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The Indian Contract Act — background and case law

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This article aims to illustrate the background and the case law of the Indian Contract Act, enacted in 1872. It also tries to provide a comparison between the law introduced in India and the model which is the English Common Law of Contract based on the English law of the time. Indeed, the provisions contained in the Indian Contract Act are more advanced and more organically conceived than the English Common Law of Contract. Pillars of the Common Law of Contract such as the doctrine of consideration, the doctrine of frustration and the doctrine of economic duress are found in the Indian act in an improved version. Indian courts applied them consistently in the majority of cases. Even today, in a few exceptional cases, the Indian courts appear to be influenced by English case law to such an extent that they do not comply with the innovative aspects of the Indian Contract Act. Recently the pandemic of Covid-19 causing hindrance to the performance of many contracts raised questions such as the existence of *force majeure* able to nullify the contract and in certain cases it triggered the applicability of the doctrine of frustration. Such situations are codified by the Indian Contract Act and case law is available. New needs have arisen in the field of marriage law such as prenuptial agreements, which may apparently be deemed valid if they pass the test of public order as stated in the Indian Contract Act.

Keywords: Indian law, Common Law, Indian Contract Act, contract law, marriage law.

Introduction

The Indian Contract Act (hereinafter the Act or ICA) came into force in 1872. The Act was absolutely innovative: it codified the Common Law of Contract. The provisions contained in the Act are based on cases decided by English courts in previous centuries, especially in the early and mid 19th century[1]. Provisions contained in English judgments[2], were, for the first time, formulated in an Act created for the colonial empire. Such case law was influenced by treatises of English jurists of the same period when contract received maximum value as a legal expression and binding institution[3].

The innovative idea of organizing a general law of contract and making it consistent in all its aspects had already been expressed[4] in judgments issued in the 16th century[5]. However, the process was accelerated just before the 19th century. During this period a general rule of contract was needed by a society where economic transactions had significantly increased. Sanctity of contract[6] became a dogma and while *laissez faire* doctrine started to gain ground, contractual freedom was necessarily strongly linked to it.

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[1] *Atiyah P. S.* An Introduction to the Law of Contract. Oxford: Clarendon Press, 1995. P. 7.

[2] *Simpson A. W. B.* A History of the Common Law of Contract. London: Clarendon Press, 1987. P. 1.

[3] Such as Principles of the English Law of Contract by Sir William Reynell Anson (1843–1914); Principles of Contract and Digest of the Law of Partnership by Sir Frederik Pollock (1845–1937).

[4] *Simpson A. W. B.* A History of the Common Law of Contract.

[5] *Atiyah P. S.* An Introduction to the Law of Contract. P. 2.

[6] *Parry D. H.* The Sanctity of Contracts in English Law. London: Stevens & Sons Ltd., 1959.

The Act is a successful experiment based of the philosophical conceptions of the Utilitarians. So, in this way, English Law was imposed or transplanted to India, also with the intention of transmitting to India a more advanced and functional model than the original British one. In relation to contract, indeed the idea of a codified general law of contract was *per se* innovative. However, the resulting law was partially in conflict with the concept of contract law as practised in Britain, which mainly concerned individual types of contracts[7].

The ICA is still the main act regulating contracts as when India gained independence and the Constitution was enacted, it was established that all laws in force before the commencement of the Constitution shall continue to be in force (article 372).

1. Concepts and definitions

The structure of the Act is based on 19th century treatises. An introduction indicates its scope; then a notion of agreement is presented and the definition of contract follows. The Act covers the following main topics: formation of contract (proposal and acceptance), invalid contracts concerning who has capacity to contract, mistake, coercion, undue influence, fraud, misrepresentation, performance and its impossibility due to circumstances such as doctrine of frustration; breach of contract and damages.

A miniature glossary[8] is contained in the initial part of the ICA. Such definitions (i. e., proposal, acceptance, agreement, contract) are mainly based on the work of Sir Frederick Pollock. He was a barrister and taught jurisprudence at Oxford between 1883 and 1903.

