as an implied contract. For instance, if a shoe shiner starts polishing the shoes of one person and the later permits it remaining silent knowingly that the first person is doing so to get a payment in exchange of this service, it will be treated by the law as a case of implied contract.

As regards the enforceability and validity:

1. *Valid contract.*
2. *Voidable contract.*
3. *Void contract.*

Valid contract: An agreement enforceable by law is a contract and this is valid contract. In other words, the valid contract is that agreement which fulfils all requirements of a valid contract as imposed by the law. Accordingly, section 10 must be taken into consideration which says directly about the requirements of a valid contract. It has been discussed above elaborately.

Voidable contract: Voidable contract has been defined in section 2 (i) as—

> 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.

Thus it appears that the voidability of a contract is a temporary status. It has to be made enforceable by law or has to be set aside and both these are dependent at the option of the parties of one side and not at the option of other side. A contract can become voidable for many reasons if determined by the law. Once a contract becomes

voidable, it acquires a temporary and transitional status. It has to be either validated or annulled. The law gives this power of validating it to the parties of one side of the contract, not of the other side. The law determines at whose option it will be valid in each particular case considering the nature of that voidable contract. Thus a contract cannot remain as voidable forever, rather it has to be valid or void.

3. ***Void contract:*** Section 2(j) says that-

> a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Thus the law defines void contract very precisely saying that a contract becomes void by ceasing its enforceability by law. The definition in fact implies two things to be void contract:

i. One valid contract is there.

ii. Then it must cease its enforceability by law

Thus, it does not speak about void *ab initio*. Because, law says that it has to cease its enforceability and it will be void only when it will cease that enforceability. So that for ceasing the enforceability it must acquire it at first and whenever it will have the enforceability by law that implies the presence of a valid contract. Thus, the precondition of a void contract is the existence of a valid contract and afterwards somehow its enforceability will be ceased and then it will be treated as void contract. It can be concluded by saying that a void contract was a valid contract once upon a time and subsequently for some reasons it lost its enforceability in law and then it has become a void contract.

And there may have various grounds for ceasing the enforceability of law, e.g., supervening impossibility or illegality.
Let us now concentrate on certain other terms—

Void agreement: It has been clearly defined by section 2(g) which says—

> an agreement not enforceable by law is said to be void.

Thus an agreement, in fact, will either be enforceable by law or not. If it becomes enforceable by law it will be a contract and if failed to be so then it will remain as agreement and the legal status of that agreement will be 'void agreement'. And there are obviously certain criteria set by law for the enforceability and those criteria have been discussed earlier.

Distinction between void agreement and void contract: There is a similarity between these two terms, void agreement and void contract, that is, both of these are not enforceable by law. The only basic distinction between these two is that a void contract was valid once upon a time, but a void agreement was never in a position to be enforceable by law. In other words, void agreement implies void *ab initio*, i.e., void from very beginning or from its birth, whereas void contract implies that it is not void at its very inception rather it was born as valid or was enforceable by law and subsequently it ceased to be enforceable by law.

Illegal agreement: The concept 'illegal agreement' has not been defined by the Act, but its definition can be inferred from the relevant laws that it means the agreement which is illegal. It is worth mentioning here that all illegal agreements are void but all void agreements are not illegal, because illegality is one of the grounds to be void but there

may be other reasons for which an agreement may be void but in that case that same cannot be termed as illegal. Suppose, entering into an agreement to write 100 standard pages within five minutes in one's own handwriting is void agreement, but this is not an illegal agreement. But, if some how an agreement becomes illegal then obviously that will be void agreement.

Illegal contract: This is a misnoma, because it creates a paradoxical situation. A contract implies that it is enforceable by law. So, whenever the term 'contract' is used it cannot bear the term 'illegal' with it, because that will create self contradiction which will give rise to a paradox. Because the agreement which is enforceable by law cannot be termed as illegal. That is why, illegal agreement is a correct term but not the illegal contract.

Unenforceable contract: This is another interesting terminology which has not been defined in the Contract Act, 1872. It means a contract which cannot be enforced by the courts of law for some technical reasons. Suppose, the right arising out of a time barred contract may not be enforceable in the courts of law and such a contract may be termed as unenforceable contract.

CHAPTER 2

PROPOSAL AND ACCEPTANCE

Definition of 'Proposal':

Proposal is the starting point from where an agreement gets life formally which ultimately may take the shape of a legally binding contract. The term 'proposal' which is used in Bangladesh is synonymous with the term 'offer' used under English law. Section 2(a) of the Contract Act, 1872, while defining the term 'proposal' says that—

> Where one person signifies to another his willingness to do or to abstain from doing something with a view to obtaining the assent of that other to such act or abstinence he is said to make a proposal.

If we dissect the above mentioned definition then one may find out the following elements of a proposal:

1) Signification of one's willingness;
2) Willingness is expressed to another person;
3) The willingness may be affirmative or negative, i.e., either to do something or to abstain from doing;
4) The said willingness is expressed to other person with a definite object, that is, the person who makes

it intends to obtain the consent to the same from the person to whom it is made.

Analysis of the definition:

What is an offer? The simplest answer to this question is that it is a willingness of one person. But if someone has a willingness in his mind it will not be sufficient to constitute an offer, rather it must be expressed to someone else. So if someone alone being in a closed sound proof room utters the words 'I would like to sell my car for Tk. 3 lacs'—it will not be an offer, the foremost reason is that it is not expressed to another person. Now, what will be type of that willingness? Of course, that willingness may be to do something or to abstain from doing something. The last important element of an offer is relating to the intention of the person who is making the proposal i.e. proposer, that is one must make it with the intention of getting the consent from the other person to whom it is made. Let us examine the following conversation:

(A conversation is taking place between A and B while they are taking tea at fine evening of autumn sitting in the garden of B.)

A: Have you bought another car? I just heard it from C that you purchased a ***lexus*** *car yesterday.*

B : Yeah. It's true.

A : But I think the second car will be really useless for you, one is sufficient.

B : I am thinking to sell my old one.

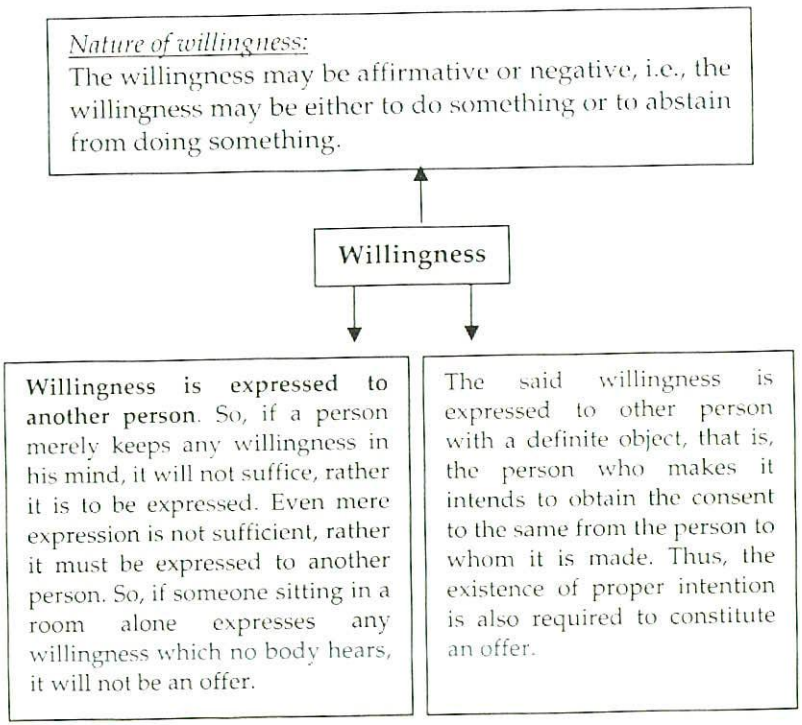
A : For how much?

B : 5 lacs.

A: That's nice.

Here the statements made by B failed to constitute an offer because of at least two reasons—first of all, he was not serious about his willingness, so it's not the final expression of his willingness, rather he was merely thinking like this. Secondly, here B told that he was thinking to sell the car for a certain price but it was not intended by his statement that he made it with a view to obtain the consent from A in this regard. How will it be understood that it is intended as such? The simple answer is it will be inferred from the construction of the offer and the circumstances.

Thus according to the definition given by the Act the centre point of an offer is 'willingness', and the sum total of the answers to certain questions around the term 'willingness' constitutes an offer.



Characteristics of a proposal and some rules regarding a valid proposal:

1. The proposer must intend to create legal relations and as such expressed willingness (which in turn is going to be an offer) must be capable of creating legal relations. We can discuss an English case in this regard to make the concept clear:

Balfour Vs. Balfour [1919], 2 K.B. 571 CA

> 'A, a businessman residing in Ceylon, promised B, his wife, who was living in England for reasons of health, to pay her a monthly allowance. It was promised also that the allowance will be continued till her come back to Ceylon. The dispute arose when A denied subsequently to give her the promised allowance. It was held that B could not enforce the obligation, as from the nature of the agreement it appeared that no intention existed to give rise to a legal obligation and as such even there was no offer at all to be accepted and consequently there was no contract between A and B in respect of paying the said allowance.'[1]

Similarly an invitation to dine is not an offer. So, if someone invites his friends to have a tea in his house and if any of the invited guests after accepting the said invitation misses that tea party, that person will not be held liable for breach of contract, though the host has already incurred certain expenses in the preparation of the party, because, these are purely social relations, where legal obligations and consequences are never intended, so there was no offer – no acceptance – no contract – no breach of contract. It is presumed ordinarily that the business expressions are

[1] Balfour Vs. Balfour, 1919, 2 K.B. 571.

intended to create legal relations, but there may be some cases where even business expressions may not intend to create legal relations, of course that will depend on the construction of the offer and the relevant circumstances.

2. Mere expression of intention is not sufficient to constitute an offer, rather that must be the final decision of his thought which is made with a definite purpose, i.e., to obtain the consent of the person to whom it is made. Thus if A says to B, 'I may sell one of my cars if I can get Tk. 3 lacs'—this is not an offer; but if A says to B, 'I will sell you my latest car for Tk. 3 lacs'—it is an offer. Again, if someone makes any statement regarding his any intention during a conversation, of course that will not suffice to constitute an offer, even though the person to whom such intention is expressed acts accordingly, there will be no offer, so no question of acceptance and as such of any contract. For example: A told B, while taking tea, I will be happy if I can sell my house situated at Uttara for Tk. 1 crore to a university teacher, B being a university teacher comes forward with the said money and claims the house. B's such performance will not amount to acceptance, because A's statement did not constitute any offer, since it was a mere statement of intention expressed to B out of a conversation.

3. An offer must be definite i.e. any vague or ambiguous statement is incapable to give birth to a proposal. The terms and conditions also must be definite or capable to be made definite. So, if a person indicating two cars of the same model kept in front of him and tells that 'I will sell one car for Tk. 3 lacs and another for Tk. 2 lacs'—we have not an offer due to the ambiguity and uncertainty in the statement made. But if though the statement is not definite at the moment directly but is capable to be made

definite applying the common sense and general idea then that statement may constitute an offer. For example, one *Lexus* car of new model and another scooter are kept in one place and indicating these the owner says 'I will sell these two, one for Tk. 1 lac and another for Tk. 30 lacs'—we may have an offer, because it is capable to be made definite by applying the common idea that a scooter is not supposed to be sold for Tk. 30 lacs. We can refer the following case to make our idea clear:

> ***Montreal Gas Co. Vs. Vasey, 1900, A.C. 595***
>
> There was a contract between A and B where, *inter alia*, A promised that if he was satisfied with him as a customer he would favorably consider an application for renewal of the contract. It was held that there was nothing in these words which would create a legal obligation, as the promise was a vague one since there is no criterion to determine the satisfaction as customer.'[1]

4. An offer may be made to a specific person or specific class of persons or even to the world at large generally.[2] Because the definition of the term 'proposal' does not restrict that the offer should be made only to one person rather the law says 'when one person signifies to ***another***...' which implies that the offer must not be addressed to the offeror himself, rather 'to another'—so it is not a bar in making an offer even to the whole world at large. Anson rightly observed: 'an offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.'[3]

---

[1] Montreal Gas Co. Vs. Vasey, 1900, A.C. 595.

[2] Carlill Vs. Carbolic Smoke Ball Co., 1892, 2 QB 484, is a famous English Law case on this particular point.

[3] Anson's Law of Contract, 409 23rd ed. by A.G. Guest, (1971).

Examples:

a) A says B to sell his computer to him for a certain price—it is a specific proposal made to one specific person, B , which is capable to be accepted only by B alone, and no other person except B can accept the offer.

b) A makes an offer to sell some computers at low price and specifically mentions in the offer that it is made only for the law students—it is an offer made to a specific class of persons.

c) A promises to give a reward of Tk. 1000 through an advertisement published in his own website to anyone who can create a new software relating to *e-case reference*—it is a general offer made to the whole world at large which is capable of being accepted by any person of the world.

5. Offer may be expressed or implied. If it is made by words, written or oral, it becomes an express offer and if it is made otherwise than in words, i.e., by conduct—it is an implied one. Because the definition of offer says 'when one person signifies to another....'—here the mode of signification is not mentioned, so it can be made in whatever mode, either express or implied, since the only important thing to be considered is whether the willingness is signified to another person or not.

Examples:

(a) A tells B 'I will sell my car to you for Tk. 1000'—it is an express offer which was made orally.

(b) A sends an e-mail to B offering to sell his land situated at Gulshan for a certain price—it is also an express offer which is in the form of writing.

(c) A professional shoe shiner when starts polishing one's shoes in front of the owner of the shoes, and the owner does not deny. That is a case of implied offer which is made by conduct.

6. Since one's willingness may be positive or negative, an offer also may be positive or negative, because an offer is nothing but the expression of one's willingness. Again, the definition of 'proposal' provides that '... ... ..., his willingness to do or to abstain from doing something ... ... '—here it expressly includes the positive (*to do*) willingness and negative (*to abstain from doing*) willingness and as such it in fact speaks of positive and negative offer.

Example:

(a) A tells that 'I will sell my car for Tk. 3 lacs'—it is a positive offer.

(b) A tells B that 'If you do not go Cox's Bazar tomorrow, I will not give C Tk. 3 lacs'—it is a negative offer.

7. Offer may be conditional or unconditional. It is natural that besides unconditional offers one can make a proposal subject to certain stipulations also. For example, if A tells B that 'I will sell my car to you if you recruit my nephew in your company as a manager'—it is a conditional offer. In case of a conditional offer the offeree must fulfill all terms and conditions of offer in order to accept it.

8. It is true that an offer is an expression of one's willingness but if that willingness is expressed in the form of a mere answer in reply to an inquiry in that regard that will not constitute a definite offer. There must be a clear intention of entering into a binding contract and for that purpose the said offer must be addressed to the offeree with the intention of taking the consent to the same from the person to whom it is made. Negotiations for the sale of land may involve the adjustments of so many questions of detail that the courts will require cogent evidence of an intention to be bound before they will find the existence of an offer capable of acceptance.[1] Thus in *Harvey Vs. Facey*[2] :

> The plaintiffs telegraphed to the defendants, 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price.' The defendants telegraphed in reply, 'Lowest price for Bumper Hall Pen, $900.' The plaintiffs then telegraphed, 'We agree to buy Bumper Hall Pen for $900 asked by you. Please send us your title-deeds.' The rest were silence. It was held by the Judicial Committee of Privy Council that there was no contract. The second telegram was not an offer, but only an indication of minimum price if the defendants ultimately resolved to sell, and the third telegram was therefore not an acceptance.

9. Communication is another key feature and also an essential constituent element of an offer, since there can not be any offer without it's being communicated to another person. There is an independent section in the Contract Act, 1872, dealing with the communication of offer, but the basic condition of it's being present in an offer, in fact, is mentioned in the definition of proposal

---

[1] Cheshire and Fifoot, *Law of Contract*, p.31.
[2] (1893) AC 552.

itself, since the definition says that 'when one person signifies to another...'—this signification in fact indicates the communication of offer that it is to be signified i.e. it has to be communicated to the other person. So, if a person makes a statement with a view to have an offer through it and nobody listens or knows it then in spite of satisfying all conditions and having all other constituent elements of an offer it will not be an offer for the absence of communication or signification as required by the law.

Offer and Invitation to Treat:

Offers must be distinguished from invitation to treat, because there are many statements which seem to be offers, but, in fact, these are invitation to treat. Simply speaking, we discussed earlier the constituent elements of an offer, and if any statement lacks any of those elements that may be termed as an invitation to treat. In fact, the Contract Act, 1872, does not define this term and even nowhere in this Act this term has been used. But it has become the popular subject to judicial pronouncements, because a lot of problems have arisen by this time centering one specific question that whether a particular incident is an offer or invitation to treat. Because, on this basic answer the whole agreement becomes dependent because if there is no offer then there can not arise any agreement at subsequent time since the offer is the first formal step towards the formation of a contract. Sometimes the distinction between these is quite obvious and sometimes it is really a tricky one and frequently confusion arises regarding this question to determine whether a particular incident (statement or act) is an offer or a mere invitation to treat.

It is the usual practice in business that a transaction begins with negotiations and so many statements and acts take place at this stage of negotiation which usually are not offers but invitations to treat. A number of invitations to treat may be present in one business transaction whereas at the end of negotiation a definite offer will come out which are capable of being accepted. The offeror must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving the offeree the option of acceptance or refusal and he must not merely have been feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not in time result, rather he must be prepared to implement his promise, if such is the wish of the other party.[1]

It will be convenient to distinguish between an offer and an invitation to treat on the basis of two factors:

1. Nature of the statement; and
2. Intention of the party who is making the statement.

In the context of the nature of the statement it is to be examined whether the said statement satisfies all requirements of a valid offer, *inter alia,* final expression of one's willingness and sufficiently definite to be capable of acceptance, if the statement or conduct becomes so satisfactory then it will be an offer, but if it is in short of it at any degree then it will be an invitation to treat, not an offer. In this regard the case of *Gibson Vs. Manchester City Council*[2] is remarkable here:

---

[1] Cheshire and Fifoot, *Law of Contract*, 2nd ed., p.27.
[2] 1979, 1 All ER 972; 1979, 1 WLR 294.

> "In September 1970 the council adopted a policy of selling council houses to council tenants. On 16 February 1971 the City Treasurer wrote a letter to Mr. Gibson stating that the council 'may be prepared to sell the house to you at the purchase price of £2,725 less 20% = £2,180 (freehold)'. The letter invited Mr. Gibson to make a formal application which he did. In the normal course, this would probably have been followed by the preparation and exchange of contracts but before that process had been concluded, control of the council changed hands as a result of the local government elections of May 1971. The policy of selling council houses was reversed and the council decided only to complete those transactions where exchange of contract had taken place. Mr. Gibson claimed that a binding contract had come into existence but the House of Lords held that the Treasurer's letter of 16 February was at most an invitation to treat and that therefore Mr. Gibson's application was an offer and not an acceptance."[3]

Then in the context of intention it is to be judged whether the person who made the statement made it with the object of getting the consent from the person to whom it was made. In other words, here the intention of the party making it must be discovered and if it is found that the statement was made with a view to obtaining the assent of that other to such act or abstinence then it will be an offer; but if it lacks this issue then in spite of satisfying all other requirements to be a valid offer, it will be an invitation to treat. So, what we see in practice, a 'TO-LET' board is not an offer for various reasons, *inter alia*, it is not the intention of the party who is hanging or publishing a 'TO-LET' board to obtain the consent from the other party, rather it is made merely to attract the prospective customers or tenants and to

[3] This case summary has been taken from Cheshire and Fifoot, *Law of Contract*, 2nd ed., p.32.

invite the interested parties to come for negotiation. In fact, such a 'TO-LET' board is not usually a ready statement to be capable to constitute an offer, rather there may be so many issues yet to be settled.

It has been the subject of judicial debate for many years and the distinction will be clear if we examine certain cases. The question to determine the distinction between an offer and an invitation to treat arose first in the law of auctions.[1] Let us now concentrate on some specific issues relating to offer and invitation to treat and in doing so it will be a better effort if some English law cases are referred here, since there are a lot of English law cases on this particular point which will definitely make the study on the distinction between an offer and invitation to treat easier resulting to some effective conclusions.

Auction sales:

It is well established principle regarding auction sale that an offer is made by the bidder, i.e., the bid itself is an offer which is to be accepted by the fall of the hammer of the auctioneer on his table.[2] There are certain issues relating to auction sales.

The first issue is about the request for bids. Is the request for bid a definite offer? The issue was held negatively in *Payne Vs. Cave.*[3]

The second issue is about the nature of advertisement of an auction sale—is it an offer or invitation to treat? The advertisement of an auction is generally held to be an invitation to treat.[4] Next question arises 'does an

---

[1] Cheshire and Fifoot, *Law of Contract*, p.27., 2nd ed.
[2] British Car Auctions Ltd. Vs. Wright, 1972, 1 WLR 1519.
[3] 1789, 3 term Rep 148.
[4] Harris Vs. Nickerson, 1873, LR 8 QB 286.

advertisement that specified goods will be sold by auction on a certain day constitute a promise to potential bidders that the sale will actually be held?' In *Harris Vs. Nickerson*[5] this question was answered negatively, where the plaintiff failed to recover damages for loss suffered in travelling to the advertised place of an auction sale which was postponed ultimately before the time fixed for the sale to be held.

