



MINORS RIGHT TO DISAFFIRM A CONTRACT*

HISTORICAL BACKGROUND OF CONTRACTS

When contract is taken into consideration in common law its position was not clear as there was no written statute or law to govern it. In common law, disputes were largely dealt beginning with the premises that everything is lawful if there is no law regarding it. Now when applying this to contracts then it intends that one can write anything in one's contract which does not go against public policy or public order.

Contract in simple words is an agreement between two parties in order to accomplish certain work. The origin is not as simple as its definition. It took many centuries to develop and reach to the present state. It's origin in common law system can be traced back in 1232 when the first case came under "action of account"¹, then came writ of covenant, writ of assumpsit, writ of debt and others.

In the attempt to bring maximum act of a person under the ambit of contract and to make it punishable there are few broad questions posed to the law system, which are as follows:

1. Whether common law system or civil law system good or sufficient to deal with different forms of contracts or agreements emerging day-by-day?
2. Is consideration an integral part of any contract or agreement?
3. If consideration does not constitute an integral part of any contract then what are the prerequisites to form a contract?
4. Can the writs be made applicable universally?
5. Are the writs sufficient to deal with the problems of contemporary world or emerging economy and society?

EVOLUTION OF CONTRACTS IN INDIA

The rules and principles governing contracts were governed in India in ancient and medieval periods of Indian history mainly by two factors – moral and economic.² The Hindu laws were enunciated over the centuries by the compilers of Smritis.³ In India, Manusmriti is one of the first Sanskrit text to be translated to English and is considered to be one of the most earliest text which defined rights, duties, laws, conducts and other such things which a person should comply with in order to perform his/her Dharma. It is written in Manusmriti that until and unless a person does not pay its debt he is not free or he/she will not be able to attain its final liberation from this life.⁴ Spiritual as well as secular engagements were referred to in the

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¹<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/barbour/HistoryContract.pdf>, accessed on 21/08/2015

²POLLACK & MULLA, THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACT, P. 4, EDITION- 14TH EDITION(UPDATED), PUBLICATION: LEXISNEXIS

³ ibid

⁴http://sanskritdocuments.org/all_pdf/manusmriti.pdf, accessed on 21/08/2015

literature as 'rta', and it was constantly reinforced by the Smritis that failure to pay back debts implied rebirth of the defaulter as a slave/servant/woman or beast in the house of creditor.⁵ The point which can be seen here is of discrimination on the basis of sex that if one would be a defaulter will take birth as a woman in its next life. Woman is described and portrayed as a slave or curse on the society according to the statement. But it talks only of debts and not of broader aspect of contract which is not restricted to debts only. All Shastras agreed that contracts or transaction based on fraud or force were to be declared, by the king, as unenforceable.⁶ Further, for more than 200 years India has been under the rule of British administration. There is a great impact of British rule on the administrative side of India. The charters of eighteenth century which established courts of justice for three presidency towns of Calcutta, Madras and Bombay, introduced into their jurisdiction the English common and statute law, in force at the time.⁷ By the charter of 1871 High Courts were obliged to decide disputes between Hindus and Mohamedans by their own laws or by the law of defendants.⁸ Islamic law had a complete and comprehensive law of contract providing for general principles applicable to all contracts.⁹ The expression 'justice, equity and good conscience' was interpreted to mean the rules of English law so far as applicable to the Indian society and circumstances.¹⁰ Then in 1872 British came out with a concrete and codified law on contracts to deal with it. The law of England, so far as consistent with the principles of equity and good conscience, generally prevailed in the country unless they conflicted with Hindu or Mahomedan law.¹¹ The trouble here is that the Indian contract act was made according to British societal background and which is altogether different from Indian society condition. India's society was much more complicated and the economic condition was also not at par with the Britain and this all required rigorous and comprehensive discussion to apply the same.