In Common Law[9], an agreement is not a contract unless it is supported by consideration. This implies that a promisee should not be able to enforce the promise, unless he has given or promised to give, or unless the promisor has obtained or been promised, some-

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[7] *Buckland W. W., McNair, A. D.* Roman Law and Common Law: A Comparison in Outline. Cambridge: Cambridge University Press, 1936: "…apart from stipulatio, all the contracts recognised by law are contracts for some one specific purpose, loan, pledge, sale, hire, and so forth. Hence we get not a theory of contract, but a theory of a number of contracts, each with its own theory… thus the attitude of the Roman law can be fairly stated by the proposition that an agreement is not a contract unless the law, for some reason, erects it into one" (P. 155); "Consideration, as originally developed, was a piece of practical machinery for deciding whether or not a promise ought to be enforced by one of the personal actions and particularly by Assumpsit… we had evolved a general remedy for its [of the contract] enforcement" (P. 177).

[8] Indian Contract Act — Section 2:

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

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

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called "promise";

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

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

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

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

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

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

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

[9] Joscelin v. Shelton (1557), Rams v. Hughes (1778).

thing in exchange for it. The notion of consideration is linked to the promise and not to the contract: "it is confusing and wrong to think of the consideration for the contract… it is the consideration for the promise that is under discussion"[10]. According to the ICA consideration makes a set of promises an agreement which, if enforceable by law, is a contract.

As already said, the ICA takes the notion of consideration from English case law[11]. In English case law it is stated that consideration is a benefit to the promisor or a detriment to the promisee. However, the ICA innovates as it goes against two dogmas: one is that past consideration is no consideration and the other one is that consideration must move from the promisee. According to the Common Law[12] of the time an act done before the promise was made cannot be the consideration for it.

Consideration is, for example, past where, in a sale of goods, qualities relating to the goods are promised after the execution of the contract of sale[13]. Furthermore, a gift based on natural love and affection[14] is not supported by consideration[15] and it can be binding only if made in a special form. If somebody has saved the life of somebody else who was drowning and the latter promises a prize such promise was not binding for the English law of the time. Unlike the English Law of the time the ICA — at Section 2 (d) — defined consideration as follows: "when the promisee 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".

The perfect tense ("has done or abstained") means that "past consideration is good consideration and it is a deviation from the general principle of Common Law wherein the past consideration is not treated as good consideration"[16].The deviation of the ICA emerged from the debate open in England by Lord Mansfield[17], a British judge who lived in the second half of the 18th century. In some cases[18], he stated that ethical aspects of consideration should also be taken into account.

Overcoming another dogma (i. e., that the consideration must move only from the promisee) of the English law of the time, the ICA states that the consideration can move from the promisee or any other person.

According to the English law[19] of the time the consideration cannot move from a third party. The fathers of two fiancés agreed that they both would have given a certain amount of money to their son and son in law to pay for the expenses of the couple after marriage but the father of the girl died before paying the agreed sum. The boy sued the executor of the will, but the court rejected the petition[20].

The Privy Council[21] applied the provision contained in the ICA. In a similar case the father of a girl agreed with the father of a boy that if the girl had married his son, he would have given her *Kharch-i-pandan,* traditionally a golden receptacle for betel, frequently consumed by Indians, but also meaning an annuity. The marriage took place and the bride

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[10] *Treitel G. H.* An Outline of the Law of Contract. London: Butterworths, 1995. P. 28.

[11] Thomas v. Thomas (1842), 2 Q. B. 851, 859; Curie v. Misa (1875) L. R. 10 Exch. 153, 162.

[12] Eastwood v. Kenyon (1840) 11 Ad. & El. 438

[13] *Treitel G. H.* An Outline of the Law of Contract. P. 33.

[14] Brij Bihari v. Bir Bahadur, A. I. R. (1968). Pat. 203; Perumayammal v. Chinnammal, A. I. R. (1967). Mad. 189; H. D. Setty v. Mallikarjuna Society (1964) Mys. L. J. (Supp.) 290.

[15] *Simpson A. W. B.* A History of the Common Law of Contract. London: Clarendon Press, 1987. P. 368.

[16] Devukutty Amma v. Madhusudanan Nair, Civil L. J. 1995 (3) Kerala High Court 431. Sindha v. Abraham (1895) 20 Bom. 755; Ramacharya v. Shrinivasacharya (1918) 20 Bom. 441; Dungarmall v. Sambhu Charan (1951) A. Ca. 55.

[17] Pillans v. Van Mierop (1765) 3 Burr. 1663.

[18] Trueman v. Fenton (1777) 2 Cowper, 544; Hawkes v. Saunders (1782) I Cowper, 289.