The third issue is regarding the advertisement that mentions the sale to be held without reserve—is it a definite offer to sell to the highest bidder? In *Fenwick Vs. Macdonald, Fraser & Co.*[6] the Scottish court decided it negatively holding that no agreement is complete unless the auctioneer acknowledges the acceptance of the bid by the fall of his hammer. But in English case *Warlow Vs. Harrison*[7] it was the subject of obiter dicta where the court opined that the addition to the advertisement of the two words 'without reserve' converts it into an offer that the sale will in fact be subject to no reserve price and that the offer is accepted by the highest bidder at the auction sale. This *dicta* has been followed in a recent English case in 2000 in *Barry Vs. Davies (Trading as Heathcote Ball & Co)* [8].

Tenders:

The general rule is that an invitation to tender for a particular project is an invitation to treat and the person who submits the tender is deemed by law as an offeror as the submission of tender is an offer which in turn is to be accepted by the person who invites the tender for any particular project. Thus the mere fact that a person made a

---

[5] *Ibid.*

[6] 1904, 6 F (Ctof Sess) 850.

[7] 1859, 1 E & E 309.

[8] 1 WLR 1962, Court of Appeal.

certain quotation in response to the tender notice, even granting that it was the lowest quotation, will not, in any manner create an obligation to accept it on the person who issued the tender notice.[1]

But in the following two recent cases in England different approach of the court is found regarding the legal position of tenders, where in fact an invitation to tender has been treated as an offer capable of creating contractual obligations under certain circumstances. The cases are:

- **Harvela Investments Ltd. Vs. Royal Trust Company of Canada (CI) Ltd[2].**

  The first defendants owned a block of shares in a company. The plaintiff (Harvela) and the second defendant (Sir Leonard Outerbridge) were rival bidders for the shares. The reason for their interest in the shares was that the ownership of the shares would give the successful bidder effective control of the company. The first defendants sent out an invitation to both Harvela and Sir Leonard in which they invited both parties to submit 'any revised offer which you may wish by sealed tender or confidential telex' to the first defendants' solicitors. The first defendants in turn stated that 'we confirm that if any offer made by you is the highest offer received by us we bind ourselves to accept such offer provided that such offer complies with the terms of this telex'. Harvela submitted a bid of $2,175,000, while Sir

[1] PLD 1983 Karachi 340 (DB).
[2] (1986) AC 207.

> Leonard submitted a bid of $2,100,000 'or [Canadian] $101,000 in excess of any offer which you may receive which is expressed as a fixed monetary amount, whichever is the higher'. The first defendants accepted Sir Leonard's offer, treating it as a bid of $2,276,000 and entered into a contract with the second defendant for the sale of the shares. Harvela issued proceedings against both the first defendants and Sir Leonard in which, among other things, it challenged the validity of Sir Leonard's bid. The House of Lords held that Sir Leonard's bid was indeed invalid and that *the first defendant was contractually bound to transfer the shares to Harvela in accordance with the terms of its bid*.[3]

Thus it appears from the above case that the invitation to tender has been treated by the court ultimately as an offer which was made accompanying the declaration of assurance regarding the acceptance of the highest bid. *Lord Templeman* observed:

> The invitation required Sir Leonard to name his price and required Harvela to name its price and bound the vendors to accept the higher price. The invitation was not difficult to understand and the result was bound to be certain and to accord with the presumed intentions of the vendors discernible from the express provisions of the invitation. Harvela named the price of $2,175,000; Sir Leonard failed to name any price except $2,100,000 which was less than

---

[3] This case summary is taken from Mackendrick, Ewan, *Contract Law: Text, Cases and Materials*, 1st edition, 2003, Oxford University Press, UK, p. 82.

> the price named by Harvela. *The vendors were bound to accept Harvela's offer*[1].

The legal nature of the invitation to tender sent by the first defendant in the above case has been explained by *Lord Diplock* in the following words:

> A unilateral or 'if' contract, or rather of two unilateral contracts in identical terms to one of which the vendors and Harvela were the parties as promisor and promisee respectively, while to the other the vendors were promisors and Sir Leonard was promisee. Such unilateral contracts were made at the time when the invitation was received by the promisee to whom it was addressed by the vendors; under neither of them did the promisee, Harvela and Sir Leonard respectively, assume any legal obligation to anyone to do or to refrain from doing anything[2].

The following analysis of *Ewan Mckendrick*[3] regarding this case is worth mentioning here:

> 'The first defendants did, however, assume a legal obligation to Harvela and Sir Leonard under these two contracts. It assumed an obligation to enter into a contract to sell shares to the promisee who submitted the highest bid in accordance with the terms of the invitation. In this way unilateral contract concluded with the successful bidder would be transformed into a binding bilateral contract, while the unilateral contract with the

---

[1] Harvela Investments Ltd. Vs. Royal Trust Company of Canada (CI) Ltd. (1986) AC 207, at p. 230.
[2] *Ibid*, at p. 224.
[3] Mackendrick, Ewan, *'Contract Law: Text, Cases and Materials'*, 1st edition, 2003, Oxford University Press, UK, p. 83.

> unsuccessful bidder would be terminated by the submission of the higher bid.'

- **Blackpool and Fylde Aero Club Ltd. Vs. Blackpool Borough Council**[4]

In the above case the Court adopted a 'two-contract analysis' which has been summarized by *Ewan Mckendrick*[5] in the following words:

> The claimants' bid was not considered by the Council because they considered it to be a late submission and concession was awarded to another party. The claimants brought an action for damages, *inter alia*, for breach of contract. The obvious difficulty which they faced was that they did not appear to be in a contractual relationship with the defendants because an invitation to tender is only an invitation to treat. The claimants had therefore simply submitted an offer which the defendant had not accepted. But the Court of Appeal took a different approach. They held that the defendants were contractually obliged to consider the claimants' tender and, for breach of that obligation, they were liable for damages. The court appeared to adopt a two-contract analysis. A contract was concluded with the party whose tender was accepted but the invitation to tender also constituted a unilateral offer to 'consider' any conforming tender which was submitted and that offer was accepted by any party who submitted such a tender.

Display of goods:

Now-a-days, fixed price shops are increasing and being popular day by day. The issue is whether the display of

[4] (1990) 1WLR 1195, Court of Appeal.

[5] Mckendrick, Ewan, *'Contract Law'*, 4th ed., 2000, Palgrave, p.39.

goods for sale is an offer or invitation to treat. If goods are exhibited in a shop-window or inside a shop with a price attached, does this constitute an offer to sell at that price?[1] The general English Law view is in favor of it's being treated as an invitation to treat. *Lord Parker* in *Fisher Vs. Bell*[2] undoubtedly decided the issue suggesting that:

> it is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract.

In *Timothy Vs. Simpson*[3] it was suggested by the counsel that 'if a man advertises goods at a certain price, I have a right to go into his shop and demand the article at the price marked', and the learned judge Park B emphatically replied that 'No; if you do, he has a right to turn you out'. In fact this view was confirmed in a subsequent case after 118 years in 1952 in *Pharmaceutical Society of Great Britain Vs. Boots Cash Chemists (Southern) Ltd.*[4]

> The defendants adapted one of their shops to a 'self-service' system. A customer, on entering, was given a basket and, having selected from the shelves the articles he required, put them in the basket and took them to the cash desk. Near the desk was a registered pharmacist who was authorized, if necessary, to stop a customer from removing any drug from the shop.

The basic question was regarding the time that when did the sale take place and that was dependent on another primary

---

[1] Cheshire and Fifoot, *Law of Contract*, 2nd ed., p.29.
[2] 1961, 1 QB 394 at 399; 1960, 3 All ER 731 at 733.
[3] 1834, 6 C & P 499 at 500.
[4] 1952, 2 QB 795; 1952, 2 All ER 456, affd (1953) 1 QB 401, (1953) 1 All ER 482.

question: does display of goods with the price tags attached with it amount to an offer or invitation to treat? The plaintiff claimed that such display was an offer and it was accepted when the said drug is put into basket and the contract has become complete, whereas the contention of the defendant was that the display was a mere invitation to treat and so that by putting the drug into the basket at best he made an offer which the company is at absolute liberty to accept or refuse. *Lord Goddad*, at first instance, decided that the display of goods is only an invitation to treat though it bears a price tag with it and the status will remain same even though the shop concerned becomes a self service shopping mall. The Court of Appeal upheld the decision accepting the following reasoning made by *Lord Goddad*[5]:

> The transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying 'I accept your offer'. I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed. In most book-shops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said 'I want to buy this book' and the shopkeeper says 'Yes'. That would not prevent the shopkeeper, seeing the book picked up, saying: 'I am sorry I can not let you have that book, it is the only copy I have got and I have already promised it to another customer'. Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the

[5] *Ibid.*

> shelves in this does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy, and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price.
>
> It is well established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell. That principle is not completely reversed merely because there is a self service scheme in operation... ... ... it comes to no more than that the customer is informed that he may himself pick up article and bring it to the shopkeeper with a view to buying it and if, but only if, the shopkeeper then expresses his willingness to sell, the contract for sale is completed. In fact, the offer is an offer to buy, and there is no offer to sell; the customer brings the goods to the shopkeeper to see whether he will sell or not. In 99 cases of a 100 he will sell and, so he accepts the customer's offer, but he need not do so.

So it is the well established rule that the display of goods is not an offer, but it is criticized on the ground that it creates hardship on the buyers. There is an English authority where display of goods in a self-service store was held an offer.[1] It was held in another case[2] that the display of deck chairs for hire on a beach was an offer which was accepted by a customer taking a chair from the stack.

Advertisements:

The general principle relating to advertisement is that it is not an offer, but an invitation to treat. It is also an established principle that a circular, catalogue advertising goods for sale is not an offer itself, but it is a mere attempt to

---

[1] Lasky Vs. Economy Grocery Stores, 319 Mass 224,65 NE 2d 305, 1946.

[2] Chapleton Vs. Barry UDC (1940) 1 KB 532.

induce offers[3] and in this regard *Lord Herschell's* observation is worth mentioning here :

> The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given, there is binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited.[4]

But it does not necessarily mean that an advertisement can never be an offer; of course there are certain instances where even an advertisement may constitute an offer and *Carlill Vs. Carbolic Smoke Ball Company*[5] is one of those instances where an advertisement was held to be an offer.

> The defendants who were the proprietors of a medical preparation called 'The Carbolic Smoke Ball", issued an advertisement in which they offered to pay $100 to any person who succumbed to influenza after having used one of their smoke balls in a specified manner and for a specified period. They added that they had deposited a sum of $1000 with their bankers 'to show their sincerity'. The plaintiff, on the faith of the advertisement, bought and used the ball as prescribed, but succeeded in catching influenza. She sued for the $100.
>
> One of the issues in the above case was whether the advertisement was an offer or invitation to treat and it was held that the said advertisement was a definite offer made to the world at large.

---

[3] CF Spencer Vs. Arding , 1870, LR 5 CP 561.
[4] Grainger & Son Vs. Gough (1896) AC 325 at 334.
[5] 1892, 2 QB 484, affd 1893, 1 QB 256.

Bowen LJ referring the advertisement in the *Carlill* case observed that: 'It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer.' As such we see that the advertisement in the *Carlill* case was differentiated from ordinary other advertisements and this particular advertisement is given the status of a valid offer as one of the exceptions to the general principle that the advertisements are not offers but invitations to treat. Why has it been considered as an offer? May be that is due to the reasons, *inter alia*, that the advertisement was clear and definite enough to constitute an offer and that it was inferred from the wording used in the advertisement that it was intended to create legal obligation treating as an offer to be capable of acceptance and that their deposit in the bank have shown their sincerity that they are really ready to create some legal obligations and mere inspiration is not the motto rather it was made with sufficient precision and seriousness to be capable of acceptance by the prospective customers following the instructions, terms and conditions given in the said advertisement.

Timetables and boarding on bus or train

The matters of daily life are in most of the cases become confusing. Such as in case of boarding on a bus or train there may be four probable explanations[1]:

1) The bus time-table and the running of the bus are an offer by the bus company which is accepted

[1] Mckendrick, Ewan, *Contract Law*, 4th ed., 2000, Palgrave, p.41.

by boarding on the bus. This was the view of *Lord Greene* expressed in *Wilkie Vs. London Transport Board*[2] where he says in the *obiter dicta* that the offer was made by the bus company and it was accepted when a passenger 'puts himself either on the platform or inside the bus'.

2) Alternatively an acceptance takes place when the passenger asks for a ticket and pays the fare.

3) The bus time-table is an invitation to treat, the offer is made by the passenger on boarding the bus and the acceptance takes place when the bus conductor accepts the money and issues the ticket.

4) The bus conductor makes the offer when he issues the ticket and this offer is accepted by paying the fare and retaining the ticket.

Which particular view is correct? There is no case law in Bangladesh regarding this issue. English authority in *Wilkie*[3] case has been also criticized by the academicians, e.g., in the book *'Law of Contract'* written by *Cheshire and Fifoot* (at page 31) this opinion has been criticized as such that 'if it represents the law it would seem that the corporation makes an offer of carriage by running the bus and that the passenger accepts the offer when he gets properly on board; and the contract would then be complete even if no fare is yet paid or ticket given.' However, does this debate have any practical utility or only of academic interest? This issue

---

[2] (1947) 1 All ER 258.
[3] *Ibid.*

has been answered by *Ewan Mckendrick*[1] in the following words:

> 'In many ways the issue may seem to be an academic one, devoid of any practical consequence. But this is not the case. It has serious consequences if there is an exclusion clause contained on the back of the ticket. If the first analysis is adopted then the exclusion clause is not part of the contract because the contract is concluded before the ticket is handed over. On the other hand if the final alternative is adopted then the exclusion clause is part of the contract because it is contained in the offer made by the conductor. A court might adopt the first of these alternatives in our exclusion clause example in order to protect the passenger but, would it also apply it where the same passenger boards the bus by mistake and wishes to get off the bus before it moves from the stop without paying for his fare? As *Professor Trietel* has stated (1999), the cases 'yield no single rule' and all that can be said 'the exact time of contracting depends in each case on the wording of the relevant document and on the circumstances in which it was issued'.'

Communication of offer

Communication plays the key role in the ultimate formation of one event, because without communication both the offer and acceptance become meaningless. Communication of offer is the prior condition of its acceptance. When does the communication of offer become complete? Section 4 of the Contract Act, 1872, specifically deals with this issue and says that—

> (the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.)

---

[1] Mckendrick, Ewan. *Contract Law*. 4th ed., 2000. Palgrave. p.41.

What is acceptance?

Section 2(b) of the Contract Act, 1872, states that—

> when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.

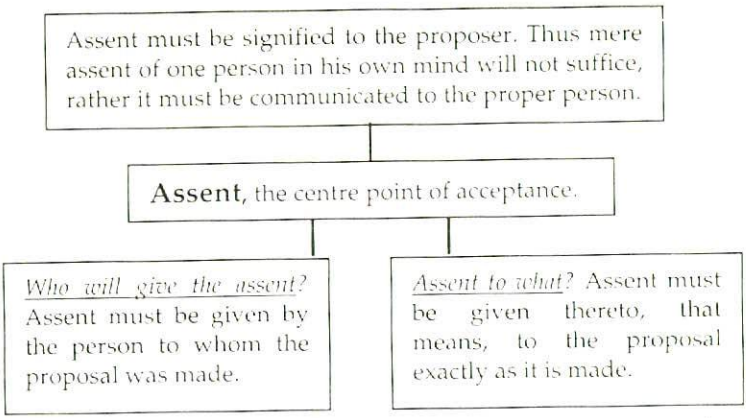
We can dissect the definition at least into three constituent parts:

1. Signification of the assent;
2. Assent is signified by the person to whom the proposal was made;
3. The term 'thereto' used in this section implies that the assent must be given to the offer as it is.

By an analysis of the above definition we can reach to the following conclusions:

1. A proposal must be accepted by the person to whom the offer is made. So, if A offers B to sell his car to him, C cannot accept the offer.
2. If the consent is not signified then there will not be a valid acceptance. It implies that if someone keeps the assent in his own mind then it will not be enough to constitute an acceptance. So, that assent must be signified.
3. The term 'thereto' in fact indicates to some essential conditions of acceptance. The law specifically used the term for an assent to be given towards 'thereto', i.e., to the exact incident which is considered as an offer. It implies that nothing can be excluded from the offer or nothing can even be added with the offer. So, if someone would like to sell his car for a certain price and the person to whom it is addressed he accepts the offer

adding another condition that it must be painted before the delivery of possession—it is not a signification of his assent 'thereto', i.e., to the offer as it is and so is not an acceptance in the eye of law. The consequence will be the same if something is excluded from the offer at the time of acceptance by the other party to whom the offer was made.



Rules regarding a valid acceptance : nature and mode of acceptance

What will be the nature of a valid acceptance?

Section 7 of the Act deals with the basic rules regarding a valid acceptance. It says—

> (In order to convert a proposal into a promise the acceptance must be absolute and unqualified)

Accordingly about the nature of a valid acceptance the law imposes two requirements to be fulfilled i.e. the acceptance must be—

i. Absolute; and

ii. Unqualified.

So, acceptance with a variation is no acceptance at all. In fact, the indication to these basic points is found in the definition of acceptance itself where the term 'thereto' has been used to mean that the consent must be given to the offer exactly as it is made by the offeror. However, just to make it more clear and to give emphasis it has been elaborately mentioned in section 7 that *in order to convert a proposal into a promise* that means the acceptance to be an effective one it *must be absolute and unqualified*. 'Absolute' and 'unqualified' these two terms together make one thing emphatically clear that acceptance must be made to the offer as it is made without any variation in it. In other words, nothing can be added with the offer or nothing can be excluded and no part or no term of offer can be varied to any extent in its acceptance. Few examples can help us to understand the discussion clearly.

Example 1

A : I will sell my car to you for Tk. 3 lacs.
B : I agree. But you must paint the car before giving it to me.

Here B's statement is not an acceptance, because it adds one more condition which did not exist in the offer. Thus, it is not an unqualified acceptance as required by law.

Example 2

A: I will sell two cars together for Tk. 5 lacs.
B: I agree to purchase any one of it for Tk. 2.5 lacs.

Here B's statement does not constitute a valid acceptance. Because it is not absolute one as required by law. It excluded something from the original offer and agreed partially, so it is not a valid acceptance.

Example 3

A: I will sell my computer to you for Tk. 50 thousands only.
B: I agree to accept for Tk. 49 thousands.

Here also B's statement is not a valid acceptance, because it is a statement with a variation and deviation from the offer.

Manner of acceptance:

Section 7(2) of the Act lays down that

> In order to convert a proposal into a promise the acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Section 7(2) in fact lays down two rules regarding the manner of acceptance based on the different circumstances:

1) If the proposal does not prescribe any manner of acceptance then it must be performed in usual and reasonable manner. What is a reasonable manner? Of course, it is a question of fact which depends on the circumstances of each and every case. But it seems that the above section using the term 'usual' probably gave an indication regarding what should be treated as 'reasonable' that what is usual that is reasonable.

2) If the proposal prescribes any specific mode and manner then it must be done accordingly. Thus if the proposer requires the answer to be made by e-mail, acceptance cannot be made by post. Whether some particular mode has been prescribed depends upon the inference to be drawn from the circumstances.[1] There is authority for the view that an offer by telegram is evidence of a desire for a prompt reply, so an acceptance sent by post may be treated as nugatory.[2]

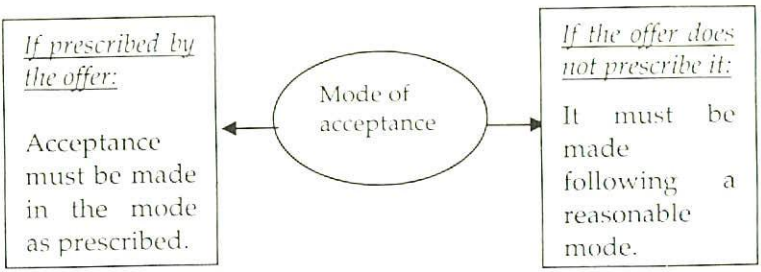
And it is also mentioned in the Act that if the acceptance is not made in the prescribed manner, then if the objection that, he will not accept the acceptance made otherwise than in the manner prescribed by him, is not raised within a reasonable time then the acceptance will be treated as a valid one though not performed in the manner prescribed by him. In England, the Court of Exchequer Chamber opined that a reply sent by some other method equally expeditious would constitute a valid acceptance.[3] An offer must use very clear words to make a mode of communication to be treated as mandatory [4].

It was held in *Bangladesh Muktijoddha Kalyan Trust represented by the Managing Director Vs Kamal Trading Agency and others*[5] that an acceptance must be expressed

---

[1] Cheshire and Fifoot, *Law of Contract*, p.43, see, Kennedy Vs. Thomassen, 1929, 1 Ch 426.
[2] Quenrduaine Vs. Cole, 1883, 32 WR 185.
[3] Tinn Vs. Hoffmann Co, 1873, 29 LT 271.
[4] *See*, in this regard Yates Building Co Ltd Vs. R J Pulleyn & Sons (York) Ltd (1975) 119 Sol Jo 370, reversing (1973) 228 Estates Gazette 1597.
[5] (1998) 50 DLR (AD) 171.

in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.



