

## A Comparative Analysis of U.K. and Indian Provision relating to Intention under Law of Contract

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### Abstract-

There is turmoil in the trade world as to intention to contract in India. The Indian contract Act was drafted way back in the year 1872 by the then British. U.K. had by that time experimented with many situations as to contract and due to this they had experience to share while drafting Indian Contract Act. They brought the doctrine of intention which formed an essential part of their law in our law, but the significance that was attached to their law on the subject was not carried to our law as the situation here was entirely different. Hence, the author here has tried to put this doctrine in the light of object of the framers of the law.

### I Introduction

The Law of Contract constitutes the most important branch of mercantile or commercial law. It affects everybody, more so, trade, commerce and industry. It may be said that the contract is the foundation of the civilized world. The requirement of 'Intention to create legal relations' constitutes one of the most significant conditions of a valid contract. Allegedly, Contract Act, being an Act governing relations between private parties, cannot be interpreted in the court of law without giving much weightage to the intention of the parties forming such contract. But to prove the existence of intention to create legal relations, at times becomes burdensome to the parties to the contract. English Law specifically requires the existence of 'intention to create legally binding contract' for enforcing a contract despite the existence of 'consideration' for the contract. According to the classical view, "the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect."<sup>1</sup>

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<sup>1</sup> Cohen, "The Basis of Contract," *Harvard Law Review*, vol. 46, 1933, pp. 553, 575.

In England, and in most common law countries, the existence of a contract depends, at least in theory, on the parties' intent to be bound. The rule dates to the Court of Appeals' 1919 refusal to enforce a husband's promise to his wife, on the grounds that "the parties did not intend that [the agreement] should be attended by legal consequences."<sup>2</sup> It is pertinent to note that there is a divide between the common law countries where the western countries e.g. U.S and U.K. require the establishment of 'intention to create legal relations' in addition to the existence of 'consideration', but in Indian law does not require it. Moreover, to decide whether such an intention is present in a particular agreement between the parties, the court starts with initial presumptions depending upon whether the agreement is originating in a domestic set-up or is it purely a commercial transaction.

There are two theories on which the theory of intention is based. First is the 'will theory' and the other being theory of 'private autonomy'. 'Will theory' of contract law maintains that commitments are enforceable because the promisor has "willed" or chosen to be bound by his commitment." The principle of private autonomy "simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations."<sup>3</sup> Autonomy theory argues that people should be free to make worthwhile choices.

## II English Law on Intention to Contract

The requirement of intention to create legal relations in contract law is aimed at sifting out cases which are not really appropriate for court action. In *Rose and Frank Co v. JR Crompton & Bros Ltd*,<sup>4</sup> the court speaking on intention stated that it is 'to create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.' Not every agreement leads to a binding contract which can be enforced through the courts. For example you may have an agreement to meet a friend at a pub. You may have a moral duty to honour that agreement but not a legal duty to do so. This is because in general the parties to such

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<sup>2</sup> Balfour v. Balfour, [1919] 2 KB 571.

<sup>3</sup> Lon Fuller, "Consideration and Form", *Columbia Law Review*, vol. 100, No. 1, 2000, pp. 94-175.

<sup>4</sup> [1923] 2 KB 261.

agreements do not intend to be legally bound and the law seeks to mirror the party's wishes.

In order to determine which agreements are legally binding and have an intention to create legal relationship, the law draws a distinction between social and domestic agreements and agreements made in a commercial context. In *Jones v Padavatton*<sup>5</sup>, a mother promised to pay her daughter \$200 per month if she gave up her job in the US and went to London to study for the bar. The daughter was reluctant to do so at first as she had a well paid job with the Indian embassy in Washington and was quite happy and settled, however, the mother persuaded her that it would be in her interest to do so. The mother's idea was that the daughter could then join her in Trinidad as a lawyer. This initial agreement wasn't working out as the daughter believed the \$200 was US dollars whereas the mother meant Trinidad dollars which was about less than half what she was expecting. This meant the daughter could only afford to rent one room for her and her son to live in. The Mother then agreed to purchase a house for the daughter to live in. She purchased a large house so that the daughter could rent out other rooms and use the income as her maintenance. The daughter then married and did not complete her studies. The mother sought possession of the house. The question for the court was whether there existed a legally binding agreement between the mother and daughter or whether the agreement was merely a family agreement not intended to be binding. It was held that the agreement was purely a domestic agreement which raises a presumption that the parties do not intend to be legally bound by the agreement. There was no evidence to rebut this presumption.