[19] Tweddle v. Atkinson (1861) 1 B. & S. 393.

[20] Dunlop Pneumatic Tyre Co. Ltd v. Selfridge and Co. Ltd. (1915) A. C. 847.

[21] Nawab Khwaja Muhammad Khan v. Nawab Husaini Begum 1910 37 Indian Appeals, 152.

sued the father-in-law to obtain the money due and the interest accrued. The Privy Council stated that she was entitled as a beneficiary to enforce the contract.

According to Section 2 of the ICA, the agreement must have been entered into freely by the parties for a lawful consideration and with a lawful object. As already said, an agreement enforceable by law is a contract.

According to Section 23 of the ICA, 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 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. Every agreement of which the object or consideration is unlawful is void.

Indian courts deemed a contract void because it would defeat the provisions of a law, in a case where a big portion of land was purchased. In this case if the contract was performed, the purchaser would have accumulated an amount of land exceeding the permitted quota under the Bombay Tenancy and Agricultural Act of 1948[22]. Such law was consistent with the social revolution that Nehru, freedom fighter and first prime minister of independent India, sought to implement. He put in place a policy to break up the huge estates often belonging to the urbanized upper class and left unproductive.

Courts qualified as immoral or opposed to public policy contracts intended to commit a crime, or to obstruct justice[23].

Courts also deemed void marriage brokerage contracts executed in order to arrange marriages[24]. In relation to marriage, according to Section 26 of the ICA, undertaking to marry somebody is a void contract because it results in an agreement in restraint to the right to marry freely. The court applied this provision and deemed void a contract in which the father of a girl undertook to incur expenses for the education of a boy and in the event that the marriage did not take place the amount incurred should be reimbursed[25].

The provision was also invoked in relation to prenuptial agreements. Such agreements are very common in the United States and are useful in a society where divorce happens quite often. The recognition of prenuptial agreements is controversial in India. Marriage in India is still regulated by the Personal Laws, so rules are different depending on the religion of the spouses (Hindu, Muslim, Christian or atheist). Christians and Muslims may be allowed to enforce prenuptial agreements. From an Islamic law perspective, the idea of contractual provisions governing married life and marriage itself do not stand in stark contrast. Muslim women, in particular, may enforce a prenuptial agreement aimed to avoid polygamy. Marrying up to four wives is allowed for Muslims in India, even if it happens very rarely. United Nations reports, however, have defined such situation as a case of discrimination against women. As the Supreme Court of India[26] stated that polygamy is not essential to the Muslim religion, an agreement aimed to avoid it may be deemed enforceable. In relation to Hindu marriages the enforceability of prenuptial agreements is quite controversial as the courts in a few cases have deemed them void because opposed to public order[27].

According to Section 27 of the ICA, every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

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[22] Neminath Appaya v. Jamboorao A. I. R. (1966) Mys. 154.

[23] Majibar v. Seyed Muktashad, 43 Cal. 113.

[24] Bakshi Das v. Nadu Das 1 CLJ 261.

[25] U Ga v. Hari 24 I. C. 777.

[26] Khursheed Ahmad Khan v. State of U. P. (2015) SCC 439.

[27] *Ghosh A., Kar P.* Pre-Nuptials Agreements in India: an Analysis of Law and Society. NUJS Law Review. 2019. No. 12. Available at: http://www.nujslawreview.org/2019/12/13/pre-nuptial-agreements-in-india-an-analysis-of-law-and-society/ (accessed: 08.12.2023).

Freedom of trade was indeed linked to liberalism, which was dominant in England at the time the ICA was enacted.

There are other cases of void contracts. Indeed, the Privy Council[28] stated that an agreement entered into by parties who have no capacity to enter into a contract such as minors is void. However, Indian law contemplates the same exceptions to the principle as English law: a contract which is to the benefit of the minor is valid[29]. Section 68 of the ICA states that if a person, incapable of entering into a contract is supplied by any other person with necessaries suited to his condition of life, the person who has provided such supplies is entitled to be reimbursed from the assets of such incapable person. Costs for necessaries are expenses for essential goods such as food, clothes, medicines but also education[30]. The ICA includes also among costs for necessaries expenses for anyone who the minor is required to support: contracts related to expenses for weddings of the sisters were considered by the courts as necessaries. According to Hindu tradition, if the father died, a brother, even if he is a minor, if rich enough, is obliged to bear the costs of the wedding of the sister[31].