Counter offer

Meaning of 'Counter Offer':

The concept 'counter offer' has not been defined any where in the Contract Act, 1872. It is a technical term used in judicial pronouncements. The question of counter offer is related with the nature of acceptance. A counter offer may come upon the scene not bearing its badge upon its sleeve but dressed as an 'acceptance'[1]. The offeree is required to give his assent unconditionally to the exact terms proposed by the offeror, if it is not so identical with the offer then this so called 'acceptance' in fact will be treated as a counter offer. If the acceptance does not become absolute and unqualified as discussed above then two consequences arise:

1. It cannot be a valid acceptance; and
2. It turns into a counter offer.

Let us have an example:
A: I will sell my pen to you for Tk. 20.

---

[1] Cheshire and Fifoot, *Law of Contract*, p.34., 2nd ed.

B: I am ready to purchase it for Tk. 19 or I agree but you have to give me a pen holder at no extra cost.

Here B's statement is not a valid acceptance and it is termed as counter offer in law.

But a mere inquiry does not constitute a counter offer and as such it does not destroy the original offer. The case *Stevension Vs. McLean*[2] is worth mentioning here:

> The defendant offered on Saturday to sell to the plaintiffs 3,800 tons of iron 'at 40s net cash per ton, open till Monday'. Early on Monday the plaintiffs telegraphed to the defendant: 'Please wire whether you would accept 40 for delivery over two months, or if not longest limit you would give'. No reply was received, so by a telegram sent at 1.34 p.m. on the same day the plaintiffs accepted the offer to sell at 40s cash. Meanwhile the defendant sold the iron to a third person and informed the plaintiffs of this in a telegram dispatched at 1.25 p.m. The telegrams crossed.
>
> The plaintiffs sued to recover the damages for breach of contract. To settle the dispute one of the important issue before the court was that whether the first telegram sent by the plaintiffs a counter offer or not. It was held that the plaintiffs did not had not made a counter offer, but had addressed to the defendant 'a mere inquiry, which should have been answered and not treated as a rejection of the offer'.[3]

Legal consequence of counter offer

1. *It rejects the original offer*. At the moment a counter offer is made the original offer becomes dead. So, if someone

---

[2] 1880, 5 QBD 346.
[3] 1880, 5 QBD at p. 350.

makes a counter offer and then he changes his mind subsequently and then would like to be agree on the same terms and conditions as were exactly made by the original offeror without any variation' he cannot so accept the earlier offer, because at the moment he makes the counter offer, the original offer has become dead, i.e., that it does not exist any more to be accepted by the person who rejected it at one time by making a counter offer. In *Hyde Vs. Wrench* :[1]

> The defendant on 6 June offered to sell an estate to the plaintiff for $1,000. On 8 June, in reply, the plaintiff made an offer of 4950, which was refused by the defendant on 27 June. Finally, on 29 June, the plaintiff wrote that he was now prepared to pay $1000.
>
> It was held that no contract existed. By his letter of 8 June the plaintiff had rejected the original offer and he was no longer able to revive it by changing his mind and tendering a subsequent acceptance.

2. *It becomes a new offer.* This counter offer becomes capable of acceptance by the party to whom it is made and if so accepted then a contract arises based on this counter offer not on the offer originally made.

Knowledge of offer: prior condition of acceptance

One must have the knowledge of offer before accepting the same. Because, how will a person accept one offer about which he has no knowledge at all? Therefore it is the well established principle of law that the acceptance in ignorance

[1] 1840, 3 Beav 334.

offer is no acceptance to give rise to a legally binding contract. In *Lalman Shukla Vs. Gauri Datt*[2] :

> The nephew of the defendant ran away from home and no trace of him was found for sometime. The defendant sent his servants to different places in search of the boy and among them was the plaintiff. When the plaintiff had left, the defendant by handbills offered to pay Rs. 501 to anybody discovering the boy. The plaintiff traced the missing boy and then comes to know of this offer. He brought an action to recover the reward and it was failed.
>
> *Justice Banerji* observed: 'In order to constitute a contract, there must be an acceptance of an offer and there can be no acceptance unless there is knowledge of the offer.'[3]

The American case *Fitch Vs. Snedaker*[4] is very clear on this particular point where *Woodruf J*, remarked on the question 'How can there be consent or assent to that of which the party has never heard?'

The Australian case *R* Vs. *Clarke*[5] in fact advanced the rule in *Fitch Vs. Snedaker* one stage ahead which provides that even the mere knowledge of the offer is not sufficient but the fact of offer must be present in the mind of the offeree at the moment of acceptance, otherwise there will not be any acceptance. In this case-

> The Government of Western Australia offered a reward of $1000 'for such information as shall lead to the arrest and conviction of' the murderers of two police officers and added that, if the information should be given by an

---

[2] 1913, 11 All LJ 489.
[3] *Ibid.* at p.492.
[4] 1868, 38 NY 248.
[5] 1927, 40 CLR 227.

> accomplice, not being himself the murderer, he should receive a free pardon. Clarke saw the offer and some time letter gave the necessary information, he claimed the reward from the Crown by petition of right. He admitted not only that he had acted solely to save his own skin, but that, at the time when he gave the information, the question of the reward had passed out of his mind.[1]

He could not recover the reward money as it was held negatively by the court. In the words of *Higgins J*[2]:

> Clarke had seen the offer, indeed, but it was not present to his mind—he had forgotten it and gave no consideration to it in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing, whether it is due to never hearing of it or to forgetting it after hearing.

Chief Justice Isaac has given a classic illustration in this connection to prove the obsoleteness of acceptance in ignorance of offer:

> 'An offer $100 to any person who should swim a hundred yards in the harbour on the first day of the year would not in my opinion be satisfied by a person who was accidentally or maliciously thrown overboard and swam the distance simply to save his life, without any thought of the offer.'

The position of English law is not clear in this respect. In old texts[3] it is seen that the decision in *Gibbons Vs. Proctor*[4] in fact favoured the acceptance of offer by performance of the relevant conditions mentioned in the offer though that is in

---

[1] R Vs. Clarke, *ibid.*
[2] *Ibid.*
[3] Cheshire and Fiffot, *Law of Contarct*, p.47., 2nd ed.
[4] 1891, 64 LT 594.

ignorance of offer. But in a recent text[5] it has been opined that a closer examination of *Gibbons Vs. Proctor* reveals that in that case in fact the person claiming the reward knew of the offer at the time when the information was given to the police. However, the present view does not in any case permit the acceptance in ignorance of offer.

In *Williams Vs. Carwardine*[6] it was held that if the fact of the offer is present in the mind of the offeree at the time of acceptance then the motive of the acceptance will be irrelevant. Here the fact was similar to the facts of *R Vs. Clarke*, 1927 and the argument 'that the plaintiff gave the information to ease her conscience and not for the sake of the reward' was dismissed and made no change in the judgement and it was observed by the King's Bench that 'motive was irrelevant, provided that the act was done with knowledge of the reward. Acceptance was then related to offer'.

In *Bloom Vs. American Switch Watch Co* (1915) App D 100, the Appellate Division of the Supreme Court of South Africa held, disapproving *Gibbons Vs. Proctor*, that, where information had been given without knowledge that a reward had been offered, the informer could not recover the reward.[7]

Acceptance by performance

Section 8 of the Act deals with acceptance by performance and says:

> Performance of the condition of a proposal or the acceptance of any consideration for a reciprocal promise

---

[5] Treitel, *Law of Contract*.
[6] 1833, 5 C & P 566.
[7] Cheshire and Fifoot, *Law of Contract*, p.48.

> which may be offered with a proposal is an acceptance of the proposal.

So, in fact, it waives the requirement of communication, rather it says that the acceptance may be made by the performance of the relevant conditions mentioned in the offer, i.e., if someone does the performance according to the instructions given in the offer then that will be deemed by the law as a valid acceptance though the same was not communicated to the other party. It may be mentioned in the offer or sometimes it will be inferred from the wording and nature of the offer. If someone advertises that 'I will give $100 to any one who can find my lost car out'—if any person with the knowledge of this offer finds out the car then it will be deemed as an acceptance of offer by performance and the finder need not communicate any further fact of acceptance. *Carlill Vs. Carbolic Smoke Ball Co*[1] is a classic illustration of acceptance by performance where the defendant company advertised to pay $100 to any one who will be caught influenza after using a smoke ball produced by the company and Mrs. Carlill used the smoke as per the instructions given by the company and she was caught influenza and sued to recover $100. Her claim was accepted by the Court and the Court rejected the arguments of the defendants, *inter alia*, that the plaintiff should have notified her intention of acceptance to the defendant and the observation made by *Bowen LJ*[2] is remarkable here:

> But there is this clear gloss to be made upon that doctrine, that is notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks

---

[1] 1892, 2 QB 484, affd 1893, 1 QB 256.
[2] 1893, 1 QB 256 pp. 269-270.

> it desirable to do so; ... ... and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification ... ... in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition ... ... From the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost and that anybody who brings the dog to a particular place will be paid some money, are all the police or other people whose business it is to find lost dogs to sit down and write me a note saying that they have accepted my proposal?

If acceptance by silence is imposed arbitrarily by the offeror upon the offeree and if the offeree becomes silent after getting the offer as required by the offeror, this mere silence, of course, will not amount to acceptance by performance, because in fact the offeror cannot impose such condition with his offer. In *Felthouse Vs. Bindley* :[3]

> 'The plaintiff, Paul Felthouse, wrote his nephew, Iohn, on 2 February, offering to buy his horse for $30 15s, and adding , 'if I hear no more about him, I consider the horse mine at that price'. The nephew made no reply to this letter, but intimated to the defendant, an auctioneer, who was going to sell his stock, that the horse was to be kept out of the sale. The defendant inadvertently sold the horse to a third party at an auction held on 25 February, and the plaintiff sued in conversion.'[4]

---

[3] 1862, 11 CBNS 869.

[4] *Ibid.*

The action was held to be failed as the court did not see any acceptance of the plaintiff's offer before 25 February. *Willes, J.*[1], remarked:

> It is clear that the uncle had no right to impose upon the nephew a sale of his horse for $30 15s unless he chose to comply with the condition of writing to repudiate the offer.

Inferring acceptance from conduct:

Whether there has been an acceptance by one party of an offer made to him by the other may be collected from the words or documents that have passed between them. It may be inferred from their conduct also and of course this task of inferring an assent and of fixing the precise moment at which it may be said to have emerged is one of obvious difficulty, particularly when the negotiations between the parties have covered a long period of time or are contained in protracted or desultory correspondence.[2] Such a difficult situation arose in *Brogden Vs. Metropolitan Rly Co* [3]:

> 'Brogden had supplied the defendant company with coal for years without a formal agreement at length the parties decided to regularise their relation. The company's agent sent a draft form of agreement to Brogden, and the latter, having inserted the name of arbitrator in a space which had been left blank for this purpose, signed it and returned it, marked 'approved'. The company's agent put it in his desk and nothing further was done to complete its execution. Both parties acted thereafter on the strength of its terms, supplying and paying for the coal in accordance with its clauses, until a dispute arose between them and Brogden denied that any binding contract existed.'[4]

---

[1] *Ibid.*
[2] Cheshire and Fifoot. *Law of Contract*, p. 33. 2nd ed.
[3] (1877) 2 App Cas 666.
[4] *Ibid.*

It was really a difficult point to determine at what moment there was a contract and when did the acceptance take place, if ever. Lastly the Court decided that there was a binding contract and the House of Lords opined that a contract came into existence either when the company ordered its first load of coal from Brogden upon these terms or at least when Brogden supplied it.

Rules regarding communication of proposal, acceptance and revocation:

Communication plays the central role in the formation of a contract and without communication even revocation of proposal or acceptance is also impossible. In fact, the seed for necessity of communication is rooted in the definitions of 'proposal' and 'acceptance', respectively, which is evident from the word 'signifies' used in both the definitions, that there will be no proposal if the expression of willingness is not signified to another, and there will be no acceptance if the assent is not signified to another. The rules regarding communication have been enumerated in sections 3 and 4 of the Act.

When does the communication become complete? Section 4 of the Contract Act, 1872, gives answer to this question which says—

> The communication of proposal is complete when it comes to the knowledge of the person to whom it is made.
>
> The communication of acceptance is complete—
>
> as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;
>
> as against the acceptor when it comes to the knowledge of the proposer.

The communication of revocation is complete—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

a) *A proposes, by letter, to sell a house to B at a certain price.*

The communication of the proposal is complete when B receives the letter.

B accepts A's proposal by a letter sent by post.

b) *The communication of the acceptance is complete:*

as against A, when the letter is posted—
as against B when the letter is received by A.

c) *A revokes proposal by telegram.*

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram.

A's revocation is complete as against B when the telegram is despatched, and as against B when it reaches him.

Thus the above-mentioned section lays down the following rules:

Communication of proposal: The communication of proposal is complete when it comes to the knowledge of the person to whom it is made. So, here the criterion is only one i.e. it

must come to the knowledge of the person to whom it is addressed. Thus, if A, by a letter posted to B communicates one proposal, and the letter reaches to B on 1st January which is opened and read out by B on the 3rd January, the communication of proposal has become complete on the 3rd of January, not on the 1st day, because it comes to the knowledge of B on the 3rd day of January. This time of communication is important in the sense that before such a communication has become completed no acceptance of that offer is possible. Thus, if in the above example, B on the 2nd day posts a letter to A expressing the same intention what A expected from B, that will not amount to an acceptance, rather that will be treated as a cross offer, because, no question of acceptance arises before the communication of proposal is complete.

Communication of acceptance: In case of face to face transaction the rule is simple, i.e., when the words constituting the acceptance are uttered, the communication of acceptance will be complete as soon as the other party listens to it. But problem arises in case of postal transactions. In fact, section 4 deals with the postal rules of communication of acceptance which says that the communication of acceptance becomes complete in fact in two phases.

First phase of communication of acceptance: as against the proposer: The communication of acceptance becomes complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor. It implies posting the letter of acceptance, because a letter is posted means that the letter is put in a course of transmission to him, so as to be out of the power of the person who posted it. Thus the moment a letter is posted communication of acceptance is complete as against the

proposer, that means at the same moment the proposer becomes bound by his proposal which has been accepted by the other, because the communication of acceptance has become complete as against the proposer, though still the acceptor does not become bound by it because of the reason that communication of acceptance yet not has become complete as against the acceptor.

Second phase of communication of acceptance: as against the acceptor: The communication of acceptance will be complete as against the acceptor when it comes to the knowledge of the proposer. Thus if A posts the letter of acceptance on 01, June, which reaches to B on the 2nd June and B reads it out on the same day, then the communication of acceptance has become complete as against the proposer on the day of posting the letter, i.e., on 01, June; and the communication of acceptance will be complete as against the acceptor on 02, June when the proposer read out the letter of acceptance. So, the acceptor will not be bound before 02, June though he posted his letter of acceptance on the 1st day of June.

However, in every case, the acceptance needs to be communicated to the other party, and till this communication is made no contract will be there. Thus, the tenderer acquired no vested right of a property merely because his tender for that property had not been rejected and his earnest money has not been refunded by the Corporation and as there was no definite communication of acceptance of tender by the Corporation no vested right was acquired by the plaintiff.[1] It is impracticable to consider what are the terms of a particular contract without

[1] Sahana Chowdhury (Widow) and others Vs. Md Ibrahim Khan and another. 6 BLC (AD) 67.

considering precisely what steps constituted the offer and what constituted the acceptance and precisely what particular terms ought to be read into the contract.[2]

Communication of offer and acceptance by telephone

As regards the communication of offer and acceptance by telephone, the rule which is applicable in England may be applied in Bangladesh. Though there is no direct Bangladeshi case law on this particular point, the English law enunciated on this point in *Entorse*[3] case has been generally accepted by the Indian Supreme Court in *Bhagwandas Goverdhandas Kedia Vs. Girdhalal Parshottamdas*[4] and accordingly the law in brief is that the message must be communicated to the other party actually and the mere utterance of the words through any machine will not amount to communication if the other party does not actually hears it. The observation made by *Denning, LJ* in *Entores Ltd. Vs. Miles Far East Corpn.*[5] is worth mentioning here—

> 'Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply the line goes 'dead' so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off, because people usually say something to signify the end of the conversation. If he wishes to make a

[2] Tarain Ch Gupta Chowdhury Vs. Jagannath Rice Mills, (1951) 3 DLR 23.
[3] Entores Ltd Vs. Miles Far East Corpn. (1955) 2 QB 327, 1955 All ER (vol.2) 493.
[4] AIR 1966 SC 543.
[5] (1955) 2 QB 327, 1955 All ER (vol.2) 493.

contract, he must therefore get through again so as to make sure that I heard. Suppose next that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

Lastly take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the link at the London end fails or something of that kind. In that case the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message 'not receiving'. Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete.

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it.

... ... My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when

> the acceptance is received by the offeror, and the contract is made at the place where the acceptance is received.'

If we follow the above rule enunciated in British case (*Entorse* case[1]), how will it be justified in the light of section 4 of the Contract Act, 1872? This issue has been resolved neatly by an Indian writer *J. D. Jain*[2] in the following words:

> Section 4 of the Contract Act no doubt says that the communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor, and as against the acceptor it is complete when it comes to the knowledge of the proposer. But it is obvious from the very language used in section 4 about the completion of the communication of an acceptance that those provisions can have no applicability where the parties negotiate a contract in the presence of each other or over telephone. The object of sections 4 to 6 is to fix the point of time at which either party negotiating the contract is precluded from changing his mind. When the parties negotiate a contract face to face or over the telephone, no question of revocation can possibly arise for in such instantaneous communication a definite offer is made and accepted at once and the same time. But where the parties are at some distance and have to negotiate a contract by letter or messenger, there is necessarily an interval of time during which there is a possibility of the offeror as well as the acceptor changing mind. Sections 4 to 6, therefore, are intended to fix the point of time at which either party is precluded from revoking the offer or acceptance. Section 4, when it speaks of the communication of an acceptance becoming complete as against the proposer when it is put in course of transmission to him so as to be out of the

---

[1] Entores Ltd Vs. Miles Far East Corpn. (1955) 2 QB 327, 1955 All ER (vol.2) 493.

[2] Jain, J.D., *The Indian Contract Act*, 15th ed., 1988, Allahabad Law Agency, p. 39.

power of the acceptor, and as against the acceptor when it comes to the knowledge of the proposer, necessarily contemplates two different points of time. But it is easy to see that even on the application of the language of the material provisions of section 4 in the contracts negotiated personally or over the telephone the communication of an acceptance is complete as against both the proposer and the acceptor almost if not completely at the same point of time. For acceptance by spoken words transmitting through the medium permeating space cannot be said to be effectually put in a course of transmission to the proposer so as to be out of the power of the acceptor uttering the words of acceptance, unless they are loud enough to be audible to the proposer and are heard by him; and if the words of acceptance have been heard by the proposer, the acceptance comes to his knowledge. Thus the effective emanation of acceptance from the acceptor and proposer's knowledge of acceptance are instantaneous. There is thus no room for the applicability of the provisions of section 4 relating to communication of acceptance to such contracts. In fact, they were never intended to apply to contracts made by telephone or by other modern methods of instantaneous communication which were unknown in 1872 when the Contract Act was enacted and were not in the contemplation of the framers of the Act. As the provisions of section 4 about the completion of the communication of an acceptance do not apply to contracts made by telephone or by other communications which are virtually instantaneous, so the general rule that acceptance of an offer must be communicated to the offeror has to be followed in such contracts. In a contract negotiated orally by the parties in the presence of each other there can be no binding contract until the offeror receives the acceptance by hearing and understanding it. In contracts made by telephone, the parties are no doubt at a distance. But communication is instantaneous and oral. The rule that acceptance is incomplete until received, heard and

> understood by the offeror would, therefore, govern contracts negotiated over the telephone no less than those settled in oral negotiations in the physical presence of the parties (*Kanhaiyalal Indermal Vs. Dineshchandra Mahesh Kumar*, A.I.R. 1959 M.P. 234).

Postal rule of communication

The communication of acceptance becomes complete in two phases if made by post according to section 4 of the Contract Act as discussed earlier. But English Law is different on this point which says that such an acceptance by post becomes complete as soon as the letter of acceptance is posted. *Ewan Mckendrick*[1] neatly sums up the position of the law in England on this point in the following words:

> When does an acceptance sent through the post become effective? Is it when the acceptance is posted by the offeree, when it is posted through the letter box of the offeror or when it is opened and read by the offeror? One might have expected the answer to be that acceptance occurs upon communication of the acceptance to the offeror (whether that communication takes place upon receipt or upon actual reading of the letter) but English law has adopted the former view, namely that acceptance takes place upon posting of the letter of acceptance. This rule has been the subject of considerable criticism and it has no been adopted in many other jurisdictions in the world. Yet the rule is one of some antiquity in English law (the case that is commonly cited as authority for the existence of the rule is *Adams Vs. Lindsell*, 1818, 1 B & Ald 681, but its place was not secured until the later decision of the House of Lords in *Dunlop Vs. Higgins*, 1848, 1 HLC 381) and is now unlikely to be uprooted judicially. Rather,

[1] Mackendrick, Ewan. *Contract Law: Text, Cases and Materials*, 1st edition, 2003, Oxford University Press, UK, p. 117.

the courts are likely to widen the exceptions to the general rule rather than attempt to abolish the general rule itself.