INDIA'S POSITION ON CONTRACT AFTER INDEPENDENCE

In India, however, the case goes slightly different as compared to other countries and unique in itself which poses different kinds of problem. Indian law system is a conflation of common as well as civil law system. It was difficult to ascertain which way to take whether common law approach or civil law approach. The honourable lawmakers came up with the decision that 'The Indian Contract law' of 1872 shall remain applicable in India. The challenging phase which is emerging right now owing to the act is whether minor's can enter and consequently disaffirm a contract. The contract act of 1872 specifies in section 11 of who all are competent to contract, but problem which springs out of this is very varied and important. There are many things which come into picture like health issues of minor, rights of minor, rights and obligations of the contracting party, future implications by disaffirmance of contract, when can it be allowed and when not, what is the remedy to the other party when it will be disaffirmed and many other such questions come into picture.

INDIAN CONTRACT ACT, 1872

Before 1950 The Indian Contract Act was applicable to all people, whether the parties were Hindu, Mahommadans or otherwise. The Indian Contract Act didn't cover the entire field of

⁵POLLACK & MULLA, THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACT, P. 4, EDITION- 14TH EDITION(UPDATED), PUBLICATION: LEXISNEXIS

⁶POLLACK & MULLA, THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACT, P. 4, EDITION- 14TH EDITION(UPDATED), PUBLICATION: LEXISNEXIS

⁷Ibid. p.5

⁸<http://drgokuleshsharma.com/pdf/History%20of%20Law%20of%20Contract.pdf>, accessed on 20/08/2015

⁹POLLACK & MULLA, THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACT, P. 5, EDITION- 14TH EDITION(UPDATED), PUBLICATION: LEXISNEXIS

¹⁰ Ibid. p.7

¹¹ Supra note 10

contract law.¹² In such cases the case was decided in reference to personal laws of the parties. Further when any subject was not dealt by the Act, courts followed the principles of justice, equity and good conscience.¹³ The Contract Act has been amended from time to time.¹⁴ Post-Independence the Indian Contract Act remained applicable by virtue of Article 372(1) of Constitution of India. It was made clear that the provisions of the Act would be subject to the provisions of the Constitution of India. The provisions of the Indian Contract Act 1872 should not be inconsistent with the fundamental rights otherwise it would be declared as void and will be struck down. The 13th law commission report under the chairmanship of M C Setalwad in 1958 recommended certain amendments to various provisions of the Act which are as follows:

1. "The law should provide that all lawful agreements should be valid contracts if the parties intended by their agreement to affect their legal relationship and either consideration was present, or the agreement was put into writing and signed by all the parties thereto"¹⁵;
2. Doctrine of privity was also pointed out to dilute the concept so that the beneficiary can claim the damages in case of breach of contract;
3. To make wagering and collateral agreements unlawful;
4. To put reasonable restriction on right to carry on trade;
5. Principle of Promissory estoppel to be recognised.

These were few provisions which were recommended by the law commission but were not acted upon at that point of time. As the time passed with the 97th report there were changes made and the Act was amended in 1997.

There are currently eleven chapters and 238 sections in the Indian Contract Act of 1872. Each chapter and section deals with specific concept and stage in the formation of contract and relief and manner in which any contract is to be carried off. For instance, section 2 tells the stages in formation of a contract which are as follows:

- Proposal [2(a)]
- Acceptance and promise [2(b)]
- Promisor and promisee [2(c)]
- Consideration [2(d)]
- Agreement [2(e)]
- Reciprocal promises [2(f)]
- Void agreement [2(g)]
- Contract [2(h)]
- Voidable agreement [2(i)]
- Contract when becomes void [2(j)]

All the above stated were stages in the formation of a contract and as it can be seen contract is formed after fulfilling the prior six conditions and then it will become a contract. Similarly, other chapters and sections deal with different concept and processes which come in the path of a contract in making and its execution.

¹²POLLACK & MULLA, THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACT, P. 8, EDITION-14TH EDITION(UPDATED), PUBLICATION: LEXISNEXIS

¹³ ibid

¹⁴ ibid

¹⁵<http://lawcommissionofindia.nic.in/1-50/report13.pdf>, accessed on: 23/08/2015 at 3:28 p.m.

