

Free Consent and Its Vitiating Factors

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WHAT AGREEMENTS ARE CONTRACTS

Section 10. What agreements are contracts.—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.

FREE CONSENT AND VITIATING FACTORS

- **Section 13. “Consent” defined.**—Two or more persons are said to consent when they agree upon the same thing in the same sense.
- **Section 14. “Free consent” defined.**—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 of sections 20, 21 and 22.

COERCION

Section 15. “Coercion” defined.—“Coercion” is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) 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 Indian Penal Code (45 of 1860) 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 Indian Penal Code. (45 of 1860). A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code (45 of 1860) was not in force at the time when or place where the act was done.

Cases/ Illustrations

- Astley v. Reynolds [1731]

UNDUE INFLUENCE

16. “Undue influence” defined.—(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 in a position to dominate the will of the other.

CASES/ ILLUSTRATIONS

- POSITION OF DOMINANCE
 - Williams v. Bayley [1866, HoL]
 - Mannu Singh v. Umadat Pande [1888, All.]
 - Moody v. Cox [1917, CoA]
 - Subhash Chandra Das Mushib v. Ganga Prasad Das Mushib [1967, SC]
- INEQUALITY OF BARGAINING POWER
 - Lloyds Bank v. Bundy [1975, QB]
- ECONOMIC DURESS LEADING TO POSITION OF DOMINANCE
 - Atlas Express Ltd. v. Kafco Ltd [1989, CoA]
 - Also See, Universal Tankships Inc. v. Int. Transport Workers' Federation [1982, HoL]

POWER TO SET ASIDE CONTRACT INDUCED BY UNDUE INFLUENCE

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

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.

FRAUD

17. "Fraud" defined.—"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 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.

CASES/ ILLUSTRATIONS

- Derry v. Peek (1889, HoL)
- Mithoo lal Nayak v. LIC [1962, SC]
- DDA v. Skipper Constructions (2000, SC)
- Keats v. Earl of Cadogen

DUTY TO SPEAK (Explanation to the section)

- Ubberima Fides
 - Insurance Contracts
 - Prospectus of a company
- Fiduciary Relations
- Where silence equivalent to speech
- Half Truth
- Change in Circumstances

MISREPRESENTATION

SECTION 18. “Misrepresentation” defined.—“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 an 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 substance of the thing which is **the subject of the agreement**.

CASES/ ILLUSTRATIONS ON MISREPRESENTATION

- UNWARRANTED STATEMENTS [18 (1)]
 - Oceanic Steam Navigation Co. v. Soonderdas Dharamsey [1890, Bom.]
 - Chuan Bee Realty Pte. Ltd. v. Teo Chee Yeow [1996, Singapore]
- BREACH OF DUTY WITHOUT INTENT TO DECEIVE [18 (2)]
 - Thake v. Maurice [1986, CoA]
 - Eyre v. Measday [1986, CoA]
- INNOCENTLY INDUCING MISTAKE ABOUT THE SUBJECT MATTER [18 (3)]
 - Ferrand v. Lazarous [2002, EWHC]
 - R v. Kylsant [1932, CoA]

- MISREPRESENTATION MUST BE OF MATERIAL FACT
- EXPRESSIONS OF OPINION AND MISREPRESENTATION
 - Smith v. Land and House Property Corpn. [1884, CoA]
 - Bisset v. Wilkinson [1927, PC]
- CHANGE IN CIRCUMSTANCES

REPRESENTATIONS AND WARRANTIES CLAUSE

The Borrower confirms and agrees that:

- a. The Credit Application is true in all material respects and discloses all material facts.
- b. [Status of the Borrower] The Borrower is a _____ duly incorporated under _____. All authorizations to carry on business and own assets have been validly obtained by the Borrower and are continuing in nature.
- c. [Binding Nature of the Facility Agreement] The obligations arising out of and assumed by the Borrower under this Agreement and all other Transaction Documents are legal, binding and enforceable in nature.
- d. [Information related] All information and documents provided by the Borrower are true in all material aspects and are not fraudulent or misleading in any form.
- e. [Conformity with Applicable Laws] The Borrower stands in compliance with all Applicable Laws which affect its business, operations and functioning.
- f. [Valid execution] This Agreement has been duly and validly executed and this Agreement along with the Transaction Documents constitutes legal, valid and binding obligations which are justiciable in nature.
- g. [Security Related] Save and except as disclosed, the Borrower has a clear, good, valid, legal and marketable title exist along with valid (ownership/freehold/leasehold interest as the case may be) without any Encumbrance of any nature whatsoever in all the Security (created or to be created in favour of the Lender) and/ or all the Secured Property and no contracts or arrangements, conditional or unconditional, exist for the creation of any Security by the Security Provider, except for the Security in favour of the Lender, herein. The Borrower / Security Provider are absolutely entitled to use its/their assets and confirms with absolute assertion and bonafide the same for the Secured Property.
- h. [Litigation related] Save and except as disclosed, no litigation, arbitration or any such proceedings are pending or threatened against the Borrower/ Security Provider or any of the assets which could result into a Material Adverse Effect on the Lender or this Financial Facility and its enforcement.

REMEDY OF RESTITUTION IN CASES OF VOIDABLE AGREEMENTS

Section 64. Consequences of rescission of voidable contract.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding avoidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received

MISTAKE

20. Agreement void where both parties are under mistake as to matter of fact.—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.

21. Effect of mistakes as to law.—A contract is not voidable because it was caused by a mistake as to any law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake of fact.

22. Contract caused by mistake of one party as to matter of fact.—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.

KINDS OF MISTAKE

- Mistake of Identity
- Mistake of Subject Matter
 - Couturier v. Hastie [1856, HoL]
 - Raffles v. Wichelhaus [1864, HoL]
 - Seikh Bros Ltd. v. Ochner [1957, PC]
- Mistake regarding Nature of Promise

REMEDY OF RESTITUTION IN CASES OF VOID AGREEMENTS

65. Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

THANK YOU