2. Free Consent

Section 12 of the ICA states that a person is said to be sound of 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 judgement as to its effect upon his interests.

According to Section 14 of the ICA, consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.

2.1. Coercion

Section 19 of the ICA provides that when consent to an agreement is caused by coercion the agreement is a contract voidable at the option of the party whose consent was so caused.

Section 15 of the ICA defines violence: the committing, or threating to commit, any act forbidden by the Indian 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.

In English law[32] the notion of duress was more restricted.[33]. First of all, to be material, only the victim or a member of his family could be the party to the contract. In contrast, the ICA refers to the prejudice of any person.

Furthermore, under the English law of the time, duress must come from a contracting party, or from a third party but in this last case the victim must provide evidence that the counterpart was aware that duress occurred to have the contract annulled. According to the ICA such evidence is not required.

English case law and consistently also Indian case law stated that also economic duress matters, providing a remedy for contracts in which the situation was not balanced[34].

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[28] Mohiri Bibi v. Dharmodas Ghose // Indian Law Reports. Vol. XXX. Calcutta Series, 1903. P. 539.

[29] Goekda Latcharao v. Vishwanadham Bhomayya (1956), 33 All. 667; Ganga Singh v. Santosh Kumar A. I. R. 1963 All. 194.

[30] Mohd. Ali v. Chinki, A. I. R. 1930 All. 128.

[31] Nandan Prasad v. Ajudhia (1916) I. L. R. 30 All. 325; Tikki v. Kewal Chand A. I. R., 1940 Nag. 327.

[32] Latter v. Braddell (1880) 50 L. J. Q. B. 166.

[33] *Pathak. H. S.* Mulla On The Indian Contract Act. Bombay: Tripathi, 1990. P. 48.

[34] North Ocean Shipping Co. Ltd. V. Hyundai Construction Co. Ltd., The Atlantic Baron (1978) 3 All. E. R. 1170; Dai-ichi Karkaria Pvt. Ltd. V. Oil and Natural Gas Commission & anr. A. I. R. 1992 Bom. 309.

2.2. Undue influence

Section 16 of the ICA defines undue influence:

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.

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 reasons of age, illness, or mental or bodily distress.

In English case law undue influence was recognized in relationships such as parents and daughters/sons[35]; tutor and student[36]; lawyer and client[37]; doctor and patient[38]; guru and devotee[39]. Consistently Indian courts recognized such fiduciary relationship in similar cases[40].

According to Section 16 of the ICA, where a person who is in a position to dominate the will of another, enters into a contract with him/her, 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 be upon the person in a position to dominate the will of the other. Section 19 A of the ICA states that 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.

Indian courts applied such provisions and set aside the contract when a ploughman, oppressed by debts, sold his field for very little value[41]. Furthermore, Indian courts applied the provisions in the case of contracts executed by women living a marginalised life. Actually, even if the Constitution of India, which came into force in 1950, proclaims equality and prohibits discrimination on the grounds of sex (article 15), in certain rural areas of India women are forced to live without social contact with people not belonging to their family. They are quite isolated from real life. They live in a dedicated area of the home behind a curtain called *pardah*. Indian courts recognized what is called *prima facie* evidence in relation to contracts entered into by such women and to maintain the contract as valid the counterpart must provide evidence that the woman, even if illiterate, fully understood the consequences of the contract and decided to enter into it[42]. Such evidence can be provided showing that the woman asked for and received independent legal advice[43]. Reading aloud the contract before the signature was not deemed enough[44]. Case law recognised similar protection also to women who were not segregated but have not received any sort of education[45].

Indeed, even judges outside India, precisely in North America, found undue influence in contracts entered by women deeming they could be impressionable contracting

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[35] Bainbrigge v. Browne (1881) 18 Ch. D. 188.

[36] Hyolton v. Hyolton (1754) 2 Ves. Sen. 547.

[37] Wright v. Carter (1903) 1 Ch. 27.

[38] Dent v. Bennet (1835) 4 My. And Cr. 269.

[39] Huguenin v. Baseley (1807) 14 Ves. 273 ed Allcard v. Skinner (1887) 36 Ch. D. 145.

