

# *CONSIDERATION*

*S. 2(d) r/w S.25*

# Consideration

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1. at the desire of promisor

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# Introduction

- S. 25 an agreement made without consideration is void subject to certain exceptions
- In English law a promise without consideration is unenforceable for it is gratuitous
- LORD SKYNNER – “it is undoubtedly true that every man is by the law of nature bound to fulfill his engagements (promises). It is equally true that the law of the country supplies no means, nor affords any remedy to compel the performance of an agreement made without sufficient consideration.”

# Definitions

- Blackstone – “consideration is the recompense given by the party contracting to the other”
- Cheshire and Fifoot – “a price for the promise”
- Pollock – “consideration is the price for which the promise of the other is bought, and the promise thus given for value is enforceable”
- Patterson – “consideration means something which is of some value in the eye of law. It may be some benefit to the plaintiff and some detriment to the defendant.”

## Definitions Contd...

- Justice Lush ~ “A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”
- Calcutta High Court – “consideration is a price for the promise, a return or *quid pro quo*, something of value received by a promisee as inducement of the promise”
- Thus, consideration means something in return for the promise. It may be either some benefit conferred on one party or some detriment suffered by the other.

## Definition u/s. 2(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 abstain from doing something,
- such act or abstinence or promise is called a consideration for that promise.

## *Requirements of valid consideration*

1. Consideration must be given “*at the desire of the promisor.*”
2. Consideration must be given ‘*by the promisee or any other person.*’
3. Consideration may be *past, present or future* , i.e.,
  - (i) promisee has done or abstained from doing, or
  - (ii) does or abstains from doing, or
  - (iii) promises to do or abstain from doing, something.
4. There should be some act, abstinence or promise by the promisee

# 1. Consideration at the desire of the promisor

Consideration must have been given at the desire of the promisor, rather than voluntarily or at the instance of some third party.

## **Durga Prasad Vs. Baldeo (1880)**

**FACTS:** Pt. constructed few shops in a market at the instance of the collector. ~ dt's., occupied one of the shops in the market. ~ money for the construction of the market was spent by the pt., ~ the dt's., in consideration thereof, made a promise to pay to the pt., a commission on the articles sold in that market. — dts., failed to pay the promised commission.

**HELD:** Consideration for promise to pay the commission for construction of the market was not at the desire of the dt., but on the order of collector. Therefore, held that since the consideration did not move at the desire of the dt., they were not liable in respect of the promise made by them.



# Subscription for a charitable purpose

A promise to contribute an amount for a charitable purpose may not be enforceable because against this promise there may be no consideration.

But a promise to pay subscription becomes enforceable when definite steps have been taken on the faith of the promised subscription.

*Kedarnath v. Gorie mohammed* – construction of Howrah municipality town hall case.

*Doraswami Iyer v. Arunachala Iyyar* ~ subscription for temple repair in progress

*Abdul Aziz Vs. Masum Ali* ~ The defendant promised to pay a sum of Rs. 500/~ as donation for the repair and reconstruction of a mosque. Nothing was done to carry the repairs and reconstruction of the mosque. The defendant refused to pay the amount.

HELD: since nothing was done on the faith of the promise, there was no consideration in this case and, therefore, the defendant was not liable to pay the subscription promised by him.

## 2. Consideration by promisee or any other person

- According to Indian law consideration may be given by the promisee or any other person. In India there is a possibility that the consideration for the promise may move not from the promisee but a third person, who is not a party to the contract.
- **Chinnaya Vs. Ramaya (1882)**~ A, an old lady, granted an estate to her daughter (defendant) with a direction that the daughter should pay an annuity of Rs. 653/- to A's brother (plaintiff). On the same day the defendant made a promise to the plaintiff that she would pay the annuity as directed by A. The defendant failed to pay the stipulated sum. In an action against her by the plaintiff she contended that since the plaintiff himself had furnished no consideration, he had no right of action.
- The Madras High Court held that in this agreement between the dt. and pt., the consideration has been furnished by the dt's mother and that is enough consideration to enforce the promise between the pt. and the dt.