Difference between Bangladeshi law and English law:

In England, once a letter of acceptance is posted the acceptance becomes complete at once forever which cannot be revoked. Even that acceptance through the posted letter cannot be revoked by any subsequent quicker way of communication, e.g., by telegram arriving before the letter of acceptance reaches the offeror. Whereas, in Bangladesh such a revocation is possible even after posting the letter of acceptance under the express provisions of sections 4 and 5. *J. D. Jain*[1] gives a wonderful illustration of accidental formation of contract, which is worth mentioning here—

> 'A' makes a proposal to B, B accepts the proposal and posts a letter to that effect on 26th October. On the same day B sends a telegram revoking his acceptance and it so happens that both the telegram and the letter reach A at the same time when he was out for a walk. The servant takes delivery of both and keeps them on the master's table. On return 'A' reads the telegram first and then the letter. In this case there will be no binding contract between 'A' and 'B' because the communication of revocation comes to A's notice first then the communication of acceptance. But if 'A' reads the letter first and then the telegram comes there will be a binding contract between them. Such contracts are called accidental form of contracts because they depend merely on a matter of chance.

When does the contract become complete?

Under English law, in case of acceptance made by post, the communication of acceptance becomes complete as soon as

[1] Jain, J.D., *The Indian Contract Act*, 15th ed., 1988, Allahabad Law Agency, p. 42.

the letter of acceptance is posted and the contract is also completed at the same moment, even if the letter does not reach the destination ever.[2] But what is the law in Bangladesh? As it has been discussed earlier, in Bangladesh, in case of acceptance made by post, the communication of acceptance becomes complete in two phases. But when is the contract concluded? The rule which is generally followed in Indian sub-continent is that the contract is concluded at the first phase of communication of acceptance, i.e., when the letter of acceptance is posted.[3]

If we follow this principle a problem may arise in the circumstance where the letter never reaches the other party, because, in Bangladesh the communication of acceptance does not become complete as against the acceptor unless the letter of acceptance reaches to the other party according to section 4 of the Act. So, under such circumstances, how can a contract be concluded where even the communication of acceptance has not yet become complete totally? Rules of communication of acceptance by post in Bangladesh are different from English Law because of the clearly different drafting of section 4 of the Act. So, such conflicting situation arises if we follow the English law in this regard. Suppose, if it is taken that the contract is concluded when the letter of acceptance is posted, then what will happen if the acceptor revokes his acceptance by any quicker method? The acceptance will be revoked under section 5, but if it is deemed that the contract was concluded beforehand when the letter was posted then obviously how can the acceptance be revoked after conclusion of legally binding contract? Well, if the acceptor is given an option to revoke his

---

[2] Adams Vs. Lindsell, 1818, 1 B & Ald 681.

[3] Kamisetti Subbiah Vs. Katha Venkataswamy (1903) ILR 27 Mad 355.

acceptance before his letter of acceptance reaches the other party, then it appears, if we follow English law regarding the moment of conclusion of a contract, that during the time when the letter of acceptance is in the transit the contract really becomes a voidable one, because it becomes binding on the offeror whereas the acceptor becomes still at liberty to revoke his acceptance. But, is it really so? The answer is, 'no', as our Act is silent about the issue. If the letter of acceptance does not reach to the other party, what will be the legal consequence? Our Act is silent about it also. May be the reason of such anomalous situation is the absence of any clear statutory provision regarding the moment of conclusion of a contract.

Communication of revocation

The rules regarding communication of revocation are more simple. Section 4 simply says that the communication of revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to out of the power of the person who makes it; and as against the person to whom it is made, when it comes to his knowledge.

How is a communication made?

Section 3 of the Act reads out:

> The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

So, it means that the communication of proposal, acceptance or revocation can be made by two ways:

1) By the act or omission of the concerned party which intended it.

2) By the act or omission of the party which though did not intend it clearly but it has the effect of such communication of proposal, acceptance or revocation.

Revocation of offer

Two questions may arise in this regard :

When can an offer be revoked?

Section 5 of the Contract Act deals with this issue and says:

> A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards.

Thus the law makes the time for revocation of offer very clear saying that if the proposer likes to revoke it then he must do so before the communication of its acceptance is complete as against the proposer and it cannot be revoked after the communication of acceptance of such proposal is complete as against the proposer. When such communication becomes so complete that has been shown in section 4. Thus the last time for revocation of offer is the moment when the communication of acceptance has become complete as against the proposer, i.e., the moment when the letter of acceptance is posted by the acceptor towards the proposer.

How can an offer be revoked?

An offer once made does not make it irrevocable, rather it may be revoked within the framework of law. Section 5 says

about the last time within which an offer may be revoked and section 6 lays down the mechanisms or different ways of revocation of offer. Section 6 of the Act says—

A proposal is revoked—

1) By the communication of notice of revocation by the proposer to the other party;

2) By the lapse of time prescribed in such proposal for its acceptance, or, if no time is so prescribed by the lapse of reasonable time, without communication of acceptance;

3) By the failure of the acceptor to fulfill a condition precedent to acceptance; or

4) By the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Thus according to section 6 an offer may be revoked by the following modes:

1) By notice;
2) By lapse of time;
3) By non-fulfillment of condition precedent;
4) By death or insanity.

1) *By notice:* An offer may be revoked by communication of notice of revocation by the proposer to the other party. Thus an offer may be revoked by notice of revocation subject to the satisfaction of the following conditions:

   i. The notice of revocation must be communicated to the other party.

ii. Such communication must be made by the proposer to the other party. So, if the other party knows it purely from a stranger, then it will not amount to revocation of offer. Thus, the Act makes it a condition for revocation of offer by communication of notice of revocation that such notice must be served by the proposer to the other party. Obviously here the proposer also includes his authorized agent to do so, but it will not suffice if the other party becomes aware of the fact of revocation purely from any stranger source. This particular provision distinguishes Bangladeshi law from English law where such condition of service of notice to be made by the proposer is not obligatory. Thus in England, the offer will be revoked if the other party becomes aware of the fact of revocation of offer from whatever source the other party knows about it.

2) ***By lapse of time:*** An offer may also be revoked by the expiry of a certain time. Because, once an offer is made does not necessarily mean that it has to be open for acceptance forever. Thus for the purpose of such revocation the offers may be categorized into two categories:

i. *Offer with stipulated time:* Sometimes there may be an offer which bears with it the time for its acceptance that it cannot be accepted after the expiry of that period. In that case, after the expiry of that stipulated time, if the offer is not accepted, it will be revoked automatically.

ii. *Offer without stipulating time:* Even there may be an offer which does not say anything regarding its

duration to remain open for acceptance. In other words, if the offer does not mention the last time for its acceptance, then the offer will be revoked automatically after the expiry of a reasonable time and what is a reasonable time that is a question of fact which depends on the nature of each transaction and other relevant circumstances. Thus in case of selling of gold an offer generally will not be open for more than twenty four hours since the price of gold fluctuates everyday. But an offer to sell a piece of land generally will remain open for a few months. Thus, it was held in *Gladstone Vs. A.B.M. Shayesta Khan*[1], what is reasonable time within the meaning of section 6(2) of the Contract Act, 1872 is undoubtedly dependant upon the facts and circumstances of each case. It was held-

> Understanding given by the plaintiff to the defendant company for completion of the construction of bungalows for the defendant within 4 months' time from 17.11.50 not fulfilled—defendant company paid a large sum of money to the plaintiff for construction in advance—with the expiry of 4 months time defendant extended further time to the plaintiff to complete construction and also paid further sums of money construction remained incomplete even till 7.3.52 when the defendant company took possession of the incomplete bungalow—plaintiff failing to comply with the terms of the contract, the defendant company served a notice on 27.12.55 in which ten days time was given to complete the construction in default it was said it would amount to failure to fulfill the contract—the

[1] (1976) 28 DLR 345.

repudiation of contract on 27.12.55 by the defendant company quite legitimate—No plea can be set up on that account.[2]

3) *By non-fulfillment of condition precedent:* An offer may be revoked by non-fulfillment of a condition precedent by the other party in time. An offer may be conditional or unconditional. Again a conditional offer may be conditional on a condition precedent, i.e., the condition which has to be satisfied before the acceptance of that offer. Suppose, if A tells B that he is ready to sell his car to him provided B gets first class in LL.B. (Honours) examination and the result is published but it is found that B has not got first class, then the offer will be revoked for non-fulfillment of the condition precedent.

4) *By death or insanity:* An offer also may be revoked by death or insanity of the proposer. But the condition is that the fact of the death or insanity of the proposer must come to the knowledge of the offeree before the acceptance made by him. Thus, if the fact of the proposer does not come within the knowledge of the acceptor before acceptance then the offer will not be revoked though the proposer dies actually. So, the death or insanity of the proposer does not make the offer revoked *ipso facto*, rather that becomes conditional on the fact that the acceptor must know about the death or such insanity of the proposer before the acceptance made by him. If unknowingly of the death or insanity of the proposer the offeree makes the acceptance then the acceptance will be operative and the offer will not be treated as

---

[2] *Ibid.*

revoked. In fact, this is the clear meaning of this section, but the section does not distinguish between offers of personal nature, i.e., offer which involves the personal skill or performance, e.g., offer to sing a song or to paint a picture, and offers involving proprietary matters, the performance of which is not dependant on the personal skill or performance of the proposer, e.g., offer to sell a car. This distinction is important in the sense that an offer personal nature is no more possible to be performed after the death or insanity of the proposer, whereas this is possible in case of offers involving only proprietary matters. But the law plainly imposes the condition of becoming aware of the fact of the death or insanity of the proposer before acceptance to make the proposal revoked in every type of offer. Thus if an offeree accepts, being ignorant about the death of a proposer, the offer which is about to sing in a concert, according to this section the offer will not be revoked and the acceptance will be operative, but how will it be performed? Section 6 is silent about it.

Revocation of acceptance

When can an acceptance be revoked?

Section 5 of the Act lays down—

> An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Thus mere posting the letter of acceptance by the acceptor does not amount to the legal consequence that the acceptor will be bound by it, rather he will be bound by it only when

it comes to the knowledge of the proposer. And obviously one should be left at liberty to revoke one by which he has not become still bound by the law. Thus an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, and such communication becomes complete when the fact of acceptance comes to the knowledge of the proposer and in no case the acceptance can be revoked after the moment when the communication of acceptance becomes complete as against the proposer, i.e., after the moment when the fact of acceptance comes to the knowledge of the proposer, because at the same moment the acceptance will be complete as against the acceptor by which he will also become bound.

In fine, it is clear that the offer cannot be revoked after acceptance is made and it has been made clear by the following classic illustration by *Sir William Anson*:

> Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which can not be recalled or undone. But the powder may have lain till it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance. Acceptance converts the offer into a promise, and then it is too late to remove it [1].

[1] Anson's Law of Contract, ed. 1999, p. 60.

CHAPTER 3

CAPACITY OF PARTIES

Qualifications of the Parties:

The law does not give license to everyone to enter into a contract, rather the Contract Act, 1872, prescribes certain specific qualifications to attain to be competent to enter into a contract. Section 10 of the Act lays down certain requirements to be fulfilled to turn an agreement into a contract and competency of the parties is one of those conditions and accordingly the first requirement is that the parties must be competent to enter into a contract. Section 10 does not speak further about the competency of the parties. Section 11 is the further elaboration of the principle laid down in section 10 about competency of parties and who are competent to contract that is mentioned in section 11:

> 'Every person is competent to contract who is of the age of majority according to the 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.

So, if we dissect the section then we get three conditions to be fulfilled by a person to be competent to enter into a contract, that the person is—

1. of the age of majority;
2. of sound mind; and
3. not disqualified from contracting by any law to which he is subject.

Thus we can express the competency of parties negatively, that the following persons cannot enter into a contract:

(1) minors;

(2) persons of unsound mind; and

(3) persons disqualified by any law.

Now let us discuss the qualifications one by one.

The person must be of the age of majority

To be competent to enter into a contract one must attain the age of majority according to the law by which he is governed. It clearly indicates that each and every legal system prescribes a particular age as the age of majority which also may vary from state to state. Now, the question is what is the age of majority in Bangladesh?

Age of majority

Though section 11 of the Act speaks that the person to enter into a contract must be of the age of majority it does not prescribe the age of majority and that is in fact determined by the Majority Act, 1875. According to section 3 of the Majority Act, 1875, the age of majority is 18 years unless the superintendence of his property as been assumed by the Court of Wards in which case it is 21 years. In England a person becomes major on attaining 18 years in all cases.[1]

The person must be of sound mind

The second qualification to enter into a contract is that the person must be of sound mind. Again section 11 mentions the requirement of being sound mind only and it remains

[1] Section 1 of the Family Law Reform Act, 1969.

silent about the question 'who is a person of sound mind?' and section 12 gives this answer which specifically mentions the meaning of sound mind for the purpose of entering into a contract. Section 12 of the Act says—

> A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.
>
> *Illustrations*
>
> (b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.'

So, it appears from the wording of section 12 that for the purpose of making a contract a person will be deemed to be of sound mind if he has the capability to do the following two things:

1. to understand the contract; and
2. to form a rational judgement considering its effect upon his own interests.

So, a person who does not have the above two capabilities will be treated by the law as a person of unsound mind and as such to be incompetent to enter into a contract. A person may lose this capability due to idiocy, lunacy, drunkenness etc. *Justice Sinha* in an Indian case nicely analyzed the provision of section 12 in the following ways:

> According to this section, therefore, the person entering into the contract must be a person who understands what he is doing and is able to form a rational judgement as to whether what he is about to do is to his interest or not.

> The crucial point, therefore, is to find out whether he is entering into the contract after he has understood it and has decided to enter into that contract after forming a rational judgement in regard to his interest ... ... It does not necessarily mean that a man must be suffering from lunacy to disable him from entering into a contract. A person may to all appearances behave in a normal fashion, but, at the same time he may be incapable of forming a judgement of his own, as to whether the act he is about t do is to his interest or not [1].

Contract in *lucid interval*

Unsoundness of mind sometimes may be occasional. What is the rule of law regarding such type of unsoundness? Second paragraph to section 12 of the Act deals with this specific issue:

> A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.
>
> A person, who is usually of sound mind, but occasionally of sound mind, may not make a contract when he is of unsound mind.
>
> *Illustration*
>
> (a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

Accordingly, we see that section 12 lays down two rules regarding it:

1. If the person is usually of unsound mind, but occasionally of sound mind, can enter into a contract at the time when he becomes of sound mind.

---

[1] Inder Singh Vs. Parmeshwardhari Singh, AIR 1957 Pat 491.

2. If the person is usually of sound mind, but occasionally of unsound mind, he cannot enter into a contract when he becomes of unsound mind. In other words in such case also one can enter into a contract when he is of sound mind.

A common phenomenon is found in both the rules that a person can enter into a contract only when he is of sound mind, and in no case he is permitted to enter into a contract when he will be of unsound mind, either it is occasional or usual in his case.

Agreement by a person of unsound mind

Effect of agreement entered into by a person of unsound mind

In Bangladesh, the agreement of a person of unsound mind is void. But the provision of English law on this particular point is different where the contracts of persons of unsound mind are generally voidable.

The person must not be declared disqualified by the law

The third requirement of competency to contract is that the person must not be declared by the law disqualified to enter into a contract. It clearly indicates that the law sometimes may prohibit certain persons to enter into a contract or that one can not enter into a contract with such and such persons. If the person is within that prohibited degree of disqualified persons then there cannot be any contract with that person. Suppose the law declares an insolvent person as disqualified to enter into a contract and one cannot enter into a contract with the citizens of enemy states.

So far, the conditions of competency have been discussed. Now, let us consider a specific issue relating to the violation

of the first condition, that means what will be the effect if a person enters into an agreement who is not of the age of majority. This specific issue rather is preferred to be discussed under a separate heading on 'minor's agreement'.

Minor's agreement

Who is a minor?

A person who has not attained the age of majority is a minor. So, in Bangladesh every person under the age of 18 years is a minor in the eye of law.

Can a minor enter into a contract?

A minor cannot enter into a contract. Because section 11 of the Act categorically bars a person from entering into a contract who has not attained the age of majority, and accordingly a minor is incompetent to enter into a contract.

Nature of Minor's Agreement

What will be the nature of a minor's agreement? Section 10 of the Contract Act, 1872, lays down that competency of parties is required for the validity of a contract and section 11 mentions the criteria of competency and the total impact of these two sections is that a minor is an incompetent person to enter into a contract. So, if a minor enters into an agreement then that one will never turn into a valid contract, as section 10 requires the competency of parties as a prior condition to turn an agreement into a contract. So, it is clear that a minor cannot enter into a contract. But if a minor enters into an agreement what will be the legal status of that agreement? This question is not solved clearly by the Act, whereas in English law minor's agreements are generally voidable. So, being influenced by the English cases

our courts sometimes considered it as voidable. But this issue was finally settled in 1903 in the famous case of *Muhuri Bibi Vs. Dharmadas Ghose* [1] where it was held that a minor's agreement is void *ab initio*, that means without of any legal effect at all—it is born as a void one. In deciding the case Sir Lord North observed:[2]

> Looking at Section 11 there Lordships are satisfied that the Act makes it essential that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant.

The Contract Act, 1872, laid down that a minor cannot enter into a contract and the rule enunciated in *Muhuri Bibi Vs. Dharmadas Ghose*[3] is a further advancement of this rule which made it clear that 'what will be the consequence of a minor's agreement?'. So, now it is the established rule of law in Bangladesh that a minor's agreement is void *ab initio* and as such it has no legality at all. A transaction which is void is a nullity; it does not exist and never existed in the eye of law.[4]

Application of doctrine of 'estoppel' against minor

Meaning of 'estoppel'

Estoppel may be described as a rule by which, in some cases, one will not be allowed to plead the contrary of a fact

---

[1] (1903) 30 1A 114; 30 Cal 539.
[2] *Ibid.*
[3] *Ibid.*
[4] 1 PLR (Dac) 627.

or state of things which he has formerly asserted by words or conduct.[5] This is a principle of law of evidence which has been embodied in section 115 of the Evidence Act, 1872, as applicable in Bangladesh. Section 115 of the Evidence Act, 1872, says-

> When one person has, by his discretion, act or omission intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representatives shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

In fact section 115 of the Evidence Act, 1872, is founded on the rule laid down in the famous case of *Pickard Vs. Sears*, 1831 where it is observed that:

> Where one by his words or conduct willfully causes another to believe in the existence of a certain state of things and induces him to act on that behalf so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time [6].

Is it applicable against minor?

No, it is not applicable against the minor. In fact, the question of applicability of this rule against the minor arises when he misrepresents himself as a person of the age of majority and as such enters into a contract, then the question arises whether the minor can deny his earlier statement as regards his age. Since the doctrine of estoppel is not applicable against the minor so a minor will be permitted to deny his earlier misstatement regarding his age.

---

[5] Sarker's *Law of Evidence*, 12th ed., p.1029.
[6] 1831, A & E 468.

Reason for non-applicability of 'estoppel' against minor

The doctrine of 'estoppel' cannot be applied against the minor, because, there is no estoppel against the statute. If we analyze a case where a minor represents him as a major person then if the minor is not given the opportunity at subsequent time to deny his wrong statement then the ultimate consequence will be that a minor's agreement will be enforceable by law. In other words, if a minor is prohibited by the application of 'estoppel' to deny his wrong representation then such application in fact ultimately will validate the minor's agreement. But the policy of the statute is that a minor cannot enter into a contract. So, if 'estoppel' is so applied then it will go against the policy of the statute. But there cannot be any 'estoppel' against the statute. So 'estoppel' is not applicable against the minor.

Doctrine of 'Restitution'

This an equitable doctrine which means that if a minor takes any property or goods by misrepresentation of his age, then he will be compelled to restore things so obtained so long as the goods will be found in his possession and if the goods are already sold or converted by the minor, he can not be compelled to repay the value of goods, because that would amount to enforce a void agreement. The well known authority of this doctrine of restitution of equity is *Leslie (R) Ltd. Vs. Sheill.*[1]

Ratification of minor's agreement

Since a minor's agreement is void *ab initio* in Bangladesh, so there is no scope of its ratification at subsequent time even

[1] (1914). 8 Term Rep 335.

when the minor will attain the age of majority. Because, an agreement having no legal effect at all can never be awarded the enforceability. It was held in *Julhash Mollah (Md) and another Vs. Ramani Kanta Malo and another*[2] that an agreement which is void *ab initio* cannot be validated by ratification.

Beneficial Contracts

The general law is that the minor's agreement is void[3]. It is argued that this rule is to be confined only in the cases where the minor has to bear any obligation. But if a minor does not need to bear any obligation, rather he can enjoy only benefit, what will happen in that case? It was observed in *Ashraf Ali Vs. Etim Ali*[4] that—

> in an executed contract where the minor's part has been performed and nothing is left to be executed by the minor, i.e., obligation is left to be discharged by the minor and to be enforced against him, such a contract is enforceable by the minor as it is a contract for the benefit of the minor, such as completed by sale or, mortgage in favor of the minor and is enforceable in law.
>
> Sections 10 and 11 of the Contract Act enacted for the benefit and protection of the minor cannot be made to operate against the minor.
>
> In a lease by the minor in favor of the defendants and of which the lease-hold property was given in possession of the defendants, there is no obligation on the part of the minor which can be enforced by the defendants lessees.