[40] Niko Devi v. Kirpa 1990 (1) Civil LJ H. P. 92; (Lakshmi Doss v. Roop Lall (1907) 30 Mad. 169; Mannu Singh v. Umadat Pande (1890) 12 All. 523; Sanderson and Morgas v. Mohanlal A. I. R. 1955 Cal. 319.

[41] Bhimbat v. Yeshwantrao (1900) 25 Bom. 126.

[42] Shambati Koeri v. Jago Bibi (1902) 29 C. 749; Ismail v. Hazif Boo (1906) 33 Cal. 773.

[43] *Nair M. K.* The Law of Contracts. Hyderabad: Orient Longman, 1997. P. 121–122.

[44] Annoda Mohum v. Bhuban Mohini (1901) 28 Cal. 546.

[45] Sonia Parshini v. S. M. Baksha 1950 A. I. R. Cal. 17.

parties[46]. Bank guarantees given by the wife of a debtor without independent advice were annulled.

2.3. Fraud, misrepresentation and mistake

Provisions contained in the ICA concerning fraud and mistake do not differ very much from the English law. If these situations occur the contract is voidable. Nevertheless, the contract is not voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence. "Fraud", according to Section 17 of the ICA, means any act committed with intent to deceive the other contracting party. "Misrepresentation", according to Section 18 of the ICA, means the positive assertion of that which is not true though believed to be true or any breach of duty which, without an intent to deceive, gains an advantage to the person committing it by misleading another. If fraud was committed, the deceived contracting party can also obtain compensation for damages.

Section 20 of the ICA provides for the mistake common to both contracting parties. Consistently with English law[47], if this situation occurs the contract is deemed void: where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Section 22 of the ICA provides different consequences for the mistake of only one of the parties. In the leading case[48], the plaintiff rented a boat to transport pilgrims from Jedda to Bombay; the plaintiff meant to travel 15 days after *Haj* (traditional pilgrimage to Mecca). The contract stated "15 days after *Haj*, i. e., 10th of August". The defendant was not Muslim, and so he ignored the date for *Haj* prescribed for that year. The plaintiff after having entered into the contract found out that 15 days after *Haj* meant 19th of July and sued the defendant to have the contract set aside or rectified. The Court rejected the request as being the mistake only of one party and so not a good ground for avoiding the contract.

However, Indian courts, consistently with English courts, recognized an exception to the rule provided in Section 22: if the mistake of only one party relates to an essential matter which goes to the root of the contract, the contract may be deemed void. Such is the case of a mistake as to the identity of the other contracting party. In the leading case an employee had the same surname as the name of the company he worked for. He entered into a contract and the other contracting party thought he was the owner of the company. When the dispute came before the courts, the contract was deemed void due to a mistake as to identity of the contracting party[49].

3. Frustration

The ICA does not use the expression "frustration" of contract but Section 56 incorporates the relating doctrine. Before the 19th century even if exceptional and not predictable circumstances occurred, it was difficult to set aside a contract because of the rule of absolute contract: "do or die"[50]. Later, courts took the dogma much less into account in their decisions[51] as if, in this kind of cases, an implied condition allowed to terminate

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[46] Bank of Montreal v. Stuart (1911) A. C. 120; Barclays Bank v. Kennedy in New Law Journal Nov. 25, 1988, 334.

[47] Couturier v. Hastie (1856) 5 H. L. Cas. 673.

[48] Haji Abdul Rahman Alarakha v. The Bombay and Persia Steam Navigation Co. (1892) 15 Bom. 561.

[49] Hardman v, Booth (1863) 1 H & C 803, Ismail v. Dattatriya (1916) 40 Bom. L. R. 631.

[50] Paradine v. Jane (1647) Aleyn 26.

[51] Atkinson v. Ritchie (1809) 10 East 530.

the contract without liabilities. It happened, for example, that a garden[52] was rented to organize four concerts. The day before the event the garden was destroyed by fire. The Court set aside the contract. Justice demands special exceptions be made from the rule of absolute contract[53].

Consistently with English law Section 56 of the ICA states that if the performance of a contract becomes impossible, the contract becomes void. Indian courts clarify that there is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because, on account of an uncontemplated turn of events, the performance of the contract may become onerous[54].