# Privity of Contract

- The doctrine of privity of contract means that only those persons who are parties to the contract can enforce the same, a stranger to the contract cannot enforce a contract even though the contract may have been entered into for his benefit.
- If in a contract between A and B some benefit has been conferred upon X, X cannot file a suit to enforce the contract because A and B are the only parties to the contract whereas X is only a stranger to the contract.
- In India a person may not have himself given any consideration but he can enforce the contract if he is a party to the contract, because according to the Indian Law consideration may be given either by the promisee or even a third party. That does not affect the rule of privity of contract.

# English Law

- *Dutton Vs. Poole (1678)* - A intended to sell his wood to make a provision for the marriage expenses of his daughter. The dt., A's son requested A not to sell the wood and in return made a promise to his father that he would pay 1,000 pounds to A's daughter, the pt. The father forebore to sell the wood but the dt., did not pay the promised amount to the plaintiff.
- **HELD:** it is true that the dt., promised to father and father furnished consideration for the promise. The Pt., was neither privy to the contract nor to the consideration. But it was equally clear that the whole object of the agreement was to provide a portion to the pt. It would have been highly inequitable to allow the son to keep the wood and yet to deprive his sister of her portion. He was accordingly liable.
- A person, who is not a party to the contract but is intended to be the beneficiary under the contract and is nearly related to the promisee, has a right of action.

➤ Tweddle Vs. Atkinson (1861) –

➤ After the marriage of the pt., there was a contract in writing between the plaintiff's father and the girl's father that each would pay a certain sum of money to the plaintiff and the plaintiff would have a right to sue for such sums. Pt., brought an action against girl's father to recover the promised amount.

➤ HELD: pt., could not sue for the same.

• Justice Whiteman – it is established principle that no stranger to the consideration can take advantage of a contract, although made for his benefit. Thus, although sole object of the contract was to secure benefit to the pt. he was not allowed to sue as the contract was made with his father and not with him.

## Tweddle v. Atkinson (1861)

- It laid foundation for doctrine of “privity of contract” which means that a contract is a contract between the parties only and no third person can sue upon it even if it is made for his benefit
- Two fundamental principles
  - Consideration must move from promisee and promisee only. If consideration moved from any person other than promisee then promisee becomes stranger to the contract as such he cannot enforce the contract
  - A contract cannot be enforced by a person who is not a party to contract even though it is made for his benefit. He is a stranger to contract and hence can claim no rights under it.

# *Beswick v. Beswick 1966*

- B was a merchant, dt., was assisting him in business. Later they agreed and transferred the business to dt – terms: B was to be employed for life as a consultant and B’s widow to get annuity of 5 pounds. – dt refused to pay annuity – suit for enforcement of contract by B’s widow.
- Lord Denning CA: she was entitled enforce the agreement – where a contract is made for the benefit of third person who has a legitimate interest to enforce it, it can be enforced by that third person. The third person has a right arising by way of contract, he has an interest which will be protected by law.
- House of Lords: law is developed by the application of old principles to new circumstances. Its reform by the abrogation of those principles is the task not of the courts but of the Parliament.

# Indian law – Privity of Contract

- The rule that “privity of contract” is needed and a stranger to contract cannot bring an action is equally applicable in India as in England. Even though under the Indian Contract Act the definition of consideration is wider than in English Law, yet the common law principle is generally applicable in India, with the effect, that only a party to the contract is entitled to enforce the same.
- **Jamnadas Vs. Ramavtar** - A had mortgaged some property to X. A sold this property to B. B having agreed with A to pay off the mortgage debt. X brought an action against B to recover the mortgage money.
- It was held by the Privy Council that since there was no contract between X and B, X could not enforce the contract to recover the amount from B.



# Exceptions to Privity of Contract

## *(1) Trust or Charge*

While only a party to a contract who can sue on it and no such right is conferred on a third party, it was also stated that “**such a right may be conferred by way of property, as, for example, under a trust.**”

The basis of an action by the third party is actually not enforcing the contract but the right conferred by a particular contract in favour of a third party in the form of trust etc.

For example, in a contract between A and B, beneficial right in respect of some property may be created in favour of C. In such a case C can enforce his claim on the basis of the right conferred upon him.