MINORS CONTRACT

The Indian Contract act of 1872 defines who can enter into a contract. The second chapter of the act elaborately gives the picture of who all are competent to contract. Section 10 of Indian Contract Act defines 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.**”*

Section 11 of Indian Contract Act says who are competent to contract-

*“Every person is competent to contract who is of the **age of majority** according to 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.”*

Section 10 describes when an agreement converts into a contract as all contracts are agreements but all agreements are not contracts. It says there are certain pre-requisites which need to be met with to come to a contract between two parties. It requires that there is free consent i.e. they should agree on the same thing in same sense. Section 13 defines consent and section 14 defines what free consent is i.e. free consent should not be caused due to any of the following factors:

1. Coercion;
2. Undue influence;
3. Fraud;
4. Misrepresentation;
5. Mistake, subject to the provisions of section 20,21 and 22;

These are the broad areas which have been identified to nullify a contract but it has been criticised widely because this is not an exhaustive list and does not cover every factor which can cause consent not to be free and voluntary.

Second requirement is of competent parties. Parties in a valid contract would mean a contract made by a natural persons or by any other person who have a legal personality i.e. corporations, companies, universities, statutory corporations, universities and in some cases where bodies cannot contract their constituents do the job like partnership firms, trusts, clubs, and registered societies.¹⁶ When section 10 is read with section 11 it gives a clear idea of who all are competent to contract and who is not. Section 11 says “who is of the age of majority” and section 3 of Indian Majority act, 1875 defines what the age of majority:

1. Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.¹⁷
2. In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day.¹⁸

Age of majority being different in different cases is like if a person has legal guardian then his age of majority will be 21 years in case of property cases and otherwise it will be 18 years. This law was creating a lot of problems so it was amended in the year 1997 and made 18 years as the age of majority. In Indian Contract Act, contract with a minor is said to be void ab initio.

¹⁶POLLACK & MULLA, THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACT, P. 231, EDITION-14TH EDITION(UPDATED), PUBLICATION: LEXISNEXIS

¹⁷ ibid, p.283

¹⁸ ibid

This notion created a lot of problems like if minors have been benefitted from the contract by any misrepresentation or fraud and the other party is made vulnerable due to this, there was no remedy for the other party as it was made void ab initio and there is no provision which says anything about it and many issues like this. In the case of *Mohori Bibee v. Dhurmodas Ghose* there three issues were in question, which are as follows:

1. Whether the mortgage was void under section 2, 10 and 11 of Indian Contract Act?¹⁹
2. Whether plaintiff to return the money received by him under such mortgage?²⁰
3. Whether any specific performance is demanded as damages like under section 64 or section 65 of Indian Contract Act, 1872?

It was held in this case that the contract was void ab initio and not void and so no action is required. Secondly the return of money was not granted by court on the basis of contract having never taken place. Thirdly, there cannot be any specific performance under section 64 and 65 of Indian Contract Act as the former section deals with the voidable contract and latter deals with void contract and as such there is no provision regarding void ab initio contract so from where the remedy will come into existence. Another angle to this case can be given through the introduction of Specific Relief Act, 1963. Under Specific Relief Act, 1963 the plaintiff can be compensated for his loss. Under section 33 of Specific Relief Act, 1963 it is written that:

“On adjudging the cancellation of an instrument the court may require the part to whom such relief is granted to make any compensation to the other which the justice may require.”

So under Specific relief Act the other party can be compensated but it was not applied in the present case as it says on the cancellation of an instrument which means any financial instrument when cancelled can raise the responsibility of the beneficiary to compensate for it. In the case of *Khangul v. Lakhasingh*, 1928 Lahore High court it was contended that the plaintiff should be given compensation under Specific Relief Act, 1963. The facts of the case were like this that the person was a minor and by false representation he entered into a contract and received 17500 rupees. When the chance of returning the money came he said I was minor and so not liable to execute the contract. In this case there was no specific performance which can be enforced and it was a void ab initio contract. But the court took a stand that the other party should be compensated.