It happened[55], for example, that a place was rented to open a restaurant. The business seemed to be successful as some army troops used to live nearby. Later on, the troops moved and litigation started as the defendant no longer paid the rent. The defendant argued that the contract was frustrated. The court rejected this argument clarifying that the supervening circumstances referred to in Section 56 of the ICA must be such as to frustrate altogether the purpose of the contract. An economic loss is not sufficient to excuse performance. However, in a few decisions, Indian courts applied Section 56 of the ICA in the case of unpredictable increases in costs due to unforeseen events. In such situations the courts stated that the very foundation upon which the parties rested their bargain was absent. During the Gulf War the costs of some goods to be provided increased by 400 %: the court set aside the contract[56].

Courts had to decide cases in relation to the Partition. Partially due to the opposition, that emerged during the struggle for independence, between the Muslim League and the movement which became a political party called the Congress, in 1947, when independence was eventually gained, the Subcontinent was split in two new nations: India and Pakistan. Many real estate properties in the territory which became Pakistan were leased before 1947. Due to the political situation Hindus felt it dangerous to continue to live or invest in the newly created nation of Pakistan. Could such leases be deemed frustrated according to Section 56 of the ICA? The courts decided differently depending on the case.

Moreover, Section 56 of the ICA states that if the performance of a contract becomes unlawful, the contract becomes void. The Court of Bombay decided a case[57] in which the defendant undertook to transport on his ferryboat 500 pilgrims from Bombay to Jedda. The plaintiff previously had transported the same pilgrims, on a boat of his own, from Singapore to Bombay. In Bombay the defendant refused to accept the pilgrims on board arguing that smallpox had spread during the journey from Singapore to Bombay: indeed, letting them on board was against Section 269 of the Indian Penal Code[58], which punishes whoever acts, being aware that the infection of any disease dangerous to life is likely to spread. The Court did not apply Section 56 of the ICA stating that special precautions could have been taken to avoid the spreading of infection.

Case law is founded upon the commandment that contractual terms are supreme and parties must be held to their bargain. However, a *force majeure* clause restricted to certain situations beyond the control of the promisor and/or the promisee may be insert-

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[52] Taylor v. Caldwell (1863) 3 B. and S. 826; Krell v. Henry (1903) 2 K. B. 740.

[53] Lord Sumner in Hirji Mulji v. Cheong Yue Stemship Co. (1926) A. C. 497–507.

[54] Alopi Parshad & Sons v. Union of India (1960) 2 SCR 793, 806-7: A. I. R. 1960 SC 588, 593-4, Shah J.

[55] Sachindra Nath v. Gopal Chandra Ghose A. I. R. 1949 Cal 240.

[56] Easun Engineering Co. Ltd. v. Fertilisers and Chemicals Travancore Ltd. A. I. R. (1991) Mad. 158.

[57] Bombay and Persia Steam Navigation Co. v. Rubattino Co. (1889) 14 Bom. 147.

[58] Section 269. Negligent act likely to spread infection of disease dangerous to life: "Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both".

ed in a contract. Such kind of clauses identify events like wars, riots, strikes, etc. They can even list the so called "Acts of God", such as flood, earthquake, epidemic, and "Acts of Government" like lockdowns to contain the spread of infectious diseases. The occurrence of an identified circumstance may suspend the performance of the contract, or render it void. It should be noted that *force majeure* or hardship clauses may be rather ambiguous, containing phrases as "events including but not limited to the ones listed" [59].

The recent pandemic of Covid-19 prevented the performance of many contracts. Indeed, it had impacted the parties' ability to meet their contractual obligations due to restriction in movement, stoppage of production, increase in costs due to scarcity of raw materials and disruption in supply chains. It affected construction contracts, employment agreements, transportation contracts, rental contracts, event-related contracts, involving professionals such as caterers, venue-owners, wedding planners, etc. A *force majeure* or hardship clause typically spells out specific circumstances or events, which would qualify as *force majeure* events. This kind of clauses are regulated by Section 32 of the ICA relating to contingent contracts.

In the absence of a *force majeure* or hardship clause covering the situation, parties will be required to examine whether the outbreak of Covid-19 or the restrictions imposed in view thereof, make it impossible for them to perform their obligations. If so, such parties may invoke the doctrine of frustration to defend themselves in any litigation initiated against them. The determination of whether a contract is frustrated is quite subjective. This may include determining the nature of the obligation to be performed, whether the outbreak or state measures were the direct or substantial cause of the inability to perform such obligation, whether the promisor was diligent and explored all alternatives, etc. It is entirely possible that courts may not consider the lockdown to *ipso facto* be an event that renders the performance of obligations under a contract impossible. The Ministry of Finance has by way of an office memorandum (O. M. No. 18/4/2020-PPD) clarified that the disruption of the supply chains due to the spread of Covid-19 should be considered as a case of natural calamity. However, such clarification has been provided only with respect to the disruption of supply chains.