---

[2] (1995) 47 DLR (AD) 35.
[3] Muhuri Bibi Vs. Dharmadas Ghose, (1903) 30 Cal 539.
[4] (1959) 11 DLR 185.

The opinion expressed in *General American Insurance Co. Ltd. V. Mandanlal Sonulal*[1] is also worth mentioning here. It was held that

> the provision of the law which make a contract by a minor not binding were no doubt intended to be for the benefit of the minors, and the courts in this country when faced with a contract which has been carried out by or on behalf of the minor, the performance of which by the other party is then raised on the ground of minority, have struggled hard to avoid holding the contract wholly void to the detriment of the minor.

Contracts of Apprentice or of service

Though according to English Law the minor would be liable in the case of a contract of service where the contract was for his benefit, it is clear that under section 11, the minor's contract (it should be agreement) being void, the minor would not be held liable.[2]

Liability for Necessaries

In Bangladesh, minor's agreements are generally void *ab initio*. If this is so, sometimes it will be difficult absolutely for the minors to survive, because then no body will be interested to enter into a contract with a minor, even though that becomes a fundamental necessity for that minor. The law thus gives a scope for minor to enter into certain types of transactions, but of course it must be kept in mind carefully that the law still does not permit a minor to enter into a contract, rather the law merely provides a scope for

---

[1] (1935) 59 Bom 656.

[2] Desai, J., in Raj Rani Vs. Prem Adib. AIR 1949 Bom 215.

certain types of transaction in special cases imposing certain liabilities upon the minor which are of course not contractual in nature. The law is embodied in section 68 of the Contract Act, 1872:

> If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.
>
> *Illustrations*
>
> (a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.
>
> (b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

Meaning of 'necessaries'

The key term used in the above section is "necessaries", because the question of liability will arise only if necessaries supplied by any person. So, the term 'necessaries' is to be defined clearly.

It is mentioned in section 68 with 'necessaries' the terms 'suited to his condition in life' which clearly indicates that the concept of 'necessaries' is not absolute, rather it is a variable idea which of course differs based on the condition of life. In fact, this has been made clear in some cases, the study of which shall provide us a clear idea about the meaning of the term 'necessaries'.' In this regard, we will

concentrate on some English law cases where the meaning of necessaries has been made clear.

In *Chappel Vs. Copper*[1], Alderson B observed:

> Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral and religious information may be necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract. Then the classes being established, the subject matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine of course according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of full age. So again, the nature and extent of the attendance will depend on his position in society ... ... But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed.

In *Peters Vs. Fleming* the Court opined that the word necessaries is not confined to articles necessary to the support of life, but includes articles and services fit to maintain the particular person in the station of life in which he moves.[2]

---

[1] (1844) 13 M & W 252, 258.

[2] (1840) 6 M & W 42 at 46-47. *Per* Parke B.

To render an infant liable for necessaries it must be proved, not only that the goods are suitable to his station in life, but also that they are suitable to his actual requirements at the time of their delivery and if he is already sufficiently provided with goods of the kind in question, then, even though this fact is not known to the plaintiff, the price is irrecoverable.[3] Thus in *Nash Vs Inman*[4] a Savile Row tailor sought to recover £122 19s for clothes including 11 fancy waistcoats, supplied to an infant, a Cambridge undergraduate, the action failed, because the evidence showed that the defendant was already amply supplied with clothing suitable to his position.

The following points are found regarding 'necessaries':

i. Thing must be essential.

ii. It will be determined based on one's condition and station of life.

iii. Though a particular thing is treated as necessary per se, that does not amount to the fact that an unlimited number or quantity of that thing will be treated also as necessaries. Thus, it also must be considered whether the minor has got already adequate supply of the said necessaries.

iv. Food, cloth, shelter, medical treatment, these are treated as necessaries *prima facie*.

v. One particular thing may be proved as essential at any time based on that peculiar circumstance, then that will be necessaries, though that same may not be treated as necessaries in ordinary times.

---

[3] Cheshire and Fifoot, *Law of Contract*, p.381, referring the case Barnes & Co Vs. Toye (1884) 13 QBD 410; Nash Vs. Inman (1908) 2 KB 1.

[4] *Ibid.*

vi. Thus it varies from person to person, time to time and circumstance to circumstance.

vii. In fine it may be summarized, as, things which are essential to survive reasonably as human being are necessaries.

Nature of Liability of minor for necessaries

The liability of minor for necessaries is clearly determined by the law in Bangladesh. Section 68 of the Contract Act, 1872, says that a right is conferred upon the person who supplies the necessaries to a minor to be reimbursed from the property of the minor. Here the minor has an extended liability that the minor will be liable to reimburse the supplier even if the necessaries supplied to the person whom he is legally bound to support. It follows two things:

i. *Nature of liability:* The nature of such liability is quasi contractual, and in no case it is contractual.

ii. *Extent of liability:* Minor is not personally liable rather his liability is limited against his property.

CHAPTER 4

FREE CONSENT

Free consent is an essential element of a valid contract. It is natural that for an agreement both parties to it must come to a common point. For that reason consent has become an essential element of an agreement. To constitute a contract even mere consent is not sufficient, rather the consent must be *free consent* according to law. First of all, we have to know the meaning of consent, then the criteria to be a free consent.

Meaning of 'consent'

Section 13 of the Contract Act, 1872, says that—

> two or more persons are said to consent when they agree upon the same thing in the same sense.

Thus, there are two statutory requirements to be a consent that the consent must be given

i. To the same thing, and

ii. In the same sense.

So, if the parties agree upon different things or in different senses then this will not be treated as 'consent'. Of course, the term 'thing' used in the first requirement means 'the contents of agreement'.

Meaning of 'free consent'

Section 14 defines 'free consent'. It reads out—

> Consent is said to be free when it is not caused by—
>
> 1) Coercion, as defined in section 15, or
>
> 2) Undue influence, as defined in section 16, or
>
> 3) Fraud, as defined in section 17, or
>
> 4) Misrepresentation, as defined in section 18, or
>
> 5) Mistake, subject to the provisions 20, 21, and 22.
>
> 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.

Thus, to be a free consent, that must not be caused by any of these five factors i.e. Coercion, Undue Influence, Fraud, Misrepresentation and Mistake. In other words, if a consent is given being affected by any of the above five factors, the consent will not be treated by the law as a 'free consent'.

When will it be deemed that a consent has been caused by any of these five factors? Second paragraph to section 14 answers to this question as that the consent will be deemed to be so caused when it would not have been given but for the existence of any of such elements. So, the mere existence of any of such elements is not sufficient, rather it must be proved that there is a 'causal connection' between that element and the consent obtained.

Let us now have a detail discussion of the above five factors from which a consent must be free.

Coercion

Section 15 of the Contract Act, 1872, defines coercion. It says—

> 'Coercion' is the committing, or threatening to commit, any act forbidden by the Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
>
> *Explanation.* —It is immaterial whether the penal code is or is not in force in the place where the coercion is employed.
>
> *Illustration*
>
> A, on board an English ship on the high seas, causes B, to enter into an agreement by an act amounting to criminal intimidation under the Penal Code. A afterwards sues B for breach of contract at Chittagong. A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Penal Code was not in force at the time when or place where the act was done.

Analyzing the above definition we see that there are two types of elements of coercion:

1. Substantial element; and
2. Psychological element.

1. *Substantial element:* To be a coercion any of the following four acts must take place—

   i. Committing any act forbidden by the Penal Code, 1860.

ii. Threatening to commit any act forbidden by the Penal Code, 1860.

iii. Unlawful detaining any property, to the prejudice of any person whatever.

iv. Threatening to detain, any property, to the prejudice of any person whatever.

It is worth mentioning here that the explanation to section 15 makes it clear that it is immaterial whether the Penal Code, 1860, is or is not in force in the place where the coercion is employed. So, if someone does any of the above acts in any place other than Bangladesh where the penal code is not in force that will not prevent the act to be termed as coercion because of this reason. Only material fact is that whether any of the above acts has been committed as such or not. The above illustration given with section 15 makes this principle clear.

2. *Psychological element:* It requires that the above act must be done with the intention of causing any person to enter into an agreement. That means, there must be an interrelated chain of causation that the act is committed with the purpose of obtaining the consent from the other party. So, if such intention cannot be proved there will not be any coercion for the purpose of this section. Of course, the existence of such intention will be proved either by direct evidence or will be inferred from the circumstances.

Undue influence

Section 16 says—

(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are

such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person hi a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Evidence Act, 1872.

Illustrations

(a) A, having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B For a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Ingredients of undue influence:

Two ingredients must be present to prove that a contract is induced by undue influence:

1. *Nature of relationship:* The relationship subsisting between the parties is of such nature that one of the parties is in a position to dominate the will of the other. In other words, one of the two parties of a contract is in a superior position and the superiority is as regards the control of the other's power of will. That means that superior party will be in such position that he can dominate the decision making of the other party. So, it is one type of psychological control over the other. This is the first requirement to exist to prove undue influence.

2. *Use of relation:* Mere existence of the above relation is not sufficient to constitute 'undue influence'; rather the second condition is that the above relation must be used to obtain an unfair advantage. So, only when it will be proved that not only the relation is of above type but this relation also has been used to gain an unfair advantage from the other party, there will be the proof of undue influence that it will be deemed that the contract is induced by undue influence.

Still the above elements can not provide a clear idea about undue influence as there is no mention as regards 'how will it be deemed that the relation is of the said nature?' that one of the parties can dominate the will of the other party since the power of domination upon another's will is an abstract one. The second paragraph to section 16 makes it clear, providing that—

> In the following cases a person will be deemed to be in a position to dominate the will of another:
>
> i. Where he holds a real authority over the other, e.g., the relation between police officer and the accused.
>
> ii. Where he holds an apparent authority over the other, e.g., the relation between master and servant.
>
> iii. Where he stands in a fiduciary relation to the other. That means the relationship is of utmost good faith, e.g., relation between parents and child, doctor and patient, lawyer and client, teacher and student, etc.
>
> iv. Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

It was observed in *Purnendu Kumar Das Vs. Hiran Kumar Das*[1] that ' The fact that since the agreement was entered when there was a case under section 406 of the Penal Code,

[1] (1969) 21 DLR 918.

1860 we are of the view that this is sufficient ground for holding that there was coercion and undue influence exercised on the defendant.'

In *Bindu Mukhi Vs. Sm. Sarda Sundari*[2] the Court observed—

> 'In order to determine the question of onus in a case attracted by section 16(3) of the Contract Act the first thing to be considered is the relationship between the parties, that is to say, whether one party was in a position to dominate over the other and then it must be proved that position was used to obtain an unfair advantage and even though the transaction may be unconscionable, relief can not be granted until the initial fact of the position to dominate the will is established. If such position is proved and the transaction also appears to be unconscionable, the burden of proof that the contract was not induced by undue influence lies on the person in a position to dominate the will of the other.'

Presumption of undue influence and the burden of proof

The general principle is that he who claims anything must prove it. Onus of the plea that the lender was not only in a position to dominate over the borrower but actually did so, is on the borrower.[3] So, if someone claims that his consent is caused by undue influence then he must prove the fact. But, clause 3 to section 16 provides an exception to this general rule of burden of proof in which case burden of proof will be shifted that the burden of proving that such contract was not induced by undue influence shall lie upon the person who is in a position to dominate the will of the other, that means in this case in fact the undue influence will be

---

[2] (1954) 6 DLR 97.
[3] Mohan Bashi Saha Vs. United Industrial Bank. (1968) 20 DLR 9.

presumed by the law. The burden will be shifted as such subject to the satisfaction two conditions:

1. The person who is in a position to dominate the will of another, enters into a contract with him.

2. The transaction appears, on the face of it or on the evidence adduced, to be unconscionable. This condition is essential for shifting the burden of proof on the person who was in a dominating position; otherwise the actual use of that possibility must be proved as a fact.[1] That means in the absence of this condition undue influence will not be presumed and consequently the burden of proof will not be shifted.

The key term of this condition is 'unconscionable' that the transaction must be 'unconscionable' and it may appear in either of the two ways—

i. On the face of it; or

ii. On the evidence adduced.

That means this 'unconscionable' will appear on the face of it or it will be proved by producing the relevant evidence. Thus, if the above two conditions are satisfied then there will be the presumption that undue influence has taken place and consequently the person who was in a position to dominate the will of the other must prove that he did not use his position and have not gained an unfair advantage as such from the other party.

The Court in *Bindu Mukhi Vs. Sm. Sarda Sundari*[2] observed that—

---

[1] Poosathurai Vs. Kannappa Chettiar (1919) L.R. 47 I.A. 1, 43 Mad. 546.

[2] (1954) 6 DLR 97.

> 'The burden of proof lies in the first instance on the party who raises the plea of undue influence. If that party proves that the other party was not only in a position to dominate his will, but that the transaction entered into was also unconscionable, then the burden of proof, that he did not use his dominant position to obtain an unfair advantage over the other is shifted on to him.
>
> ... ... When there is evidence of overpowering influence and the transaction is immoderate and irrational, proof of undue influence is complete. It is not necessary that such overpowering influence should be by threat or by committing any act forbidden by law or by unlawful detention, etc. If a person has some influence over another person and by means of that influence reduces the will of that person to his subjection, whatever may be the nature of the influence—spiritual, moral, social or any other influence, then it is such coercion as is sufficient to constitute undue influence.
>
> Undue influence usually arises in fiduciary position. But as between strangers between whom there exists no fiduciary relation certain forms of coercion, oppression or compulsion may amount to undue influence invalidating a contract. Undue influence is not a matter always capable of direct proof.'

It was observed in *Abul Hossain Vs. Farooq Sobhan & ors*[3] that—

> 'when the defendant No.1 had a dominant position on account of close association with the Martial Law Authority and the bargain obtained by defendant No.1 in the compromise petition was clearly unconscionable because the plaintiff had to give up his rightful claim in the contractual land, the defendant No.1 has to prove that

[3] 4 BLC (AD) 241.

the compromise was not attained by undue influence which he has miserably failed to discharge.'

Effect of undue influence

The effect of undue influence is that the agreement which is induced by undue influence becomes a voidable contract at the option of the party whose consent was so caused. Section 19A says—

> 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.
>
> Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Taka 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Taka 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay the Taka 100 with such interest as may seem just.

Fraud

The term 'fraud' has been defined in section 17 of the Contract Act, 1872. Section 17 says-

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it.;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself equivalent to speech.

Illustrations

(a) A sells, by auction; to B, a horse which A knows to be unsound, A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A "If you do not deny it, I shall assume that the horse is sound". A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would effect B's willingness to proceed with the contract. A is not bound to inform B.

Ingredients of fraud

Analyzing the above definition we see that there are two types of elements of fraud:

1. Psychological element.
2. Substantial element.

1. *Psychological element:* It requires that the following act must be done with the intention to deceive another party thereto or his agent, or to induce him to enter into the contract. That means to constitute a fraud there must be the fraudulent intention and as such to cause any person to enter into an agreement. This deceptive intention is the distinguishing factor between fraud and misrepresentation.

2. *Substantial element:* The initial scheme of this section was to enumerate the different types of fraudulent activities and that is evident from first three types of fraud as are mentioned in the section. But later on probably it has been felt that it is never possible to give the list of fraudulent activities and however long that list is that will never cover every kind of fraud. That is why fourth and fifth types have been added to widen the scope of fraudulent activities and as such to ensure that all probable forms of fraud are being covered by the section. First three are the enumeration of three kind of fraudulent acts, the fourth one says that every act fitted to deceive will be deemed as an act capable to constitute

fraud and the fifth one is more wide in this sense that it gives in fact a wide power in the hands of the law that if the law declares any act as fraudulent that will be fraud. So, according to the fifth one however innocent an act is that may constitute a fraud if that is declared merely by the law as fraudulent. To be a fraud any of the following five acts must take place—

i. The suggestion, as to a fact, of that which is not true, by one who does not believe it to be true. That means if a person makes a false statement knowingly to another person it will be fraud.

ii. The active concealment of a fact by one who has the knowledge or belief of the fact. Here two things must be present—one is the concealment and that concealment must be an active one. Active concealment must be distinguished from a passive concealment. It means that the concealment must be done actively. So, if the seller shows a dress keeping it's one corner into his hands where the cloth is defective, then if he does it unknowingly that there is a defect and he is putting the defective area into his hands, it will not be a fraud; but if he does it actively with fraudulent intention there will be a fraud. Secondly, the person who is concealing the fact must have either the actual knowledge of the fact or must have the belief about the fact.

iii. A promise made without any intention to perform it. Of course, this must be proved based on the circumstances of that case. So, if an insolvent person enters into a contract to purchase a car of latest model, it may be proved as a promise made without

any intention to perform it and as such there is a high probability of it to be a fraud.

iv. Any other act fitted to deceive. It has widened the concept of fraud for the purpose of this Act. Because, first three are mentioned in section 17 in fact as instances of fraud, but it is never possible to mention all types of fraud and in fact nobody knows how many types of fraud may be. That is why by this mention law has widened the scope of fraud to include all types of fraud that any act which fitted to deceive the commission of that act, with the above mentioned fraudulent intention, will be fraud.

v. Any other act or omission that the law specially declares as to be fraudulent. That means though an act is not considered to be fitted to be fraud yet if that is declared specially by the law as fraud then that will be fraud. So, if there is any question like this that 'why is it fraud?' the answer will be 'because the law declared is as void'. For example, the seller of an immovable property is required by section 55 of the Transfer of Property Act, 1882 (Act IV of 1882) to disclose to the buyer any material defect relating to that immovable property, and if no such disclosure is made then this non-disclosure shall amount to be a fraud.

Does mere silence amount to fraud?

The general principle is that mere silence does not amount to fraud. According to the 'explanation' to section 17 it appears that silence amounts to fraud only in the following two circumstances:

i. If the silence is in breach of duty. That means considering the nature and circumstances of the transaction if it appears that it was the duty of that person to speak but he remains silent then such silence shall amount to fraud.

ii. If the silence is equal to speak fraudulent statement. Suppose, a buyer asks the seller indicating a Intel Pentium II computer 'it is a Intel Pentium III computer, is not it?' and the seller remains silent—this silence amounts to fraud.

Misrepresentation

Misrepresentation is defined in section 18 of the Act. It says:

> "Misrepresentation" means and includes: -
>
> (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (2) any breach of duty which, without an intent to deceive, gains and advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;
>
> (3) causing, however innocently, a party to an agreement to make a mistake as to the substances of the thing which is the subject of the agreement.

Types of Misrepresentation:

Section 18 speaks of the following three types of acts as misrepresentation:

(1) *Unwarranted false statement*: If a person positively asserts (meaning of positive assertion is an absolute and explicit statement of a fact) that a fact is true and he believes it to be true when his information does not warrant it to be so. A statement is said to be warranted by the information of the person making it when he receives the information from a trustworthy source[1]. According to section 18(1), a positive assertion to be a misrepresentation must fulfill two conditions—firstly, it must be in a manner not warranted by the information of the person making it, and, secondly, the statement is not true though the person making it believes it to be true. Simply speaking, in contrast with fraud, if some one makes any false statement considering it as true then it will be a misrepresentation.

(2) *Breach of duty*: If there is any breach of duty in consequence of which another party is misled but this breach was done without any intention to deceive then it will be a misrepresentation. Some compared it with equitable rule of constructive fraud. In the case of a contract of insurance the policy holder requires the total disclosure and here non disclosure of any material fact which likely to affect the willingness of the other party if done without an intent to deceive may amount to misrepresentation being covered by this category.

(3) *Causing mistake as to the subject matter*: Causing however innocently a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement. In other words, if some

[1] Singh, Avter, *An Introduction to the Law of Contract*, 2nd ed., p.95.

one does anything in consequence of which another person makes mistake as to the subject of the agreement and it is done by that person in fact innocently then it shall amount to misrepresentation.

Effect of coercion, misrepresentation and fraud

The relevant laws have been laid down in section 19 which says—

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 a 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.

Exception.- If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.- A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) A, [illegible] to deceive B, falsely represents that 500 [illegible] of indigo are made annually at A's factory, [illegible] by inducing B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that 500 maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which shows that only 400 maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out, and the mortgage-debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Thus, the effect of coercion, fraud and misrepresentation is that the agreement becomes a voidable contract whose validity depends upon the option of the party whose consent is so caused as appears from section 19:

> 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.

Additional option in case of fraud and misrepresentation

The law gives an additional option in case of fraud and misrepresentation to the person whose consent is so caused

that he can insist the contract to be performed putting him in the position in which he would have been if the representations made had been true as appears from section 19:

> A party to a 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.

Thus, if the seller enters into a contract to sell one fan to a customer representing it as '*Millat* Fan' either fraudulently or innocently which in fact is a 'National fan' then the buyer considering the contract as voidable may exercise another option that he may insist the seller to perform the contract by selling a real '*Millat* Fan' to him.