What should be done in cases where specific performance is required? Take for example in entertainment industry which keeps working on the basis of performance of actors. Suppose a person is working as a minor in a movie or serial as his parents or legal guardian entered into contract on behalf of minor. Now if we say minor has a right to disaffirm then what would happen. There two situations would arise:

1. If minor on attaining majority disaffirms the contract then there will surely be huge loss on the part of producer in all forms that can be thought of like financial loss, loss of shooting of those many days.
2. If minor does not get the freedom to disaffirm a contract then he/she may be exploited in light of this situation.

Similar dilemma was faced by the courts in the case of *Warner Brother's pictures v. Miss Brodel*, 1928. It so happened that the guardian of the minor entered into a contract which can be renewed every year for six year. When Miss Brodel attained majority she appealed to

¹⁹<https://indiancaselaws.wordpress.com/2013/01/17/mohori-bibee-v-dharmodas-ghose/>, accessed on 20/08/2015

²⁰ ibid

disaffirm the contract as the contract was void ab initio. The side of Warner Brothers said that it is not in favour of them as it will cause a huge financial setback to it and also she is in lead role of the movie and if she leaves it in midway then the cost to reshoot will be doubled. In this case court ruled out that she will have to comply to the contract and fulfil the requirements of contract and when it is completed then she can decide whether to renew the said contract or not. The court gave this decision as she was willing to work with others but not with Warner Brothers and the same was considered as injustice by the court to Warner Brothers.

It is very evident from previous cases and its decision that it depends on the court of justice to decide whether there is a right to disaffirm a contract or not. The problems which will arise here are several, which are as follows:

1. Does a minor have absolute right to disaffirm a contract?

From the above decisions it is not clear that whether a minor has any right to disaffirm a contract, leave aside the issue of absolute and relative right. Till date there is no law or act or statute which explicitly says that there is a right to disaffirm a contract by minor. It can be ascertained from above two cases of mortgage that in first case no restitution was allowed but in second case it was allowed on the basis of Specific Relief Act of 1963.

2. If minor does not possess the right to disaffirm a contract, is it not violation of fundamental rights of him/her i.e. of right to life, freedom of occupation, right to choice etc.?

It is very clear that if a minor is not provided with these rights then he will be deprived of his fundamental rights guaranteed by our Constitution of India. In case Miss. Brodel the court in a way infringing the freedom of occupation she chooses to do and wherever she wants to do. It is restricting her right to choice. The problem is not with the decision, but with the rule of law which is not specified which is leading to so much mess. The question also arises in this contemporary world where entertainment industry is widening and propagating and is recruiting minors to act in movie, serial or drama. It is of utmost concern that the children doing acting is taking so many aspects of their life into consideration like their health, education, atmosphere, and many other things which effect the overall development of a child comes into question. Another issue which comes is of exploitation i.e. is minor working with adequate intervals or is he/she being paid required amount to what is been taken from them. There are instances where minors are exploited on these bases taking the advantage of their being innocent. These are issues which are of great importance and needs to be given attention to arrive at a solution.

3. Can we strictly abandon minors to enter into a contract?

It is one of the most typical questions to answer. If we abandon minors from entering into a contract then it will be injustice to those children's who have special skills and moreover if they can improve their condition i.e. economic as well as social, with the usage of those skills. It will be a step which will discourage and kill their talent. On the other hand if we allow then the sort of exploitation of them stated earlier may happen which will make their life miserable. So, it is quite difficult to decide in favour of either side. It is advisable to not to do away with the concept of minors contract as it will not be right to do it.

4. Should there be restitution if a minor entered into a contract fraudulently or by misrepresentation of his/her age to the other party?

The answer to this question is affirmative. If a minor knowingly misrepresents his/her age to the other party and enters into a contract then there should be compensation to bring the other party at least to its position which was before entering into a contract. If

not given this relief to the other party then it will lead to a miscarriage of justice as it will leave the other party in adverse position.

5. Whether a minor has right to disaffirm a contract? If yes then to how much extent or in what conditions? When can a minor disaffirm a contract?