In another instance *Balfour v Balfour*<sup>6</sup>, a husband worked overseas and agreed to send maintenance payments to his wife. At the time of the agreement the couples were happily married. The relationship later soured and the husband stopped making the payments. The wife sought to enforce the agreement. The agreement was a purely social and domestic agreement and therefore it was presumed that the parties did not intend to be legally bound.

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<sup>5</sup> [1969] 1 WLR 328.

<sup>6</sup> *Supra* note 1.

### III Presumptions to rebut that there is a legally binding contract

The presumption may be rebutted by evidence to the contrary there existed an intention to create contract. This evidence may consist of written agreement. For instance in *Errington v Errington Woods*<sup>7</sup>, a father-in-law purchased a house for his son and daughter-in-law to live in. The house was put in the father's name alone. He paid the deposit as a wedding gift and promised the couple that if they paid the mortgage installments, the father would transfer the house to them. The father then became ill and died. The mother inherited the house. After the father's death the son went to live with his mother but the wife refused to live with the mother and continued to pay the mortgage installments. The mother brought an action to remove the wife from the house. It was held that the wife was entitled to remain in the house. The father had made the couple a unilateral offer. The wife was in course of performing the acceptance of the offer by continuing to meet the mortgage payments. Under normal contract principles an offer may be revoked at any time before acceptance takes place, however, with unilateral contracts acceptance takes place only on full performance. Lord Denning held that once performance had commenced the Mother was *estopped* from revoking the offer since it would be unconscionable for her to do so. Furthermore there was an intention to create legal relations despite it being a family agreement.

Where the parties have separated, the matter came up in *Merritt v Merritt*<sup>8</sup>, a husband left his wife and went to live with another woman. There was £180 left owing on the house which was jointly owned by the couple. The husband signed an agreement whereby he would pay the wife £40 per month to enable her to meet the mortgage payments and if she paid all the charges in connection with the mortgage until it was paid off he would transfer his share of the house to her. When the mortgage was fully paid she brought an action for a declaration that the house belonged to her. It was held that the agreement was binding. The Court of Appeal distinguished the case of *Balfour v Balfour*<sup>9</sup> on the grounds that the parties were separated. Where spouses have separated it is generally considered that they do intend to be bound by their agreements. The written

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<sup>7</sup> [1952] 1 KB 290.

<sup>8</sup> [1970] 1 WLR 1211.

<sup>9</sup> *Supra* note 2

agreement signed was further evidence of an intention to be bound. Lord Denning while delivering this judgment, further went to say that “the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: Would reasonable people regard this agreement as intended to be legally binding?” Hence, it is objective theory which the court will look to find out whether there was intention or not. The objective test of intentions is one of the rules of engagement necessary to protect the integrity of the contracting process and to prevent its abuse.

And where there is a 3rd party to the agreement, For Ex. in *Simpkins v Pay*<sup>10</sup>, a Grandmother, granddaughter and a lodger entered into a weekly competition run by the Sunday Empire News. The coupon was sent in the Grandmothers name each week and all three made forecasts and they took it in turns to pay. They had agreed that if any of them won they would share the winnings between them. The grandmother received £250 in prize money and refused to share it with the other two. The lodger brought the action to claim one third of the prize money. It was held that there was a binding contract despite the family connection as the lodger was also a party to the contract. This rebutted the presumption of no intention to create legal relations.

