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Evolutionary Pattern of Contract Law

By

B. Sadasivaiah *

In modern law, contract is defined in simple language as an agreement which is enforceable in a court of law. Therefore, an agreement which has no Vinculum Juris can never partake of the nature of contract. Further, a contract to be enforced must have been entered into by persons who are considered competent to enter into contract, in other words, they must be major, of sound mind and should not suffer from any disqualification whatsoever under the law. These themselves do not make a contract a binding one unless it has what is called consideration.

Further, contracts are classed under the modern law as valid, voidable, void and unenforceable. This classification brings into prominence one more element called free consent. If a contract is entered into under undue influence, coercion or misrepresentation then it becomes a voidable contract; also a contract entered into by a man of unsound mind. The modern law even goes to the extent of saying that a contract entered into by a lunatic in a lunatic asylum during lucid intervals is a valid one.

Even with regard to the subject matter of contract if there is consensus of agreement, the contract is said to have come into existence. These are some of the finer points of law which we notice in any modern books on contracts.

If we examine carefully, the law of contract in ancient society, we have to come to the inevitable conclusion as Henry Maine has put it in his classic "Ancient Law," the reliance on the words of another man is one of the slowest conquests of nature. Henry Maine makes it quite clear what was important in ancient society was not so much the promise but the ceremonial which accompanied the promise and he further states that gradually the important ceremonial were left out and

*Principal, Government Law College, Bangalore.

others simplified : and emphasis came to be laid on intention. That is how the mental agreement of the party became the sole criterion. This process of growth, Henry Maine has tried to illustrate with reference to both Roman and English Law.

"Contract" as understood today is a bilateral one. But if we look into the Roman Law of Contract (which were formal in nature), there were very many cases of contracts which were unilateral in character. The earliest Roman word for a contract was Nexum and a party thereto is called Nexi in other words, connected by a strong bond or chain. And in Roman Law, we have mainly 4 classifications of Law of Contracts. Re Verbis, Litteris and Consensual. The most developed form of contract being the consensual, where we find the law regarding sale, partnership, agency, letting and hiring. These types of contractual laws were developed in Rome mainly because the members other than the heads of amily could not enter into a valid agreement and further a slave could never be party to a contract. Therefore, during the period of Roman History aliena juris, slaves and even women in general could not enter into contracts. They were even disqualified to enter into valid contracts. That is all because of the general recognition of the principle of Petria Potests, Dominica Potesta and Manus. Therefore, the law of contract in Roman society was conditioned or oriented with the social and economic structure of the times.

But in English Law, the develooment of Contracts arose originally in respect of three actions, viz., (i) Debt, (ii) Detinue and (iii) Govenant. Debt and Detinue were regarded as proprietory rather than contractual obligations. Here, the plaintiff sued to recover something belonging to him and itwa held that a promise under seal need not be communicated to the promisee - Fletcher v. Fletcher. Therefore, it can also be seen clearly that the law of contracts at its rudimentary stage in English law was one with the economic and political trends of the times.

It is a well known theory that the modern law of contracts was developed out of the Law of Torts through the action of assumpsit which meant that something was undertaken to be done but the same was done badly. It is only in later stages it was found in principle that a promise was to become enforceable, if given for a promise and this theory is very well enunciated in the famous case of <u>Slade</u>. Here, we come across the word consideration which is defined as a detriment to the promise sought to be enforced. It is observed while covering the Roman theory of contracts, the idea of consideration being totally absent in Roman law. But in its place Causa played an important role by providing a more flexible basis for contractual obligations.

But at this stage, I must casually refer to what is called social contract theory which if accepted could give rise to many theories which cannot be answered easily by Jursits. In brief, the theory of social contract states that there was a state of nature where there was no law and order, but one where everyone was a law to himself and one could achieve his own aims and objects in life without regard to considerations of others. Life in such a society was "nasty, brutish and short." Inshort, it was an existence which can well be described as one of absence of civil state.

The contractarians whether it be Hobbes, Locke, Spinoza, Rousseau, are of unanimous opinion that one fine morning me who were in a state of nature came to an agreement to form a civil government and only from thenceforth a civil state came into existence. This is no doubt a very plausible and igenious theory put forward by the protagonists of the contract theory to explain away the existence of the Civil Society. But unfortunately, as is very well known, this theory of social contracts has deplorably failed to explain certain juristic queries like the fact how the people living in a state of nature could ultimately decide upon relying upon the words of other or others to guarantee peace and harmony and thus give birth to a covenant; (ii) as to who entered into agreement on behalf of compas mentis. The theory of socialcontract has been discounted as one being historically fictitious and juritically unsound.