When it comes to answer the question of right to disaffirm a contract by minor then to some extent it is viewed that they should have this right owing to different situation which may arise before them or make them vulnerable to contract. In case of child labour this right stands in favour of them and which is being appreciated universally. It is very difficult to ascertain the conditions in which a minor can disaffirm a contract and in which not. In spite of not having any rule or guideline regarding the conditions in which a contract can be disaffirmed by a minor, one can jot down some conditions in which it should be allowed, which are as follows:

- Consent taken by
 - Fraud
 - Coercion
 - Undue influence
- In case of exploitation of minors owing to contract, whether in execution of contract or in any other situation.
- When he/she attains the age of majority, he/she should be allowed to disaffirm a contract.

Conditions where a minor cannot disaffirm a contract is like when minor itself is not clean handed or where the other party is incurring a huge loss being honest on its part or was in illusion of certain material facts like age of the person with whom contract is being made. There can be many other situations with regard to social, economic and cultural background which could not be ascertained at this platform as it will depend on different situations coming into picture.

CONCLUSION

In India contract between two parties is governed by Indian Contract Act, 1872. It is enforceable till date with some amendments i.e. inclusion of some provisions and removal of others. Throughout the development of Indian Contract Act, it has been case that new act and laws came into force to deal with certain specific areas like sales and goods act, Negotiable Instrument Act of 1881, Transfer of Property Act of 1882, the Powers of Attorney Act of 1882, the Specific Relief Act of 1877 (1963 after amendment). The Indian Contract Act of 1872 had some principles/doctrines governing it such as doctrine of privity and doctrine of consideration. In English law, doctrine of privity of contract is taken strictly to its words i.e. the parties to contract can only sue in case of breach of contract and not the person affected by that breach. In other words, a beneficiary to contract cannot sue for the breach and its outcome. But India has adopted this doctrine with some modifications, that is to say it takes the worries of the beneficiary into consideration and allows him to sue for the breach of contract by any one party or both party at hand. Doctrine of consideration is also not followed in India as it was creating a lot of problem in delivering justice to the concerned party. The biggest flaw in the Indian Contract Act is that there is no clear position which the law takes on the issue of minor's contract. As minors contract is said to be void ab initio there is no provision in the act which talks about it. Indian Contract Act defines what constitutes contract, who all are competent to contract but does not say anything about minors entering into any contract. There certain question which the Indian Contract act has failed to answer and it all depends on the judicial mind and preceding cases. The questions which the Act has not been able to take a concrete stand are as follows:

1. Whether a minor has right to disaffirm a contract?
There is no provision till date which says that whether a minor has right to disaffirm a contract or not. There is no clear position in law regarding this facet of minor entering into contract.
2. On what conditions a minor can enter into a contract?
This is sheer inaptness on part of legislature which could not till date come out with some guidelines, rules or regulation for a minor to be able to enter into a contract which would have a suitable backing. Indian Contract Act lacks on this aspect of contract which is incapable of defining certain conditions on which minor can enter into contract and on which not. It is not expected that the list should be exhaustive in nature but there should be something on which it can be governed.
3. Whether a minor should strictly be restricted to enter into a contract?
Again there is no answer in law regarding the said issue. If we take this question into a situation where a child suppose possesses a particular skill and which can be used to improve his or her family's economic and social condition then what to do? It is a crucial and typical question to be answered blatantly as it needs a very deep and comprehensive discussion. If we allow the child to work then what should be the criteria and if we are not allowing then what are the conditions in which it can be justified for the minor not entering into a contract.

In conclusion it can be said that there is no provision in laws which are governing contract which deals with the above stated contentions. Minor's contract depends wholly on the judicial mind and it lies with the court of justice to decide whether the contract is enforceable and executable or not. It is very uncertain to say at this juncture that this particular act is enforceable under law or not. There is a need to ponder upon this issue and come out with some kind of guidelines to be followed before making or entering into a contract. There needs to be some line which reflects those certain conditions in which one can enter into contract and also can claim compensation for the loss incurred because of it, if any. It can be said that the issue of minors contract it at a very primary stage of development and which will take a lot of effort and time to mature to a level where it is certain that whether a minor has any freedom to enter into a contract, whether a minor has any right to disaffirm a contract and if yes then in what conditions and also the question of compensation or restitution in breach or non-execution of contract from the side of minor arises or not, etc. are questions which needs to be answered as soon as possible.