The Bombay High Court[60], remarkably, dismissed a petition, holding that the lockdown cannot come to the rescue of the defendants so as to walk away from their contractual obligations. In other words, the lockdown was not deemed a legal basis for termination or repudiation of a contract. Another litigation[61] involved a start-up called OYO. The company's online platform allowed people to book rooms at famous and beautiful mountain/hill towns in Himalaya, such as Shimla or Manali, usually used by trekking enthusiasts. These rooms had to comply with certain standards: they had to be spotless and an excellent wi-fi line had to be available. OYO cited Covid-19-related reasons for claiming frustration of contract with partner hotels signed under a minimum guarantee deal — a model that guarantees revenue regardless of business generated. It claimed that after Covid occurred it was impossible to pay revenue regardless of business generated. The Delhi High Court was asked to issue interim relief as the arbitration case was due to be commenced. Indeed, the terms minimum guarantee deal were probably framed by OYO, and they could have entered into an insurance agreement to cover pandemic-related business losses. Many similar cases are pending. Courts seem cautious to reallocate losses changing the terms of contracts as it would jeopardize the sanctity of contract and discourage investments. Public policy is better suited to compensate people and busi-

[59] *Utkarsh L., Ram S.* Covid-19 and Contractual Disputes in India. 2020. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720741 (accessed: 08.12.2023).

[60] On 8 April 2020 (No 404 of 2020) in Standard Retail Pvt. Ltd. v. M/s. G. S. Global Corp & Ors.

[61] Pearl Hospitality & Events Pvt … vs Oyo Hotels and Homes Pvt Ltd. 3 Nov. 2020.

nesses affected by Covid-19 and the ensuing lockdowns rather than judicial remedies relating to contract law, like the Insolvency and Bankruptcy Code (Amendment) 2020, which introduced a temporary measure and restricted the filing of insolvency applications during Covid-19.

Conclusion

A general law of contracts was imposed in India during the colonial time. The act was based on the case law of the time and it is an improved version of it. Such act remained in force after independence and Indian courts apply it in a way that is compatible with the needs of Indian society. Indeed, judges have played a fundamental role in keeping the written law updated and adapting it to cultural change and development. The ICA has been applied to protect segregated and illiterate women living in rural and remote areas and also to deem enforceable prenuptial agreements, which are felt necessary in matrimonial relationships today. Entrepreneurs tried to apply provisions of the ICA to avoid the disastrous consequences of Covid-19.

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Индийский закон о контрактах — доктринальные основания и прецедентное право

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Цель этой статьи — проиллюстрировать предысторию и прецедентное право Индийского закона о контрактах, принятого в 1872 г. Также делается попытка провести сравнение между законом, введенным в Индии, и образцовой моделью, использованной при его создании, а именно английское договорное право того времени. В действительности положения, содержащиеся в индийском законе о контрактах, более продвинуты и более органично сформулированы, чем английское общее договорное право. Основные доктрины общего договорного права — «встречное предоставление», «исчерпание» и экономическое принуждение — содержатся в законе Индии в улучшенной версии. Индийские суды последовательно применяли их в большинстве случаев. Даже сегодня, кроме не-

скольких исключительных случаев, индийские суды находятся под влиянием английского прецедентного права до такой степени, что их практика не соответствует инновационным аспектам Индийского закона о контрактах. Недавняя пандемия Covid-19, создавшая препятствия для исполнения многих контрактов, подняла такие вопросы, как существование форс-мажорных обстоятельств, способных аннулировать контракт, и в некоторых случаях это привело к применимости доктрины «исчерпания». Такие ситуации кодифицированы индийским законом о контрактах, и по данному вопросу имеется прецедентное право. В области брачного права возникли новые потребности, такие как добрачные соглашения, которые, по-видимому, могут считаться действительными, если проходят проверку на соответствие публичному порядку, как указано в Индийском законе о контрактах.

Ключевые слова: индийское право, общее право, Индийский закон о контрактах, договорное право, брачное право.

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