From the above, it is quite clear that the law of contrct can exist, develop and thrive only in a civil State. And in Ancient Societies to begin with what was important was not the promise as such but the formalities and technicalities which accompanied the promise. The rituals were of all importance and the promise was only an incidental fact. A promise without the ceremonial or the ritual could be of no value. It was only gradually that the ceremonials were dispensed with and the promise took the all important place. This further shows that the theory of contract could develop fully in an atmosphere where there is complete individual freedom. As Henry Maine has put it in his Classic, Ancient Law,the development of the theory of contract is one which is linked with the theory of mankind moving from status to contract or from authority to right and power to liberty.

While dealing with either the Roman Law of Contract or the development of the English Law of Contract, the modes of discharge of contract or remedies for breach of contract are not dealt with since they are of consequential nature. In fact, at the developed stage of both Roman and English Law there was not much of divergence either in the modes of discharge of contract of the remedies for breach of contract. Similarly anything that is impossible, illegal or contrary to good morals cannot be the subject of a contract in Roman or modern law. No doubt, there are some significant changes

introduced like antiicpatory breach of contract in modern English law. But this is one which is naturally conditioned by the time. The matters regarding offer and acceptance, the privity of contract or even the full capacity of parties are not dealt with in detail because of their secondary place in the early period of Roman development of the law of con_ tract.

We have further classification of contracts in Roman Law as Quasi-contracts and Innominate contracts. Quasi-contracts are after all obligations which are analogous to those arising from contracts but though not founded on any agreement of the parties but still imposed by law on grounds of equity or public policy. Quasi-contractual obligations in Roman law although not based on contract, they possessed a certain resemblance to some particular type of contract. The chief types of these quasi-contractual obligations were negotiorum gestio. Here one who had made some useful expenditure on another's behalf was enabled to recover from him on the analogy of contract of mandate. This principle is abundantly made use of in connection with the law dealing with Salvage operations.

A similar type of quasi-contractual obligation comprises those obligations, which are enforced as if there had been a contract. Lord Mansfield who is regarded as the founder of English quasi-contract, has reduced the cases of qauasi-contractual obligations to the simple dictum that no man should retain a benefit obtained in conflict with natural justice and equity. Professor Winfield is also of the same opinion. He says that 'genuine quasi-contract signifies liability not exclusively referable to any other head of law imposed upon a particular person on the ground of unjust benefit.' But only Scrutton L.J. dismissed these opinions, as "well-meaning sloppiness of thought."

It is nodoubt true to a great extent that this division of obligations relating to quasi-contract has no logical basis either in Roman or in English Law. It is rather an unsound principle merely on resemblances to provide with contractual remedies for obligations which are not strictly contractual in character. That may even amount to be an anomaly. But some name has to be provided for these obligations which fall without either the heads of contract or tort, and hence the title of 'quasi-contract.' No doubt in this sense, quasi-contract may be confused with implied contracts in English Law particularly as to whether liability upon quantum meruit is based upon a genuine implied contract or upon quasi-contract. Regarding this Professor Holdsworth makes the following observation aptly:

"It is not till these procedural changes have

> taken place that the fiction of a promise and with it the confusion between implied contracts and contracts implied in law, will be got rid of, and the law of quasi-contract will be able to emerge a distinct branch of the law."

Paul sums up all the cases of innominate contract thus, "Either, says he, I gave something to you in order that you may give something to me, or I give something to you in order that you may do something to me; or I do something to you in order that you may give something to me or I do something to you in order that you may do something to me." This classification, no doubt proceeds upon the distinction between a promise to do and a promise to give which is within the common knowledge of Roman Lawyers. Strictly speaking it has no logical value since the general word 'to do' includes 'to give.' But the omission 'not to do' cannot be brought within its pale since it may be the object of a promise. But finally in Roman Law, the innominate contracts had developed into the general principle that "where an agreement for reciprocal services had been performed by one party, he could insist upon the other specifically performing his obligation.

The topic of quasi-contracts needs to be examined a little more in detail in the context of its importance in the modern law of contract in Common Law countries.

Professor Winfield examines the nature and utility of quasi-contract mainly from three aspects fiz.,

(1) Quasi-contract arising from compulsion;
(2) Quasi-contract for work done; and
(3) Equity and Quasi-contract.

His observations in regard to the place of quasi-contract in the law of contract in common law countries are of stupendous importance.

Professor Winfield is emphatically opposed to the idea of quasi-contract being extended to the cases where the "agent has borrowed the money from the principal's enemy or has paid a debt which the Principal would have disputed his ilability to pay, or where there are other circumstances that negative real benefit to the principal." There is much force in Professor Winfield's argument, and one wonders whether the same claims cannot be negatived on the grounds of want of equities.