- **Khwaja Muhammad Khan Vs. Husaini Begum**  
An agreement between the fathers of a boy and a girl that if the girl married a particular boy, the boy's father would pay certain personal allowance known as *Kharch-i-pandan* (betel-box expense) or pin money to the plaintiff. It was also mentioned that a certain property had been set aside by the defendant and this allowance would be paid out of the income of that property. The pt married the dt's son but the dt failed to pay the allowance agreed to by him. Pt., brought an action against the dt.
- **HELD**: the basis of the plaintiff's claim being a specific charge on the immovable property in her favour she is entitled to claim the same as a beneficiary, and as such, the common law rule of privity is not applicable.

## (2) Conduct, acknowledgement, or admission

- If a party by conduct, acknowledgement, or admission recognises the right of other to sue him, he may be liable on the basis estoppel.
- *Narayani Devi Vs. Tagore Commercial Corporation Ltd. (1973)*

In a contract between the pt.'s husband, and dt., Dt.'s agreed-

- to pay certain amounts to the pt.'s husband during his life time &
- thereafter to pay the same to pt. for her life.
- On death of pt.'s husband, dts.,-
  - made certain payments to the pt., in pursuance of the agreement,
  - had asked for the extension of time to pay, and
  - called the pt., to execute certain documents in this connection.
- On suit for recovery of the same dt.'s take the plea of privity of contract!

*Narayani devi vs. Tagore Commercial Corporation Ltd. Contd.,*

- HELD: Dts., have created such privity with the pt., by their conduct, by acknowledgement and by admission, that the pt., is entitled to her action even though there was no privity of contract between the pt., and the dts., when the said contract was entered into.

### 3. Marriage settlement, partition or family arrangement

- Where, under a family arrangement, the contract is intended to secure a benefit to a third party he may sue in his own right as a beneficiary.
- Eg., on the partition of joint family property between the male members, a provision is made for the maintenance of the female members of the family.
- Eg., agreement of marriage by father of a girl,
- Two brothers agreeing to invest a sum for the benefit of mother,
- a daughter and her husband agreeing with her father to provide maintenance to mother on receipt of property,
- promise by a husband to his wife's father to treat her well and to provide separate dwelling house in case of default.

## 4. Covenants running with the land

- Rule of privity is modified by the principles relating to transfer of immovable property
- A person purchasing a land with the notice that the owner of the land is bound by certain duties created by an agreement affecting the land shall be bound by them, although he was not a party to it.
- *Smith & Snips Hall Farm ltd., v. River Douglas Catchment Board*

**FACTS:** dts., agreed with certain land owners adjoining a stream to improve the banks of the stream and to maintain them in good condition – landlords paid costs – subsequently one of the landlords sold it to pt. – board negligently maintained banks, which burst and flooded pt's land.

**HELD:** Board was liable. Whole arrangement was to benefit the lands who ever be the owners.

### (3) Consideration may be past, executed or executory

Indian Contract Act recognises three kinds of consideration, viz., Past, Executed and Executory.

- Past services voluntarily rendered
- Indian Contract Act recognises only such consideration which has been given at the desire of the promisor, rather than voluntarily. If consideration has been given voluntarily, it is no consideration.
- For example, if my dog has been lost and without any request from me to find the same, you find that on your own and deliver the dog to me. This is a case of past services rendered voluntarily.

I promise to pay Rs. 100 to you after you have rendered these services, - can such an agreement be enforced ?

Usually rendering of such voluntary services does not constitute valid consideration to support the promise.

But a valid contract is created in such a case also because the situation is covered by sec. 25 (2) of the Indian Contract Act,

“S.25 - An agreement made without consideration is void unless, it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do”

### Illustrations.

(i) A finds B's purse and gives it to him. B promises to give A Rs.50. This is a contract.

(ii) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.



## Past service at request

- Neither s. 25 nor s. 2(d) covers it
- Consideration is at promisor's desire – presupposes the existence of promise to pay
- Literally construing promise to pay for past service at request not enforceable
- Courts - Implied promise can be inferred – *Upton Rural District Council v. Powell*

## English law regarding past consideration

- According to English law past consideration is no consideration.
- Consideration should be **contemporaneous** with the promise
- A promise in lieu for a past act is a gratitude for the benefit already received.
- Consideration being “price for the promise” should be **given in response to and as an inducement** for the promise.
- A promise after the consideration has already been given and independent of it, is not enforceable for want of any consideration in exchange for the promise.