Conditions to be fulfilled to make a contract voidable on the ground of misrepresentation and fraud :

Section 19 of the Act adding two explanations to it specifically made it clear that to make a contract voidable on the ground of fraud and misrepresentation two conditions must be satisfied:

First condition is imposed by the first explanation to section 19:

> If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Thus, this specific condition in fact emphasized on the diligence to be applied by the person whose consent is so

caused that if the fraud or misrepresentation would discovered by the application of ordinary prudence and diligence which the concerned party did not do recklessly the law will not further help him by making the contract voidable in his favor.

Second condition is imposed by another explanation added to it which is about the consent to be caused by fraud and misrepresentation. Accordingly, the contract will not be voidable if the consent was not in fact caused by the said fraud and misrepresentation. In other words, there must be a logical casual relation of sequence between the consent and fraud or misrepresentation. Explanation to section 19 says:

> A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable.

Thus, it appears that the mere commission of fraud or misrepresentation by one of the parties to a contract does not make it a voidable contract rather to make it voidable on these particular grounds the above two specific conditions also must be satisfied.

Special condition to be fulfilled to make a contract voidable on the ground of misrepresentation or silence amounting to fraud : doctrine of 'caveate emptor'

Even on fulfillment of above conditions a contract will not be voidable if the consent is caused by misrepresentation or silence amounting to fraud within the meaning of section 17 of the Act if another additional condition is not fulfilled, that is, it must be proved that the other party could not discover the truth by his ordinary diligence. So, in these two specific

cases, to make the contract voidable, the buyer also must play an active role in discovering the truth misrepresented or fraudulently presented by silence. Thus, if the buyer negligently does not care about discovering the truth which could be discovered applying the prudence of a reasonable person then he can not subsequently claim the benefit of making the contract voidable though his consent has been proved to be so caused. It reflects the policy of the law to assist a vigilant person, not a dormant careless one. It is worth mentioning here that the law requires the application of reasonable degree of prudence of a reasonable person and it does not require the application of the standard of an angel or super human being of extra ordinary merit.

But this test of application of ordinary prudence to discover the truth is not applicable in case of general fraud. In such cases, the buyers ability to discover the truth and its application thereby is absolutely immaterial, this is because may be for the reason that law should be rigidly applicable in cases of clear fraud.

The above condition is nothing but the embodiment of common law principle of 'buyer be aware' which comes from Roman origin *'caveate emptor'*. The theme of this common law principle is that the buyer should take reasonable care in the transaction and must be vigilant about his rights and quality and genuineness of the product. Otherwise he can not afterwards claim to set aside the contract on the ground of misrepresentation made by the other party which he could discover by application of his ordinary prudence and diligence. It in fact imposes upon the buyer also a duty of care about his own matters of interest.

Mistake

The relevant laws have been laid down in sections 20-22 which are as follows—

Section 20 says—

> Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.
>
> *Explanation.*- An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.
>
> *Illustrations*
>
> (a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Chittagong. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away, and the goods lost. Neither party was aware of these facts. The agreement is void.
>
> (b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.
>
> (c) A, being entitled to an estate for the life of B, agrees to sell it to C. B, was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Section 21 says—

> A contract is not voidable because it was caused by a mistake as to any law in force in Bangladesh; but a mistake as to a law not in force in Bangladesh has the same effect as a mistake of fact.

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Law of Limitation. The contract is not voidable.

Section 22 says—

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Different types of mistake:

First of all, let us classify different types of mistakes and then will consider the legal impact of each if that causes any consent to an agreement.

From the dimension of the nature of the mistake it may be of two types:

i. Mistake of fact; and

ii. Mistake of law.

Again from the dimension of the person who is committing it, mistake may be of two types:

i. Unilateral mistake; and

ii. Bilateral mistake.

Mistake of fact: The mistake which is related with facts of the agreement and not of law that is called mistake of fact. But an additional explanation of the term mistake of fact has been added by section 20 which says that an erroneous opinion regarding the value of the thing which forms the subject matter of the agreement is not a mistake of fact. Thus it appears from this explanation that even though the

erroneous opinion regarding the subject matter of the agreement seems to be a mistake of fact but it has been negatived to be so by the statute.

Mistake of law: the mistake which is related with the law is called mistake of law and section 21 makes it clear that such law must be among the laws which are enforceable in Bangladesh. This section adds another explanation of the law which says that the mistake of any foreign law will be treated like the mistake of fact for this purpose. Thus if any mistake of foreign law occurs then the rules relating to mistake of fact will come into operation.

Unilateral mistake: If only one party to an agreement is under a mistake, but not the other or others, it is called unilateral mistake.

Bilateral mistake: If both the parties to an agreement are under a common mistake, that is termed bilateral mistake.

Legal consequence of mistake:

Mere causing the consent by mistake does not invalidate the agreement. Legal consequences of each type of mistakes, if that causes the consent to an agreement, are given below:

Nature of the mistake	*Legal consequence*
Bilateral mistake of fact	Agreement becomes void.
Unilateral mistake of fact	Contract does not become voidable.
Bilateral mistake of law	Contract does not become voidable.
Unilateral mistake of fact	Contract does not become voidable.

On the ground of absence of free consent for its being caused by mistake the agreement becomes void on

fulfillment of the following three conditions as mentioned in section 20 of the Contract Act, 1872, which are as follows:

i. The mistake must be bilateral. So a mere mistake done by one of the parties shall not invalidate the agreement.
ii. The mistake must be of fact.
iii. The mistaken fact must be essential to the subject matter of the agreement. So, if any tiny bilateral mistake of fact occurs the agreement will not be void.

This is the only instance of invalidating of an agreement on the ground of its consent being caused by mistake on fulfillment of above three specific conditions. In case of every other mistake even if that causes the consent the validity of the agreement will not be affected adversely. When a contract was entered into between the parties on a mistake of fact, that contract cannot be binding on the parties in view of provisions of section 20 of the Contract Act[1]. It was observed in *S. S Fazli Vs. M/s Star Film Distributor* that—

> 'If there was no misrepresentation and both parties had been laboring under a misapprehension that the contract had been cancelled, the abandonment due to a mutual mistake, would not affect the plaintiff's rights. Under section 20 an agreement based on a mutual mistake is void and same principle will apply to an abandonment of a right under a contract.'[2]

[1] Baka Gopal Basak Vs. Kafiluddin Chowdhury, (1959) 11 DLR 125.
[2] (1964) 16 DLR (SC) 198.

CHAPTER 5

CONSIDERATION

Consideration is one of the essential elements of a contract. The general principle is that 'no consideration no contract'. But there are certain exceptions to this general principle where there may be contracts even without consideration.

Meaning of consideration

In ordinary sense, consideration means the exchange price. It has a different legal meaning which does not restrict it only within the area of monetary compensation rather this term has been given a wider legal connotation. The concept 'consideration' has been defined in section 2(d) of the Contract Act, 1872. It says:

> 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.

Analyzing the above-mentioned definition of 'consideration' we get the following ingredients of consideration:

i. It is an act or abstinence. That means it may be positive or negative.

ii. It is done at the desire of the promisor. So, if it is done at the desire of any third person that will not be

a consideration. Conversely, if anything is done at the desire of the promisor, then that will be a good consideration irrespective of the nature of the thing done, even that may be legal or illegal, adequate or inadequate.

iii. It may be of three forms, i.e. has been done, or is being done or is promised to be done at some future time.

Essence of consideration

According to the definition to be a consideration it is required that something is to be done, forborne, or promised at the desire of the promisor. It is worth mentioning here that consideration is not restricted only within monetary compensation. Consideration even may be termed as a burden discharged. In other words it can be explained as 'suffering' in the sense of loosing something, may be that is one's energy, service, money or anything. In fact, it is wonderfully defined in famous English case *Currie Vs. Misa*[1]:

> A valuable consideration in the sense of law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Justice Patteson's observation is also remarkable here:

> Consideration means something which is of value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant.[2]

A paragraph from the book 'Law of Contract'[3] written by *Professor Treitel* is worth mentioning here—

---

[1] (1875) LR 10 Exch 153.
[2] Thomas Vs. Thomas (1842) 2 QB 851.
[3] 10th edn, Sweet & Maxwell, 1999, at p. 64.

> The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. These statements relate to the consideration *for the promise of each party* looked at separately. For example, the seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price. It is quite irrelevant that the seller has made a good bargain and so gets a benefit from the performance of the contract. What the law is concerned with is the consideration *for a promise*—not the consideration *for a contract*.

Justice Patteson[1] observed that—

> 'The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.'

Consideration may move from the promisee or any other person

It appears from the clear language used in the definition of consideration that there is no such requirement that a

[1] Bainbridge Vs. Firmstone (1838) 8 A & E 743, at p. 744.

consideration must move from promisee, rather it may be furnished by the promisee or any other person and as such only material thing to be considered is that whether there is any consideration or not. So, a promise is enforceable if there exists any consideration and it is immaterial that by whom the consideration has been furnished. Thus in *Chinaya Vs. Ramaya*[2]:

> An old lady, by deed of gift, made over certain landed property to the defendant, her daughter. By the terms of the deed, which was registered, it was stipulated that an annuity of Rs. 653 should be paid every year to the plaintiff, who was the sister of the old woman. The defendant on the same day executed in plaintiff's favour an *ekrarnama* (agreement) promising to give effect to the stipulation. The annuity was, however, not paid and the plaintiff sued to recover it.

The promise was held to be enforceable though here the defendant's promise was given to the plaintiff and the consideration was furnished by the plaintiff's sister.

Types of consideration

Consideration may be of three types as it appears clearly from the language used to define the term 'consideration'— *has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing*. So, we get the following considerations:

1) Executory consideration;

2) Executed consideration;

3) Past consideration.

---

[2] (1882) 4 Mad 137; 6 Ind Jur 402.

1) Executory consideration: Executory consideration consists of a promise to do or to abstain from doing something at a future time. In such case, the liability becomes outstanding on both the sides and in fact most of the business contracts take place in this way. Suppose, A agrees to sell a car and B agrees to buy it at a certain price, here the consideration is executory.

2) Executed consideration: If one of the parties thereby performs his part and the liability on another's part remains outstanding, the performance of the earlier person is an executed consideration. In other words, if any party to a contract performs his part and the other party keeps it for future time then the part which is performed already will be called executed consideration. Suppose, A agrees to sell his computer for Tk. 30,000, B agrees and pays the amount stated to A but still A has not delivered the car, then the payment made By B will be considered as an executed consideration.

3) Past consideration: By using the words 'has done or abstained from doing' in section 2(d), the law clearly recognized past consideration as a good consideration, though it is not generally recognized as consideration in English Law. If the service is 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[1]. Thus, in *Sindha Vs. Abraham*[2], the plaintiff rendered services to the defendant at his desire during his minority and

[1] Re Casey's Patents (1892) 1 ch. 104, 115, per Bowen, L.J.
[2] (1859) 20 Bom. 755; cf. (1918) 20 Bom. L.R. 441.

continued those services at his request after his majority and 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 section 25 of the Act.[3] According to section 2(d), the act should be done at the desire of the pomisor. A past consideration should be distinguished from an executed consideration. An executed consideration is done in response to a positive promise, whereas the case of past consideration is not so.

Consideration: an essential element of a contract

Section 25 lays down the general principle regarding the requirement of consideration to form a contract in this way that—'an agreement made without consideration is void'. From here the rule has sprung that if there is no consideration there is no contract.

Exceptions to the general principle: contracts without consideration

Section 25 of the Contract Act, 1872, also speaks of exceptions to the general principle where there may be valid agreements without consideration. In the following three circumstances there can be valid agreements without consideration:

1) Agreement made out of natural love and affection: Section 25(1) while laying down the first exception says that—

> it is expressed in writing and registered under the law for the time being in force for the registration of documents

[3] Mulla, *The Indian Contract Act*, 10th ed., p.11.

and is made on account of natural love and affection between parties standing in a near relation to each other;

So, it appears that first exception requires to satisfy three conditions. They are as follows:

i. The parties stand in a near relation to each other and the agreement is made out of natural love and affection. It may be one between father and son, mother and son, husband and wife and likewise. One thing should be emphasized here that mere nature of the subsisting relationship that they are nearly connected with each other and existing of natural love or affection are not sufficient to enjoy the privilege of this sub-section rather it must be proved that that particular agreement was made out of that natural love and affection. So, even if there is an agreement between father and son where the relationship is one of natural love and affection but the agreement was made at the hit of anger not on account of love and affection that agreement shall not be enforceable without consideration because of non-fulfillment of the requirements imposed by law in this regard.

ii. It is written.

iii. It is registered .

2) The second exception is mentioned in section 25(2) which is about to compensate past voluntary service. Section 25(2) says:

> It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do;

Two types of promises are covered by this exception:

i. To compensate wholly or in part a person who has already voluntarily done something for the promisor. Suppose, A finds the lost dog of B and then B promises to give A Tk. 1000, the promise made is enforceable by law without consideration.

ii. To compensate wholly or in part a person who has already voluntarily done something for the promisor which he was legally compellable to do. Suppose, if A pays the gas bill of B and then B's subsequent promise to compensate A is enforceable without any consideration.

So, we see that a past voluntary service has been considered as a good consideration under section 25(2). It is immaterial whether that was a mere voluntary act or voluntarily doing something which, in fact, the promisor was legally bound to perform. One thing must be mentioned here that if something is done at past at the request of the promisor then it comes within the definition of section 2(d) as past consideration. But here the act done voluntarily is covered by it. This was not done at the request of the promisor, because then there would not arise of being covered by exception as that would be covered by the definition of consideration itself.

3) Third exception is about the promise regarding the payment of time barred debt. Section 25(3) lays down that:

> it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

Following conditions must be satisfied to enjoy the privilege of a contract without consideration according to the above mentioned sub-section, these are:

i. The promise must be about payment of time-barred debt. So, if there is any claim which is barred by the law of limitation for the time being in force, then the subsequent promise made to pay the debt is enforceable without consideration if the next condition is satisfied.

ii. It should be written and signed.

It was held in *Daulat Ltd. Vs. Pubali Bank*[1] that such a document must also be properly stamped. An unconditional promise in writing and signed by the party to pay on demand a time-barred debt though not a fresh transaction comes under Article 49 of Schedule to the Stamp Act, 1899 (Act No. II of 1899) and hence will require requisite stamp.[2]

An unconditional promise to pay a time-barred debt in writing duly signed does not come under section 19 of the Limitation Act, 1908 (Act No. IX of 1908) if it is not made before the expiration of the period of limitation. ... It directly comes under section 25(3) of the Contract Act.[3] It was held in *Riasatulla Vs. The Tripura Modern Bank Ltd.*[4] that when a promise is expressed in writing with signature from which a contract to pay a time barred debt can be spelled out, it amounts to a contract within section 25(3) of the Contract Act. The Court observed in *Tripura Modern Bank Ltd. Vs. Elahi Baksha*[5] that—

---

[1] 39 DLR 243.
[2] *Ibid.*
[3] *Ibid.*
[4] (1968) 20 DLR 44.
[5] (1966) 18 DLR 498.

while an acknowledgement under section 19 of the Limitation Act is required to be made before the period of limitation prescribed has expired, a promise under section 25(3) of the Contract Act may be made after the period of limitation.

The letter in the present case which contains the phrase (I sign below acknowledging the debt up to date) clearly indicates a promise to pay so as to operate as a promise within the meaning of section 25(3) of the Contract Act.

Unqualified acknowledgement made by the debtor is by itself a promise to pay. Therefore, the expression used in the letter referred to above is an agreement as contemplated by section 25(3) of the Contract Act and gives a fresh starting point of limitation to the Bank for realization of the debt specified in the said letter.

Adequacy of consideration

The word 'something' used in the definition of 'consideration' in section 2(d) of the Contract Act implies an important principle regarding consideration that it may be anything. It is immaterial whether that is sufficient or not. The definition says:

> 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.

Here *something* means anything which has any value in the eye of law. It implies that consideration need not be adequate, because it is not mentioned in the law that consideration must be sufficient rather *'something'* which requires the existence of consideration in any form. In other words, it is required by law that consideration must exist in reality whether that is sufficient and adequate compensation in exchange of the promise or grossly inadequate against the

promise made. Hence there is a popular conclusion that consideration must be real, it need not be adequate.

So, the only point is that whether anything is done at the desire of the promisor? If so, then that will be sufficient to constitute a consideration as required by law for the formation of valid contract irrespective of the gravity, quality, quantity or inadequacy of the thing so done. The observation made by *Peter Gibson LJ* in a recent English case[1] is worth mentioning here—

> On the second point, the consideration moving from the plaintiff, (counsel for the defendant) submitted that in reality there was no consideration provided by the plaintiff. The plaintiff was expressing himself to be ready, willing and able to proceed to exchange contracts, which was, he submitted, simply what he would have to do in any case. Further, he said that the judge rightly described the threat by the plaintiff to issue an injunction as vapid, that is to say of no substance. He accordingly submitted that there was nothing by way of valuable consideration which the defendant received. I cannot accept these submissions either. I accept that the threat of an injunction only had a nuisance value in that I cannot see how the plaintiff could have succeeded in any claim. Nevertheless, that nuisance was something which the defendant was freed from by the plaintiff agreeing to the lock out agreement. Further, the threat of causing trouble with Miss Buckle was again a matter which could have been a nuisance to the defendant and again removal of that threat provided some consideration. But I also believe that the promise by the plaintiff to get on by limiting himself to just two weeks if he was to exchange contracts was of some value to the defendant. The defendant had the benefit of knowing that if it chose to give the plaintiff a draft contract to agree, there would be no delay on the

[1] Pitt Vs. PHH Asset Management Ltd. (1994) 1 WLR 327, at p. 332.

> plaintiff's part beyond a maximum of two weeks thereafter. The judge held that these three items constituted valuable consideration sufficient to support the lock out agreement and I respectfully agree with him.

If the parties agree for a transaction with inadequate consideration then the law is not to interfere in it. Because, the amount of consideration is a matter to be decided by the parties to a contract. The law will examine only whether there is any consideration or not. The parties will bargain and at one stage they will be agreed and as such the Court or the law must not interfere in this freedom of transaction. But the Court will examine side by side whether the consent is given freely or not. Once it is seen that the consent is given freely then the Court will not take the matter of inadequacy of consideration into consideration. In other words, if any party freely consents to do something with grossly inadequate consideration, the law will not prohibit him. But if the court sees that the consideration is inadequate then the court may be suspicious about free consent that whether the consent was given freely or not. This provision of law is embodied in the explanation II to section 25, which spells out as follows:

> An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

So, the explanation makes it clear that if consent is given freely then the agreement will not be void merely because the consideration is inadequate. But the Court may take into account the amount of consideration to determine the question whether the consent of the promisor was freely given or not.

CHAPTER 6

LEGALITY OF OBJECT AND CONSIDERATION

It is one of the essential elements of a valid contract that the object and consideration of an agreement must be lawful. Thus there may be an agreement with an illegal consideration or object, but not a contract. To constitute a contract both consideration and object of an agreement must be lawful.

Meaning of object and consideration:

Section 2(d) of the Contract Act, 1872, defines the term 'consideration'. It says *'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'*. But there is no such statutory definition of the term 'object' and it must be understood from its ordinary legal sense. The term 'object' is different from the word 'consideration' which implies the purpose of any particular act. So, in relation to an agreement the term 'object' means the specific purpose of the agreement. In other words, consideration is something done at the desire of the promisor whereas object is the purpose for which the acts are being done. For instance, there may be an agreement between persons to sale arms for killing some persons unlawfully—here the object of this agreement is to kill some persons unlawfully.

Provisions regarding legality of object and consideration:

Section 10 of the Act requires that to turn an agreement into a contract the consideration and object must be lawful. Section 23 lays down the basic rules regarding the considerations and objects which are lawful. Again, section 24 deals with the illegality of consideration in part. Let us examine the provisions relating to legality of object and consideration:

Which considerations and objects are not lawful?

Section 23 says—

> The consideration or object of an agreement is lawful, unless—
>
> it is forbidden by law; or
>
> is of such nature that, if permitted, it would defeat the provisions of any law; or
>
> is fraudulent; or
>
> involves or implies injury to the person or property of another; or
>
> the court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful.

Illustrations

(a) A agrees to sell his house to B for 10,000 Taka. Here B's promise to pay the sum of 10,000 Taka is the consideration for A's promise to sell the house, and A's promise to sell

the house is the consideration for B's promise to pay the 10,000 Taka. These are lawful considerations.

(b) A promises to pay B 1,000 Taka at the end of six months if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A 1,000 Taka yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void as its object is unlawful.

(f) A promises to obtain for B, an employment in the public service, and B. promises to pay 1,000 Taka to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the

defaulter is prohibited from purchasing the estate. B., upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's *mukhtar*, promises to exercise his influence as such, with B in favour of C, and C promises to pay 1,000 Taka to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter on hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code.

So the above section declares the following considerations and objects as unlawful:

Forbidden by law: If the consideration or object is in contravention of any legislative enactment or regulation made by a competent authority that will not be a lawful consideration. The obvious illustrations are the acts forbidden by the Penal Code, 1860. Of course, beside Penal Code, 1860, there are many other laws which also forbid certain acts to be done, those are also covered by this provision. For example, if there is any agreement between A and B to commit a theft and to divide the property so acquired between them equally, that agreement is void, because the object is forbidden by law.