#### **IV Intention to create legal relations in commercial agreements**

Where an agreement is made in a commercial context, the law raises a presumption that the parties do intend to create legal relations by the agreement. Sighting an example to this, in *Esso Petroleum v Commissioners of Customs & Excise*<sup>11</sup>, the appellants ran a promotion whereby any person purchasing four gallons of petrol would get a free coin from their World Cup Coins Collection. The question for the court was whether these coins were 'produced in quantity for general resale' if so they would be subject to tax and appellant would be liable to pay £200,000. The appellant argued that the coins were simply a free gift and the promotion was not intended to have legal effect and also that there was no resale. It was held that there was an intention to create legal relations. The

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<sup>10</sup> [1955] 1 WLR 975.

<sup>11</sup> [1976] 1 WLR 1.

coins were offered in a commercial context which raised a presumption that they did intend to be bound. However, the coins were not exchanged for a money consideration and therefore the coins were not for resale. This presumption can be rebutted by evidence to the contrary.

Again in *Edwards v Skyways*<sup>12</sup> the claimant was an airline pilot working for the defendant. He was to be made redundant. The defendant said that if he withdrew his contributions to the company pension fund, they would pay him the equivalent of company contributions in an *ex gratia* payment. The claimant agreed to this and withdrew his contributions. The company then ran into further financial difficulty and went back on their promise relating to the *ex gratia* payment. It was held that the agreement had been made in a business context which raised a strong presumption that the agreement is legally binding. The claimant could therefore enforce the agreement and was entitled to the money.

#### **V The distinction between social and domestic agreements and commercial agreements can be fine**

The fine distinction between the two was explained by the English courts with two examples. In *Coward v Motor Insurance Bureau*<sup>13</sup>, a coward was killed whilst riding pillion on a motorcycle driven by a friend and work colleague on the way to work. The collision was due to the negligence of the friend. Coward's widow sought to claim damages from the Motor Insurance Bureau since the rider's insurance did not cover pillion passengers. The Motor Insurance Bureau would only be obliged to pay if insurance for the pillion was compulsory. Insurance was only compulsory for pillions if they were carried for hire or reward. Coward paid the friend a small weekly sum to take him to and from work each day. The widow therefore argued that this was a contract for hire or reward. However, the MIB argued that to amount to a contract for hire or reward there had to be an intention to create legal relations which was absent in agreements of

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<sup>12</sup> [1964] 1 All ER 494.

<sup>13</sup> [1963] 1 QB 359.

this nature between friends. It was held that there was no contract of hire or reward as it was a social and domestic agreement and therefore no intention to create legal relations. The widow was therefore not entitled to compensation.

And in *Albert v Motor Insurance Bureau*<sup>14</sup>, a docker was killed in a road collision on his way to work. He was a passenger in a car owned and driven by a work colleague. The driver gave lifts to the deceased and other dockers in return for payment. He had given lifts to different dockers over a period of eight years. A claim was made against the Motor Insurance Bureau (MIB) as the driver had no insurance cover for passengers. The MIB was obliged to pay, only if there exist a contract between the docker and the driver. It was held that the lifts were offered in a commercial context as he had given lifts to different people over a period of time. Therefore there was an intention to create a binding contract. Hence, where an agreement is made in a commercial context, the law raises a presumption that the parties do intend to create legal relations by the agreement.

In *Masters v Cameron*<sup>15</sup> the High Court outlined three situations that commonly arise when one party alleges a binding contract has come into existence in advance of execution of formal documentation. The parties have finalized the terms of their bargain and intend to be bound immediately to perform those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. The parties have completely agreed on all the terms of their bargain and intend no departure from those terms but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document; or The intention of the parties is not to make a concluding bargain at all, unless and until they execute a formal contract.

In England with all these landmark judgments, the doctrine of intention to create legal relations to create legal relations has not lacked its critics. Some, such as Jurist, are critical of the way in which it has been used to deny legal effect to agreements made in a family context. Others points out that the doctrine rests on a fiction in that the parties to

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<sup>14</sup>[1971] 3WLR 291.

<sup>15</sup> (1954) 91 CLR 353.

the alleged agreements frequently have no discernible intention one way or the other. . But it is assumed that it is a necessary part of contract.