- *Nudam pactum* – a promise with no consideration to support it
- Rule involves inconvenience – a voluntary promise to pay for past services shall not be allowed to be broken.
- English law reform committee recommended abolition of the rule
- *Lampleigh v. Bruthwait* - dt., having committed murder requested dt., to help him in getting pardon from the king. – dt at his expenditure helped - pt., promised to pay for the expenditure and help – later refused.
- HELD: dt., was liable – service rendered at request would ultimately be paid because subsequent promise is mere fixation of the reasonable compensation for the service.
- Thus-
  - a promise to pay for past act done at request
  - a promise to pay a time-barred debt
  - a negotiable instrument issued for a past consideration, are enforceable

## Executed or present consideration

- When one of the parties to the contract has performed his part of the promise, constituting the consideration for the promise by the other side it is executed consideration.
- A advertises an offer of reward of Rs. 100/- to any one who finds out his lost dog and brings the same to him. B finds the lost dog and brings the same to him. When B did his part of the job that amounted to acceptance of the offer, resulting in a binding contract under which A is bound to pay Rs. 100/- to B, and also simultaneously giving consideration for the contract. The contract in this case is said to be “executed”
- Executed consideration is different from past consideration – executed consideration is the consideration provided simultaneously with the making of the contract. In case of past consideration at the time of providing of the consideration the promise is non-existent.

# Executory or future consideration

- When one person makes a promise in exchange for the promise by the other side, the performance of the obligation by each side to be made subsequent to the making of the contract, the consideration is known as Executory.
- A agrees to supply certain goods to B, and B agrees to pay for them at a future date, this is a case of executory consideration.

## 4. Consideration need not be adequate

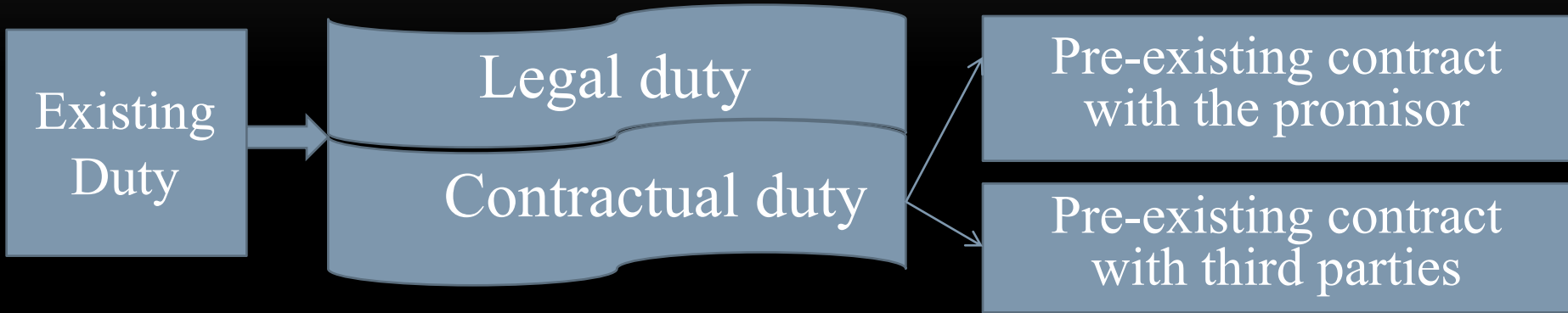
- Agreement to sell the property at a price lesser than the market price or its value – validity?
- A contract supported by consideration is valid even though it is inadequate.
- Explanation II to section 25, “An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by Court in determining the question whether the consent of the promisor was freely given.”
- burden is on the party pleading absence of free consent
- Unconscionable bargains leads to presumption of absence of free will

## 5. Consideration must be real, of some value

- Although it is not necessary that consideration should be adequate, it is, however, necessary that it should be real and should not be unsubstantial.
- *White v. Bluett (1853)* a son used to complain to his father that his brothers had been given more property than him. The father promised that he would release the son from a debt if the latter promised stopped complaining. After the father's death an action was brought by the executors to recover the debt.
- **HELD:** Promise by son not to bore his father with complaints in future did not constitute good consideration for the father's promise to release him, and, therefore, the son continued to be liable for the debt.
- Promise not to bore the promisor is not enough to constitute consideration
- Eg., Promise to give Rolls-Royce car on fetching it from garage –

## 6. Performance of an existing duty is no consideration

Consideration is a promise to do something more than what a person is already bound to do.