Defeat the provision of any law: It implies that though the act agreed to be done is not a direct violation of law but if that is permitted to be done that would defeat the provision of any law, then such object or consideration will also be unlawful. In such cases, it may defeat the provision of any legislative enactment or any provision of any personal law or of any other law in force in Bangladesh. Thus, if a Muslim

couple enter into an agreement that the wife will live separately after the marriage, the agreement is void, as the agreement is made in violation of Muslim personal law.
It was observed in *Haji Abdullah Khan Vs. Nisar Muhammad Khan*[1] that—

> If under the law there is some condition precedent attached to the validity of a transfer it is open to the parties to enter into an agreement subject to compliance with the condition precedent. The attack on the agreement for sale on the ground of public policy could only succeed if it was shown that the intention of the agreement was to defeat a law. If the parties that enter into an agreement for sale contemplate only a sale with the requisite sanction they are not making any effort to defeat the law.

Fraudulent: If the object or consideration becomes fraudulent then the agreement will be illegal agreement. What is fraudulent that is a question of fact. It may be fraudulent by concealing the material facts or otherwise.

Injury to the person or property of another: Here injury means the violation of one's legal right though there may not have any actual loss or damage. Thus the agreements to break the car of another, or to defame another, or to trespass to another's property, though may not cause actual loss, are void.

It was held in *Hossain Ali Khan Vs. Firoza Begum*[2] that the contract which adversely affects the lawful interests of a third party both in status and in respect of right to property is void. In this case[3]—

---

[1] (1965) 17 DLR (SC) 481.
[2] (1969) 21 DLR 9.
[3] *Ibid.*

The wife brought a suit for setting aside a compromise decree on the ground that it was obtained by fraud and the *solenama* was filed without her knowledge. The defendant husband's case was that compromise was signed by the plaintiff after been aware of its contents and that she receives a sum of Rs. 2,30,000 in consideration of the compromise.

It was stated in the *solenama* that the plaintiff had admitted that the son born to her was not of the defendant and the said son was not entitled to any monthly allowance from the defendant.

The Court of appeal blow on this compromise observed as follows: -

> On the plain meaning of these terms, the boy stands to be illegitimate child and is not entitled to any maintenance from the defendant. Needless to say that these terms do involve injury to the status and property of the minor son. That being the position, the consideration of the *solenama* is void.

Held:

Every agreement unlawful in nature is void. Consequence of the admission by the plaintiff in the present *solenama* which forms part of the decree is that the son will be reduced to the status of an illegitimate son. It clearly involves injury to his status, right to maintenance and also inheritance. That being so, the terms of the contract would come within ambit of section 28. Such an agreement is unlawful and is void.

The Court regards it as immoral or opposed to public policy: This is in fact a wide power given in the hands of the Courts, because what is 'immoral' or 'opposed to public policy' is a mixed question of law and fact, since the statute does not define these terms directly, so the interpretation remains on the discretion of the judges. Moreover, 'morality' is really a variable concept

which is dependant on many factors including the culture of one time. And 'public policy' precisely means public welfare which indicates the ultimate well being of the people at large. It was observed in *Dula Mia Vs. Haji Md. Ebrahim*[1] that—

> Public policy and morality referred to in section 23 of the Contract Act, are by their very nature variable things and always an unsafe and treacherous ground for legal decision. The determination of what is or is not contrary to public policy or morality must necessarily depend upon the merits in each case and upon the stage of development of public opinion and morality of the community concerned as a whole. The Courts are, as such, very cautious in deciding the question and normally reluctant to invent new heads of public policy or to extend it beyond the class of cases already covered by it.
>
> Public policy does not comprehend, as often popularly imagined, all the political policies from time to time of the Government nor does it render void agreements merely because they tend to defeat some purpose ascribed to the law which is neither apparent nor necessarily implied in the language of the enactment.

Thus it is now well settled that the provisions of section 23 of the Contract Act have to be construed strictly and the Court should not invent new categories or new heads of public policy in order to invalidate a contract.[2]

If the contract of lease of a factory was lawful at the time when the lease was executed the fact that the operation of the factory was found as falling within mischief of a statute would not make the lease in its inception opposed to public policy.[3]

---

[1] (1956) 8 DLR 616.

[2] Manzoor Hussain & others Vs. Wali Muhammad & others, (1965) 17 DLR (SC) 369.

[3] Haji Abdul Karim Vs. Sh. Ali Mohr, (1959) 11 DLR (SC) 313.

In *Lal Mia Vs. Abdul Gani*[4] it was decided that it is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compromising an offence which is not compoundable in law and an agreement to that effect is wholly void. If from the evidence and circumstances it can be inferred that the consideration is referable to the withdrawal of a criminal proceeding the agreement must be held to be void under section 23 of the Contract Act.[5] If, however, there is a *bona fide* civil dispute which the parties have decided to settle and there happened to be subsidiary proceedings in a criminal court, it would be contrary to public policy and to justice and equity to allow any person to escape his legal liabilities on the mere technical ground that there was some understanding that these criminal proceedings too would not be pressed to conclusion.[6]

The Court observed in *Moti Mia Vs. Ayesha Khatun*[7] and another that—

> if for withdrawing and compromising a non-compoundable case an agreement is entered into between the parties then the same is against public policy and the bar of section 23 of the Contract Act is attracted.
>
> By an oblique and indirect reference the object of the agreement cannot be brought within the mischief of section 23 of the Contract Act.
>
> If consideration is for compromising a non-compoundable offence then it is hit by section 23 of the Contract Act as opposed top public policy.

---

[4] (1953) 5 DLR 338.
[5] *Ibid.*
[6] *Ibid.*
[7] (1996) 48 DLR (AD) 64.

It was observed in *Radha Ballav Basak Vs. Krishna Sundari Basak* that—

> In order to determine whether the consideration of a document is prohibited by section 23 of the Contact Act it is to be seen whether the facts are that this contract came into existence, when a criminal prosecution was hanging on the head of the executant or the contract was entered into for the purpose of taking away the prosecution for a non-compoundable offence from the hands of the Crown prosecutor in their own hands. It would be legitimate to infer that in those circumstances, the consideration would be a consideration which is prohibited by section 23.

The Court observed in *Md. Abdul Kasem Vs. Mofizuddin Shah*[1] that—

> It has been contended that since the document was brought into existence during the pendency of a criminal proceeding in which plaintiff was the complainant and defendant was the accused, it is hit by section 23 of the Contract Act as being against public policy, namely the stifling of a criminal prosecution. The most important question in this behalf is, has the criminal case been settled as result of and because of the impugned document? If it is so, it would be hit by the provisions of section 23, if not, it would not come within the mischief of the said section, notwithstanding the fact that it come into existence during the pendency of the criminal proceeding.
>
> The execution of the document at a time when the suit was pending may amount to a strong piece of circumstantial evidence tending to show that the criminal proceeding was compromised as a result thereof, but it is no more than a piece of evidence which may be rebutted. The Court would look to the other evidence and attending circumstances in order to arrive at a finding whether the

[1] (1965) 17 DLR 435.

> execution of the document was the consideration for a compromise of the said criminal proceeding. If the document is merely executed during the pendency of such a criminal proceeding and if it is not the basis of compounding the criminal proceeding, it would not hit by section 23 of the said Act.

If the principal contract is one which is void *ab initio* or comes within the mischief of section 3 of the Contract Act, then the arbitration clauses providing for settlement of dispute between the parties by arbitration will be unenforceable and the award thereon becomes a nullity.[2] Where a person invoking the aid of a court to invalidate a contract on the ground of illegality is himself implicated in the illegality, the court will not, as a rule, assist him.[3] It was held in *Central Bank of India Ltd. Vs. Messrs. Jan Muhammad Haji Ismail*[4] that it is undoubtedly true that the contracting parties may enter into a contract on special terms if they are not contrary to the provisions of section 23 of the Contract Act and they shall be bound by the terms of such agreement, but a party seeking protection under such a special term must first establish that any of the clauses of the said special contract is attracted to the case. The Court decided in *Md. Azam Khan Vs. Akhtarunnessa Begum*[5] that a suit for recovery of property transferred in consideration for an illegal promise would not lie and so also a suit for declaration that a sale deed executed in consideration for an illegal promise will not lie. It was observed by the Court[6]—

> When the parties to a contract are themselves in *pari delicto* neither of them is entitled to ask any relief from a Court of

---

[2] (1965) 17 DLR (SC) 369.
[3] *Ibid.*
[4] (1965) 17 DLR 582 .
[5] (1957) 9 DLR (WP) 19.
[6] *Ibid.*

law. The Court will not come to the aid of either party to retrieve his position. In a case where the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate.

Section 65 is not applicable where a contract is void *ab initio* under section 23 or section 25 of the Act.[1] In a Pakistani case[2]—

> An agreement entered into between the appellant and the respondent contained a clause providing that if the respondent attempts to offer bribe to any employee of the appellant, the appellant could confiscate the price of the work done by the respondent even if such attempt occasioned no loss to the appellant. Accordingly, on an allegation that the respondent offered bribe to an engineer the appellant confiscated the price of the work done by the respondent. The trial Court found that the said clause was penal within the meaning of section 74, Contract Act and held that the appellant could have confiscated only a reasonable sum out of the pride of the work completed before the offer of bribe. On appeal to the High Court, the Court
>
> *Held:*
>
> (a) The clause providing that the price of the work done by the contractor may be confiscated even if no loss was occasioned was violative of section 73, Contract Act and void under section 23 but section 74 which dealt with breach of valid contract had no application to the present agreement which was void *ab initio;*
>
> (b) that the clause in question conferred on the appellant jurisdiction to punish the offence of bribe and that the appellant could not assume that jurisdiction unless

[1] P. K. Basak Co. Vs. Gossen & Co., (1960) 9 DLR 1.
[2] PLR (1960) 2 WP 602.

empowered by the legislature subject to the condition that state was a party to the proceedings;

(c) that the clause was also exceptionable because it subjected the respondent to double penalty, that is, confiscation of price of the work done and prosecution in the criminal court.

It was held in *Purnendu Kumar Das Vs. Hiran Kumar Das*[3] that a contract is hit by section 23 of the Contract Act when consideration or object of an agreement is unlawful. In this case[4]—

> The plaintiff had initiated three criminal proceedings of which one was under section 406 P.P.C. against his brother the defendant, and when these proceedings ere pending before the Magistrate, the said Magistrate suggested a compromise between the brothers as result of which the defendant after 4 days executed a *bainapatra* in favor of the plaintiff to sell to him the suit properties and on that very date proceeding under section 406 was dismissed for non-prosecution. When a suit for specific performance of contract was filed by the plaintiff, it was held:
>
> > The very fact that a case was initiated by the plaintiff under section 406 of Pakistan Penal Code goes to show that the defendant was in a very difficult position when the learned Magistrate was dealing with three cases and was suggesting compromise and as it appears that term of agreement were settled on 25.4.55 and the case under section 406 Pakistan Penal Code remained pending till 30.4.55 when the parties entered into

[3] (1969) 21 DLR 918.
[4] *Ibid.*

> the agreement and an order was passed in the proceeding in these terms: "The complainant does not proceed, dismissed under section 203 Criminal Procedure Code." We are of the view that this is sufficient to hold that this contract is hit by section 23 of the Contract Act as the consideration or object of the agreement is unlawful.[1]

It was observed by the Court of Appeal in *Irfan Sayed (Md) Vs. Rukshana Matin*[2] and others that—

> The phrase "equity and good conscience" is not in Order VII rule 11 of the Code of Civil Procedure and as such the learned single Judge wrongly imported this concept to that provision of the Code which he was not permitted to do and there is no reasoning as to how the agreement is void as opposed to Public Policy under section 23 of the Contract Act and as to why the suit ought to have been filed in the family Court when there was no issue as to guardianship and custody of the child and as such, the judgment suffers from irrelevant and rambling exercises bereft of legal acumen and hence the same is set aside.

Legal consequences of agreements where considerations and objects are unlawful in part: Section 24 says—

> If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

---

[1] *Ibid.*

[2] 1 BLC (AD) 67.

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 Taka a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

Thus, the laws enumerated in the above section may be projected through the following table:

Nature / number of consideration	*Nature / number of object*	*Legal consequence*
Any part of a **single** consideration is **unlawful**	For one or more objects	The agreement is void.
Any one or any part of any one of **several** considerations is **unlawful**	For a single object.	The agreement is void.

CHAPTER 7

VOID AGREEMENTS

A contract starts its formation with the proposal at its first phase, which ultimately turns out as an agreement passing through the stage of promise. That agreement then will reach to its final destination, i.e., may be turned into a contract if it can satisfy the requirements of a contract. But if it fails to satisfy the legal requirements to be a contract then that becomes nothing but unenforceable by law which cannot turn into a contract ever.

What is void agreement?

Section 2(g) of the Contract Act, 1872, says that "an agreement not enforceable by law is said to be void". So the law is very much simple on this point which states that an agreement is void if it is not enforceable by law. As such we get two elements of a void agreement:

i. There is an agreement, and

ii. it is not enforceable by law.

There must have been an agreement for the first time and a mere promise which has not been turned into an agreement can not be termed as void agreement though that does not become enforceable by law. Then the sole test for an agreement to be declared as void is that whether that is

enforceable by law or not. If not then will be termed as void agreement.

Meaning of 'enforceable by law':

It is worth mentioning here that the law has not kept the term 'enforceable by law' undefined to be interpreted at discretion, rather the reading of sections 2(h), 2(g) and 10 together gives a clear answer to the question that 'when will an agreement be enforceable by law' or 'what are the conditions to be satisfied by an agreement to be enforceable by law' or 'when can an agreement be termed as not enforceable by law'.

Section 2(h) states that 'an agreement enforceable by law is a contract'. Section 10 lays down that—

> All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

An agreement which is a contract that is, of course, enforceable by law and since section 10 lays down the agreements which are contracts, this in fact says when does an agreement become enforceable by law, and accordingly we get the answer that to be enforceable by law, i.e., to be a contract, an agreement must fulfill the following conditions:

i. The parties must be competent;
ii. There must have free consent of parties;
iii. Lawful consideration must be there;
iv. The object of the agreement must be lawful; and

v. The agreement is not expressly declared void by law. Section 10 is nothing but a proper explanation to sections 2(g) and 2(h) that explains the phrase 'enforceable by law'. If an agreement satisfies the above five conditions then it will be enforceable by law and consequentially be termed as a contract. So, if an agreement does not satisfy any of these five conditions, it will not be enforceable by law and an agreement not enforceable by law is said to be void[1]. So there may be an agreement by the incompetent parties without free consent and it is immaterial whether the consideration or object is lawful or not, but obviously that can never turn into a contract rather it will be termed as void agreement. So, according to the indication given by section 10, there may be five types of void agreements. The following agreements are void in which—

i. any of the parties is incompetent to enter into an agreement, or

ii. free consent is absent, or

iii. consideration is not lawful, or

iv. the object is not lawful.

v. Apart from the above mentioned four reasons there are certain other agreements which are void because the law declares them expressly as void. And it is mentioned clearly that the last type of void agreement is that agreement which is expressly declared void by the law.

First four types of void agreements have already been discussed in the preceding chapters, which need not have any further discussion, these are:

[1] Section 2(g), the Contract Act, 1872.

i. If the parties to an agreement are not competent that will be void (sections 10, 11, 12 and *Muhuri Bibi Vs. Dharamadas Ghose* [2]).

ii. Consent may not be termed as 'free' as is required by section 10 for various reasons[3]. Every agreement in which the consent is not given freely cannot be termed as void. Rather in most of such cases it becomes voidable[4] one and on this ground an agreement becomes void only in one circumstance where the consent of an agreement is caused by bilateral mistake of fact essential to the agreement (section 20).

iii. Every agreement of which the object or consideration is unlawful is void.[5]

iv. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.[6]

The discussion about the last type of void agreement will be the main concern of this Chapter. Section 10 lays down that—

'all agreements are contracts if ... ... and *are not hereby expressly declared to be void*'.

This particular condition implies three things:

i. If an agreement falls within the category of expressly declared void agreements then it will not be a contract.

---

[2] (1903) 30 1A 114; 30 Cal 539.
[3] *See* section 14, the Contract Act, 1872.
[4] *See* sections 19,19A, the Contract Act, 1872.
[5] *See* section 23, the Contract Act, 1872.
[6] *See* section 24, the Contract Act, 1872.

ii. So, obviously there are certain agreements which are expressly declared to be void.

iii. The term 'hereby' used by section 10 implies to mean the express declaration of void made by this law, i.e., the Contract Act ,1872.

Different types of void agreements:

So, it can be concluded that there are certain agreements which have been expressly declared as void by the Contract Act, 1872. These are the following:

1. Agreement made without consideration (section 25).
2. Agreement in restraint of marriage (section 26).
3. Agreement in restraint of trade (section 27).
4. Agreements in restraint of legal proceedings (section 28).
5. Agreements the meaning of which uncertain (section 29).
6. Agreements by way of wager (section 30).
7. Agreements contingent on impossible events (section 36).
8. Agreements to do impossible acts (section 56).

Agreement made without consideration

An elaborate discussion has been made in chapter 5 about it.

Agreement in restraint of marriage

Section 26 lays down that—

> every agreement in restraint of the marriage of any person other than a minor, is void.

Thus the section prohibits every type of restriction whether total or partial or of any type. The language used in this section is wide enough so as to declare every type of agreement in restraint of marriage as void other than the marriage of a minor. This unguarded restriction may create certain practical anomalies with some other laws.

Under Islamic Law, the wife enjoys a limited power to divorce her husband and accordingly the wife may divorce her husband by an exercise of her delegated power of divorce which may be given as conditional upon the 2nd marriage of the husband though Islamic law permits polygamy. It would seem, therefore, that a provision in a *Kabinnamah* by which a Muslim husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void, and if the wife divorces herself from the husband on his marrying a second wife, the divorce is valid, and she is entitled to maintenance from him for the period of *iddah*.[1]

Again, an agreement by a Hindu at the time of his marriage with his first wife not to marry a second wife whilst the first was living would be void according to the literal terms of this section.[2] Did the legislature contemplate it? Mulla rightly commented that 'it may be doubted whether such a result was ever contemplated by the Legislature'.[3]

Agreement in restraint of trade

Section 27 lays down that—

> every agreement by which any one is restrained from

---

[1] Badu Vs. Badarannesa (1919) 29 C.L.J. 230.
[2] Mulla. *The Indian Contract Act*, students edition, 10th edn., p.97.
[3] ibid.

exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1. - Saving of agreement not to carry on business of which goodwill is sold: One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein:
Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Ambit of section 27: Does it require the restraint to be absolute?

The scope of this section is very wide so as to invalidate many agreements which are allowed even by common law. The section declares all agreements in restraint of trade (meaning a lawful profession, trade or business of any kind) as void by its general terms indiscriminately as it appears from the plain reading of this section. So, even an agreement by which a partial restraint is imposed upon trade that will be void. To escape the prohibition, it is not enough to show that the restraint created by an agreement is partial, and not general; it must be distinctly covered by the exception mentioned in the section.[1] It was contended in *Madhub Chander Vs. Raj Coomar*[2] to validate an agreement in restraint of trade in terms of partial local restraint but the contention was rejected by the court where Justice Couch decided the agreement to be void holding that *"the words 'restrained from exercising a lawful profession, trade or business', do not mean an*

---

[1] Mulla on *The Indian Contract Act*, students edition, 10th edn., p.98.
[2] (1874) 14 BLR 76.

absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some place."

So, the words 'restrained from exercising a lawful profession, trade or business' show the clear intention of the legislature to apply it even to a partial restraint, in terms of time or place, and obviously it does not require the restraint to be absolute to be termed as void under section 27. One of the conditions of the section mentioned exception is that the restraint must be partial and it proves again the above meaning to be true that section covers every type of restriction, otherwise there would have been no further necessity of incorporation of such exception. The words used in section 28 lay down that an agreement in restraint of legal proceeding to be void the restraint, *inter alia*, must be absolute. Section 27 uses no such word and so that the requirement of an absolute restraint cannot be imported here in any way. Thus the section does not distinguish between total restraint and partial restraint for the purpose of the legal consequence.

Agreements not in restraint of trade

Handley, J., says that the object of this section is to restrict "contracts by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business, nor contracts by which in the exercise of his profession, trade, or business, he enters into ordinary agreements with persons dealing with him which are really necessary for the carrying on of his business." [3]

Section 27 must be interpreted reasonably so as not to invalidate the common form of contracts which may

[3] Mackenzie Vs. Striramiah (1890) 13 Mad. 472. 475.

apparently seem to be made in restraint of trade. Thus if some one enters into a contract with a manufacturer that he will sell his all products to him and not to any one else, is not an agreement in restraint of trade within the ambit of section 27.

Thus a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant is not in restraint of trade.[1] Similarly an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade.[2]

Agreements in restraint of legal proceedings:

Section 28 says—

> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.
>
> *Exception 1.*— This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of that dispute so referred.
>
> When such a contract has been made, a suit may be brought for its specific performance, and if a suit other

---

[1] Carlisles, Nephews & Co. Vs. Ricknauth Bucktearmull (1882) 8 Cal. 809; Mulla, *Law of Contract*, 10th ed., p.99.
[2] Sadagopa Ramanjiah Vs. Mackenzie (1891) 15 Mad. 79; Mulla, *Law of Contract*, 10th ed., p.99.

than for such specific performance, or for the recovery of the amount so awarded is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Exception 2.— Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Conditions to be satisfied to make an agreement void under section 28:

Every agreement in restraint of legal proceedings is not void, rather the following conditions are to be satisfied to make an agreement void on this ground under section 28:

i. The restraint must be absolute.

ii. The restraint must be regarding rights under or in respect of any contract.

iii. It has to restrain usual legal proceedings.

iv. It has to limit the time for enforcement of the right.