## VI Indian Law and Intention to Contract

In our Indian law the intention to create legal relations is not given as an essential ingredient of contract law, but even the apex court of India has expressed its reservation about the need of this separate requirement of “intention to contract” under the Contract Act. It is sufficient if the parties show that consideration is part of contract to legally bind the parties. It is presumed that there exists an intention to create contract, when the parties show that the agreement contained clause as to consideration. Consideration is one of the essential elements of a valid contract. The requirement of consideration stems from the policy of extending the arm of the law to the enforcement of mutual promises of parties. A mere promise is not enforceable at law. Consideration is the price for which the promise of the other contracting party is bought. Nevertheless, this price need not be in terms of money. If the promise is not supported by consideration, the promise will be *nudum pactum* (a bare promise) and is not enforceable at law. Furthermore, the consideration must be real and lawful. The test of contractual intention is objectivity, not subjectivity. The deciding factor is not what the parties had in mind, but what a reasonable man would think, in the circumstances, their intention to be.

Prior to this in *Banwari Lal v. Sukhdarshan Dayal*<sup>16</sup>, the case was about a plot that was reserved for *dharmashala* was sold to one Manohari Devi who in turn sold to defendant. Defendant constructed a wall around the plot. Plaintiff then filed a permanent injunction that the plot was reserved for *dharmashala* and hence should be restored. But the court held that sufficient consideration was paid showed they had intention to sell to any one and not construct *dharmashala*. It was a contract. This case shows that consideration plays a vital role to conclude whether the parties intended to contract or not. It has been pointed out that consideration brings out the idea of reciprocity as the distinguishing mark of English in terms of the obligatory nature of promise.<sup>17</sup> The doctrine is supposed to identify the intention of the parties as to their desire to make the

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<sup>16</sup> AIR 1973 SC 814.

<sup>17</sup> J. Beatson, et. al., ‘*Anson’s Law of Contract*’, Oxford University Press, New York, p. 91.

agreement legally enforceable.<sup>18</sup> It has been to its reiterating relevance that the doctrine of consideration serves as a safeguard against possibilities where the parties may accidentally bind themselves on impulse.<sup>19</sup>

## VII Conclusion

It has been rightly stated that “An agreement, even though it is supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations. Of course, in the case of ordinary commercial transactions, it is not normally necessary to prove that the parties in fact intended to create legal relations.”<sup>20</sup>

The position in England and in India in relation to intention to create contract is inversed reality. In England, the legal development on the principle of intention to create legal relationship has ensured that the marginalization of consideration only as an evidentiary factor. But in India, consideration is essential to prove the existence of legal intention to bind parties to the contract. It is a non negotiable element in the formulation of binding contractual liabilities.

Analyzing the changing scenario prevailing in modern day domestic set up and considering the drastic transformation in the way people perceive their relationships, it is apparent that dividing line between the domestic and commercial contracts is shrinking. People are becoming more and more commercial even in familial relations and security of transaction is becoming a matter of priority. In such situation the legal requirement of the parties' intention to be contractually bound continues to impede the enforcement of family contracts. The distinction between commercial contracts, which are presumptively enforceable, and family contracts, in which intention must be proved, cannot be justified. If the requirements of consideration and agreement are thought to be inadequate to distinguish enforceable from unenforceable arrangements, then a more appropriate method needs to be devised to achieve this purpose than one which is ostensibly focused on a fictitious inquiry as to party intention, and which actually masks an anachronistic

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<sup>18</sup> *Ibid.*

<sup>19</sup> Rangin Pallav Thripathy, 'The Demise of Consideration', *Manupatra*, p.3. Available at <http://www.manupatra.co.in/newslines/articles/Upload/123E249D-6C00-493A-80EF-7A6E4EEA43E5.pdf>. Accessed on 27<sup>th</sup> June, 2016.

<sup>20</sup> Hugh Beale, '*Chitty on Contracts*', ed. 25, vol. I, Sweet & Maxwell, U.K., p. 108.

and inappropriate judicial sentiment.<sup>21</sup> On to E-contracts, intention to contract can be implied where there is consideration and no intention can be seen in offers such as website providing health tips and information. They display the product but do not state the price.

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<sup>21</sup> M. Keyes and K. Burns, "Contract and the Family: Whither Intention," *Melbourne University Law Review*, vol. 26, No. 3, 2002, p. 577.