Further, refering to recovery of payments made by mistake, R.J. Sutton describes it one of "lifting the lid or Pandora's Box," and states that "while many criticisms are made of existing legal rules as to recovery of payments

made by mistake, few countries have progressed in reforming them. The problem is one of balancing points of videw: that of the person who has made the mistake, and claims money he says in his own; that of the innocent recipient who in many cases has paid the money to someone else, or otherwise changed his position on the strength of the payment; and finally that of the court, which must evolve a simple, workable and reasonably predictable basis of decision."

In regard to the second type of quasi-contract, Professor Winfield is of the firm opinion that the same is distinct from that for money paid at the request, express or implied of another person. And further substantiates his theory by distinguishing quasi-contract for work done from the rule in Lampleigh v. Brathwait in that liability for work done does not require any subsequent promise to support it.

In both Roman and modern jurisprudence, "Quasi-contracts are but extensions of the law of contracts to duties similar to obligations arising ex contractu." No doubt Quasi-contract is a branch of the Common Law. Quasi-contract has been defined by Professor Winfield as follows:

> "Liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit."

But the differences between the Common Law and Equity have thinned down. No doubt, the remedies which are granted by equity are by way of cancellation or rectification of an instrument. So much so the court of chancery will not order payment of money where "on the same facts no action for money had and received would be maintainable at common law."

The French, the German and the Spanish Codes have borrowed much material from the Roman Law particularly in the field of contracts. It is said that the Lousanian Code is nothing but a replica of the Roman. The continental countries have been no doubt influenced more or less completely by the Roman Law. Therefore, the civil law countries have more or less the same type of law regarding the law of contracts as distinguished from the common law countries. Even here, as a matter of fact, particularly in the early period of English History, Professor Bracton advocated the study of Roman Law for the proper understanding and development of English Law. In fact, Professor Edward Jenks, in his book on History of English Law, makes an intriguing statement that the influence of Roman Law on English law, still the impact of Roman Law on Civil Law cannot be wholely ruled out as pointed out by Sherman in his book on 'Roman Law in the Modern World.' He says that "the English common law is vastly indebted to the Roman for its law of contracts. "

The Indian Law of Contracts is no doubt a copy or a duplicate of English law of Contracts with a few changes introduced to meet the Indian conditions. The law of contract as developed and found in India from the time of the English conquest at any rate, is a replica of the English Law of Contract. The Juristic basis of law in India is analogous to that of England, no doubt, minus its rich and varied historical background. Hence, naturally to meet the social habits, the economic needs and other requirements of the people, the English law of contract in India had to be modified or changed, with reference to them.

Conclusions:

There are no doubt certain pitfalls in the existing Law of Contract in Common Law countries and they are to be got over by suitable law reform. The law as a matter of fact requires a particular contract to be in writing. No doubt, this requirement generally works hardship on one or the other party since it encourages the evasion of agreement and the law is very clear in matters of evidence. It is stated in the law of evidence, that what is in writing must be proved in writing and no oral evidence can be given either to vary or supplement the writing. This theory would leave enough scope for dishonesty. In fact, two businessmen may enter into a a written agreement mentioning most of the terms agreed upon but omitting to include the most important term on which they have agreed for the reasons best known to themselves. Obviously the omitted term will be to a certain disadvantage to one party rather than the other, in which case the other party to whom it is advantageous may take to a court and get the written agreement enforced as it stands and thereby leaving out the omitted term that was orally agreed upon. There may be several witnesses who can very well depose to the promise agreed upon but the Judge will have refused this evidence to be taken because of the law that "nothing is allowed to vary or add to what is down on the paper." This rule has been attacked by modern Jurists as being 'archaic and immoral'. Hence this is an important field on which Jurists could bestow some thought to remove the too formalitic nature of law in the interests of justice.

Similarly, it is said that the law of contract as extended is too wide in the matter of the promises of marriage. Marriage promises are put on the same level as buying certain quantity of goods in a market, particularly in the matter of damages to be obtained for breach. As a modern writer has put it - "The sanction for engagement to marry ought to be purely social, to attempt to enforce it by legal means when the

parties have fallen out or one party has changed his mind is not only bad policy but is contrary to the doctrine of the Church that marriage is a relationship voluntarily entered into." This is in vogue in common law countries with the exception of India. Under Hindu Marriage Act, 1955, it is no doubt a voluntary union if both parties to be married are above the age of 18 years and under strict Hindu law, marriage is a sacrament or a holy union.

Hence, the propriety of claiming damages for breach of promise of marriage is one which may be done away with early in English speaking countries. This is another point on which legal thinkers in the common law countries may focus their attention with a desire to bring in reform.

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