The restraint must be absolute:

The first condition to be satisfied is that it must restrain the person from enforcing his right absolutely, so if any way remains open before him then the section will not come into operation. Thus the partial restraint of legal proceedings shall not invalidate an agreement within the ambit of section 28 In other words, to make an agreement void a party must be restricted absolutely from enforcing his rights under or in respect of any contract. The language of section 28 of the Contract Act is clear by itself, and can only mean that a

contract which absolutely restricts any party to it from enforcing his rights under or in respect of such a contract by the usual legal proceedings 'in the ordinary tribunals' of the country, will to that extent, be void.[1]

The restraint must be regarding rights under or in respect of any contract:

In other words it will not be applicable in case of wrongs or torts other than the rights under or in respect of any contract.

It has to restrain usual legal proceedings:

Section 28 makes it clear absolutely that the restraint imposed must be one that is against the enforcement of rights by the usual legal proceedings in the ordinary tribunals. So, negatively interpreting if any one is restrained from enforcing his rights before any special tribunal or following a special procedure will not be void on the ground of section 28.

Or limits the time for enforcement of the right:

This is the last alternative way to make the agreement void which says that if an agreement which makes any party bound to enforce his rights within a particular time limit other than which is set by the law. Negatively speaking, that agreement bars that party to enforce the rights after the expiry of the new time limit agreed by the parties, will be void. The Limitation Act, 1908 (Act No. IX of 1908) sets down the particular time limit within which a suit is to be instituted and if any shorter period of limitation is set by an agreement that will be void under section 28. For example, according the law of limitation in Bangladesh a suit for

[1] M A Chowdhury Vs. Murri Mitsui OSK lines limited., 22 DLR (SC) 334.

breach of contract is to be instituted within three years[2], so if the parties by an agreement limits the period within one or two years which is shorter than the three years time as fixed by the law, the agreement settling such a shorter period will be void.[3] But what will happen if the parties by an agreement provide for a longer period than is provided by the Limitation Act, 1908? Obviously, that will not come within the ambit of this section, but that agreement will be void under section 23 as it defeats the provision of other law, e.g., the Limitation Act, 1908.

Cases from DLR on section 28:

- **M.A. Chowdhury Vs. Murri Mitsui OSK Lines Ltd[4]**

> 'Burden as to who should satisfy the court as to the justification for staying the case. It now remains only to consider the question of burden, namely, as to on whom should be the burden to satisfy the court as to the justification for staying its proceedings. In such circumstances, the party who seeks to invoke the foreign jurisdiction clause, should ordinarily satisfy the court that it is just and equitable to bind the parties to their bargain. If there had been a provision similar to that of section 28 of the Contract Act in the Law of Great Britain, there too the same view would have been taken. The courts in Great Britain have taken a different view because of their willingness to recognize, as Tetly has put it "the rights of the parties to contract in almost any way they please." If there was by law any clog on such freedom the result might well have been different.

---

[2] Section 3 of the Limitation Act, 1908.
[3] Islamic Republic of Pakistan Vs. Nazar Din Khattak, 21 DLR (Peshwar) 313.
[4] (1970) 22 DLR (SC) 334.

The language of section 28 of the Contract Act is clear by itself, and can only mean that a contract which absolutely restricts any party to it from enforcing his rights under or in respect of such a contract by the "usual legal proceedings" in the "ordinary tribunals" of the country, will to that extent, be void unless protected by the exceptions to the said section. In case of competition between two courts within the country there will of course be no absolute bar but it cannot be said that where the jurisdiction of all courts within the country is taken away and exclusive jurisdiction is given to a foreign court by a contract. It will not come within the mischief of that section.'

Extensive jurisdiction clause in a bill of lading whereby jurisdiction of a country's court is ousted is to be treated no more than the Exception to section 28 of the Contract Act and does not take away the court's jurisdiction.

The "legal proceedings" and "tribunals" referred to in section 28 of the Contract Act can only mean legal proceedings and tribunals known to the legislature as ordinary tribunals in the country and the usual proceedings available in these courts.

"Ordinary tribunals" referred to in section 28 of the Contract Act should mean ordinary tribunals within the country and not every any and every kind of tribunal. The argument that because a foreign judgment can be enforced by a suit in our country, therefore, a foreign tribunal which passed that judgment is also an "ordinary tribunal" within the meaning of section 28, is clearly untenable.

Abdul Razzak Vs. East Asiatic Co.[1]

Section 28 of the Contract Act makes void only that agreement which absolutely restricts a party to a contract

[1] (1952) 5 DLR 394.

from enforcing his right under the contract in ordinary tribunals but has no application when a party agrees not to restrict his right under the ordinary tribunal but only agrees to the selection of a particular tribunal in which the suit is to be tried.

In agreeing to bring a suit in one out of the two Courts belonging to two foreign countries, both of which would be competent to try the suit, the parties cannot be said to have contracted out of the jurisdiction vested in that Court or to be depriving that Court of its jurisdiction, which it otherwise possessed. Therefore, if two parties, one being a national of Pakistan and another of Denmark agreed by their contract to have their dispute settled under the contract by a Court in Denmark according to Danish Law, it cannot be said that they have contravened the provisions of section 28 of the Contract Act.

- **Tar Muhammad & Co Vs. Federation of Pakistan**[2]

'Mutual consent cannot confer jurisdiction upon any Court which that Court might not possess under the general law nor individuals by agreement amongst themselves can divest any Court of its jurisdiction which it might possess under the general law. Section 28 of the Contract Act makes void only that contract which absolutely restricts a party from enforcing his right under the ordinary tribunal but it does not attract a party who agrees not to restrict his right in the ordinary tribunal only consents to the selection of Court in which the suit is to be decided.'

- **British India Steam Navigation Co. Vs. A. R. Chowdhury**[3]

'The clause in the bill of lading runs as follows: "The contract evidenced by this bill of lading shall be governed

---

[2] (1957) 9 DLR 197.
[3] (1967) 19 DLR 54.

by English law and disputes determined in England according to English law to the exclusion of the jurisdiction of the Courts of any other country."

The parties to the contract agreed that the Court in England which has also jurisdiction to try the suit in case of a dispute between the parties, would be the only Court which should try the suit.'

- **Osaka Shosen Koisha O. S. K Line *Vs.* Province of East Pakistan**[1]

'The defendant-petitioners case is that in the contract between the parties, as embodied in the bill of lading, it was agreed that any claim arising between the parties out of the contract and involving any breach of its terms, would be decided by the District Court of Osaka, and such a claim would be governed by the law of Japan. It was contended, in the first place, that in the aforesaid premises, no suit could be instituted against the defendants in a Court in Pakistan in violation of the above mentioned terms of the contract, namely that District Court of Osaka would be the forum for adjudication of a claim arising out of the contract. Secondly, it was argued that defendant No.1 (petitioner No.1), Osaka Shosen Koisha, O. S. K Line, with whom the contract was entered into by the plaintiff, was a company having its principal registered office at Osaka in Japan, and was, therefore, a non-resident foreign company. In this context, it was submitted that a Court in Pakistan had no jurisdiction to try the suit against the said defendant which was a foreign company residing in a foreign territory.

On behalf of the plaintiff it was argued that the terms of contract under reference come within the mischief of section 28 of the Contract Act and as such has no legal validity.

---

[1] (1965) 17 DLR 659.

Held:

The parties herein have by agreement chosen to have such matters adjudicated only in the Osaka District Court and therefore section 28 of the Contract Act has no application to such a case. In the present case there is no absolute prohibition which disentitles a party to the contract to have his claim decided in a competent Court of law. By agreement there is only a restriction upon the choice of such a Court.

The plaintiff having agreed to abide by the aforesaid clause cannot be allowed to sue the defendant, Osaka Shosen O. S. K Line in a Court in Pakistan.'

Exceptions to section 28: This section provides for the following two exceptions to the above general principle:

Reference to the arbitration: First Exception: If two or more persons agree by a contract that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred, then such a contract will be valid by way of an exception to the general principle relating agreement in restraint of legal proceedings is void.

Contract to refer questions that have already arisen: Second Exception:

This section even will not render illegal, on the ground of restraint of legal proceedings, any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Thus, if according to the award of arbitration a person's legal right is barred that will not amount to an agreement in

restraint of legal proceeding to be declared as void within the meaning of section 28. It was observed in *Sadharan Bima Corporation Vs. Dhaka Dyeing and Manufacturing Co. Ltd.*[1] that—

> The arbitration agreement contained in the insurance policy in question provided that if a claim be made and rejected and an action be not commenced within three months after such rejection all benefits under the policy shall be forfeited. The Insurance Company having informed the plaintiff that their claims under the policy were not payable and as such rejected the same as per condition No. 13 of the policy and the plaintiff having not commenced any action within 3 months, have forfeited all their rights under the policy.

It was observed in *Daulatpur Traders and Co. Ltd. Vs. The Eastern Federal Union Insurance Co. Ltd.*[2] that—

> it is quite clear that cause of action to recover the laws finally accrues only when the arbitrator, arbitrators or umpire have finally settled the award as to the quantum of loss or damage, but not before that. This principle of common law has now found statutory recognition in section 28 of the Contract Act. So, condition No. 18 of the policies has the full backing of explanation (1) of section 28 of the Contract Act. It would be a clear violation of the law of contract and terms and conditions of the policy to saddle insurers with the liability to pay the loss though they never acknowledged the liability and had right to postpone a decision on liability until arbitrator had fixed the amount of loss or damage.

It was observed in *Bangladesh Air Service (Pvt) Ltd. Vs. British Airways*[3] that—

---

[1] (1991) 43 DLR 286.
[2] (1990) 42 DLR 125.

there is nothing in Exception 1 to section 28 of the Contract Act prohibiting the parties to a contract from choosing a foreign forum under the supervision of a foreign court for arbitrating its disputes. Such contract does not offend the main provision of section 28, because the local Courts still retain the jurisdiction to decide the *lis* between the parties.

The appellant is free to file a suit for damages against the respondent in the local court. The respondent is also free to ask for a stay of the suit, pending arbitration, and it is for the local court having regard to all circumstances, to arrive at a conclusion whether sufficient reasons are made out.

The plea of sovereignty and interest of the country and its citizens, if accepted, will render foreign arbitral jurisdiction absolutely nugatory.

We venture to say that such a consequence will itself be opposed to public policy, for no country lives in an island these days. Foreign arbitration clause is an integral part of international trade and commerce today.

Agreements the meaning of which are uncertain:

Certainty of the terms is obviously a pre condition to an agreement. Section 29 says:

> Agreements, the meaning of which is not certain, or capable of being made certain, are void.
>
> *Illustrations*
>
> (a) A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
> (b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of

[3] (1997) 49 DLR (AD) 187, at paragraphs 24 & 26.

commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in coconut-oil only, agrees to sell to B "one hundred tons of oil." The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.

(d) A agrees to sell to B "all the grain in my granary at Rangpur." There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B "my white horse for Taka five hundred or Taka one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

The above illustrations are sufficient to give a clear idea about the law enunciated in section 29. Accordingly to be enforceable by law either the meaning of the agreement has to be clear or capable to be made clear, otherwise it will be void. It lays down that sometimes the meaning may not be clear in itself directly but one may ascertain the meaning and as such the agreement can be made certain. Thus, if in no way the meaning can be made certain in that case the agreement will be void for uncertainty.

It was held in *Ashutosh Basak Vs. S. M. Rahmatulla*[1] that a contract for permanent lease not void for uncertainty even though it depends upon payment in future of salami when

[1] (1966) 18 DLR 578.

the amount of *salami* is ascertainable by the Court. In this case[2]—

> The written statement ran as follows: "After some talk J agreed to grant a permanent settlement of the land to this defendant. The annual rent was fixed at Rs. 396 and on J's asking to pay one year's rent the defendant paid that amount and thereafter the defendant was permitted to enter into possession and start his business there. It was further agreed that a reasonable amount of *salami* which would be ascertained after measurement of land would be paid by the defendant and a regular deed of permanent lease would be executed and registered by both the parties on defendant's payment of *salami* money."
>
> *Held:*
>
> The aforesaid quotation goes to show that there was a concluded contract and all that was left out was the determination of the reasonable amount of *salami* and the execution of the lease deed for permanent settlement after payment of *nazer* money.

Agreements by way of wager:

Section 30 says—

> Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any Wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.
>
> Exception in favour of certain prizes for horse-racing—This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate,

---

[2] *Ibid.*

prize or sum of money, of the value or amount of five hundred Taka or upwards to be awarded to the winner or winners of any horse-race.

Section 294A of the Penal Code, 1860 not affected: Nothing in this section shall be deemed to legalise any transaction connected with horse racing, to which the provisions of section 294A of the Penal Code, 1860 apply.

Agreements collateral to wagering agreements: Section 30A says—

All agreements knowingly made to further or assist the entering into, effecting or carrying out, or to secure or guarantee the performance, of any agreement void under section 30, are void.

No suit for recovery of money, commission etc., in respect of void agreements: Section 30 B says—

No suit or other proceeding shall lie for the recovery of

(a) any sum of money paid or payable in respect of any agreement void under section 30A, or

(b) any commission, brokerage, fee or reward in respect of knowingly effecting or carrying out, or aiding in effecting or carrying out, of any such agreement, or of any sum of money otherwise claimed or claimable in respect thereof, or

(c) any sum of money knowingly paid or payable on account of any person by way of commission, brokerage, fee, reward or other claim in respect of any such agreement.

Payment of guardian, executor etc., in respect of void agreements not to be allowed credit: Section 30C says—

No guardian, executor, administrator, heir or personal representative of any minor or deceased person, as the

case may be, shall be entitled to or allowed any credit in his account for or in respect of any payment made by him on behalf of such minor or deceased person in respect of any such agreement, or any such commission, brokerage, fee, reward or claim as is referred to in sections 30A and 30B.

Agreements contingent on impossible events:

Section 36 says—

> Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made."
>
> *Illustrations*
>
> (a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.
>
> (b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

Analysis of section 36:

Contingent contract is a good contract generally. One specific type of contingent agreement has been declared void by this section. Contingent agreement necessarily means an agreement which is dependent on the happening or not happening of a future event. If that future event becomes an impossible one and the agreement made is dependent on the happening of that impossible event then this type of contingent agreement will be void under section 36 of the Act.

Agreements to do impossible acts:

Types of impossibility:

An impossibility may be of two types:

i. Initial, and

ii. Subsequent.

Obviously in case of initial impossibility that agreement cannot turn into a valid contract ever, because the impossibility is at its root. Thus an agreement caused by initial impossibility becomes a void agreement. First paragraph to section 56 deals with this type of void agreement which says—

> An agreement to do an act impossible in itself is void.

Illustration (a) to this section explains the law as such that if A agrees with B to discover treasure by magic, the agreement is void. Thus an agreement to write 1000 pages in one's own handwriting is a void agreement.

Compensation for loss in such a void agreement : Paragraph 3 to section 56 deals with the compensation for loss through non-performance of act known to be impossible or unlawful which says—

> Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promiser must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustration (c) to section 56 explains the above law in the following words:

> (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

Thus, in this case, it was within the knowledge of A that since he has been already married with C, so it is not possible for him to marry B, because of being forbidden by the law to which he is subject to practise polygamy. Under this circumstance, even if this prohibition of polygamy was not within the actual knowledge of A, yet the law will presume that it was within his knowledge, because with reasonable diligence that might have known. Thus, under such circumstance law imposes upon 'A' the liability to pay compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

CHAPTER 8

CONTINGENT CONTRACTS

The Contract Act, 1872, also covers certain special types of contract. Contingent contract is one of them. Apart from simple contracts sometimes even there may be a contract dependent on any further contingency. It does not mean that certainty does not remain as one of the conditions of a contract. Because, here the act agreed to be done is certain, though its happening or not happening has been made dependent on any contingency.

What is contingent contract?

Section 31 says—

> A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.
>
> *Illustration*
>
> A contracts to pay B Taka 10,000 if B's house is burnt. This is a contingent contract.

Elements of contingent contract

The constituent elements of a contingent contract are mentioned here in the following way:

1) It is a contract.

2) It may be positive or negative, i.e., to do or not to do something.

3) It is dependent on the future event and this event—

i. is a future uncertain event, which may or may not happen, and

ii. the event must be collateral to such contract. Thus a mere conditional contract will not be treated as contingent. The event upon which the contract is dependent must be collateral to such contract. So, if a person gives a declaration for giving reward to any person who finds his lost laptop, is not a contingent contract within the meaning of section 31, because there is no collateral event upon which the agreement is dependent. But, if a person says that 'I will pay you Taka 1 Lac if your car is burnt', is a contingent contract within the meaning of section 31, because here the contract is dependent on an event (burning the car) which is collateral to such contract.

The above simple illustration with the section about fire insurance describes contingent contract nicely. It was held in *Md. Sama Mondol Vs. Md. Ahmed Sheikh*[1] that the agreement that the particular document for sale of land will be executed and registered after seeking permission from the Collector regarding the sale of the land, cannot be said to be a contingent contract as defined in section 31 of the Contract Act, inasmuch as the condition to take permission of the Collector is not collateral to the agreement but forms part of the consideration of the contract.

---

[1] (1962) 14 DLR 709.

Enforcement of contracts contingent on an event happening:

Section 32 says—

> Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> If the event becomes impossible such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B, at a specified price, if C., to whom the horse had been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to by the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Table: Enforcement of contracts contingent on an event happening (S.32)

Nature of the contract	*Nature of contingency*	*When will be enforceable by law?*	*When will be void?*
Contingent contract	To do or not to do anything if an uncertain future event happens.	When that future event happens, i.e., it will not be enforced unless and until the said future collateral event has happened.	If that event becomes impossible such contract become void.

Thus, this is natural that if a contract to do or not to do anything becomes dependent on the happening of a future event then that will be enforced when that event happens and in other words it will not be enforceable till happening of that event. Consequently, if that event becomes impossible such contracts will be void, because it will be no more capable to be enforceable because of the impossibility of that event on the happening of which this contract was contingent.

Enforcement of contracts contingent on an event not happening:

Section 33 deals with the enforcement of contracts contingent on an event not happening, which says—

> Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.
>
> *Illustration*
>
> A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

Thus the reason for the above rule is obvious, since if a contingent contract is made to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before. Because only impossibility of that event can ensure satisfaction of the condition 'future event does not happen'.

Table: Enforcement of contracts contingent on an event not happening (S.33)

Nature of the contract	*Nature of contingency*	*When will be enforceable*
Contingent contract	To do or not to do anything if an uncertain future event does not happen.	when the happening of that event becomes impossible, and not before.

When event on which contract is contingent to be deemed impossible:

Section 34 says about the case when event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person, which is as follows—

> If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.
>
> *Illustration*
>
> A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

Thus the illustration given with the section is clear enough to clarify the section that if the happening of an event becomes impossible once, then that will be treated impossible forever, though there remains the possibility of being possible again. And the contingent contract based on that event will bear the consequence based on the first impossibility and that will be final.

Contracts contingent on happening of specified event within fixed time:

Section 35 says that—

> Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.
>
> Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.
>
> *Illustrations*
>
> (a) A promises to pay B, a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.
>
> (b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Table: Paragraph 1 to section 35

Nature of the contract	*Nature of contingency*	*When will it be void ?*
Contingent contract	To do or not to do anything if a specified uncertain event happens within a fixed time.	It becomes void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

Table: Paragraph 2 to section 35

Nature of the contract	*Nature of contingency*	*When will it be enforceable ?*
Contingent contract	To do or not to do anything if a specified uncertain event does not happen within a fixed time.	May be enforced by law when the time fixed has expired and such event has not happened ; or before the time fixed has expired, if it becomes certain that such event will not happen.

Agreements contingent on impossible events:

Section 36 deals with the agreements contingent on impossible events, which says—

> Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.
>
> *Illustrations*
>
> (a) A agrees to pay B 1,000 Taka if two straight lines should enclose a space. The agreement is void.
>
> (b) A agrees to pay B 1,000 Taka if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

Thus, if the agreement becomes dependent on an impossible event then that will be termed as void, though the act actually promised to be done is not in itself impossible. It is not even essential that such impossibility is to be known to

the parties rather such an agreement will be void whether this impossibility is known or not to the parties to the agreement when the agreement is made. It must be noted here carefully that the above section used the term 'contingent agreement' instead of 'contingent contract', because such an agreement has never turned into a contract at any time in any way, so it is void from very beginning. That is why, such a transaction has been termed as agreement void, instead of void contract.

Table : Agreements contingent on impossible events: Section 36

Nature of the agreement	*Nature of contingency*	*Knowledge of the parties*	*Legal status*
Contingent agreement	To do or not to do anything, if an impossible event happens.	The impossibility of the event **is known** to the parties to the agreement at the time when it is made.	In both the cases the agreements will be void.
		The impossibility of the event **is not known** to the parties to the agreement at the time when it is made.	