### Performance of Legal duty

*Collins v. Godefroy (1831)* – Pt. received a summons to give evidence in a case. Thereafter the dt., promised to pay to the Pt., some money for the trouble which was to be taken by him in appearing in that case.

Held – Pt., having received the summons was already under a public duty to give evidence, and therefore, the promise by the defendant to pay did not constitute consideration for the promise.



## 6. Performance of an existing duty is no consideration

- promise to pay a sum of money to a police officer for speeding up the investigation?
- But agreement to do more than one's official duty?
- Eg., consideration promised to a fireman on duty to protect a person, inviting risk to his life.
- Promise of a father to a woman for maintaining his illegitimate child?
- Husband's promise to a deserted wife to pay her a weekly sum if she leads a chaste life?

### Performance of Contractual duty

- A. Pre-existing contract with the promisor
- B. Pre-existing contract with third parties

# Performance of existing contractual duty

- If the pt., is already bound to perform a particular contractual duty owed to the dt., his promise to pay something additional for the same promise is no consideration.
- *Stilk v. Myrick (1809)* - Two sailors having deserted in the course of a voyage, the captain of the ship promised to distribute the wages of those two sailors amongst the other members of the crew if they would work the ship home.
- **HELD:** the members of the crew being already duty bound to work the ship home, there was no consideration to pay the additional amount and hence the promise to pay that amount could not be enforced.

# Performance of an existing duty owed to a third party

- *Shadwell v. Shadwell (1860)*
- The plaintiff had already promised to marry one Ms. Nicholl. The plaintiff's uncle wrote a letter to the plaintiff as under:
- “I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life or until your annual income derived from your profession of a Chancery barrister shall amount to six thousand guineas, of which your own admission shall be the only evidence that I shall receive or require.”

- Thereafter the plaintiff married Miss Nicholl. He could not earn 600 guineas from his profession but no annuity was paid by his uncle to him. After his uncle's death he brought an action against his executors to recover the amount promised to be paid by his uncle to him.
- It was decided by a majority that the promise was enforceable as it was supported by consideration. Consideration in this case being a benefit to the uncle as marriage of a near relative could be of interest to him, and also detriment to the plaintiff as he might have incurred pecuniary liabilities on the faith of the promise.

# No consideration no contract - Exceptions

S. 25. An agreement made without consideration is void unless

- (1) It is expressed in writing and registered under the law for the time being in force for registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other : or unless
- (2) It is a promise to compensate , wholly or in part, a person who has voluntarily done something for the promisor, or something which the promisor was legally compellable to do ; or unless
- (3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specifically authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitations of suits.

In any of these cases, such an agreement is a contract.

## (1) Promise due to natural love and affection

When the promise is made in favour of a near relation on account of natural love and affection, the same is valid even though there was no consideration for such a promise. The following are requirements:

1. The parties to the agreement must be standing in a near relationship to each other.
2. The promise should be made by one party out of natural love and affection for the other.
3. The promise should be in writing, and
4. The agreement is registered.

### Analysis

“**near relation**” - blood relations or those related through marriage, but would not include those relations which are not “near”, but only remotely entitled to inherit.

presence of “**Natural love and affection**” -

**Bhiva Vs. Shivaram** - If one brother, although not legally bound to do so, transfers half of his property in favour of another brother, so that they have cordial relations?

that is deemed to have been done out of natural love and affection, and such an agreement is binding.

“**near relation**” does not necessarily imply natural love and affection  
**In Rajlucky Dabee Vs. Bhootnath Mookerjee** - after lot of disagreements and quarrels between a Hindu husband and his wife they decided to live apart - husband executed a registered document in favour of wife whereby he agreed to pay for her separate residence and maintenance - agreement also mentioned about quarrels and disagreements between the two.

Held that from the recitals in the document it was apparent that the document had been executed not because of natural love and affection between the parties but because of the absence of it, and therefore the wife was not entitled to recover the sums mentioned in the document.

## (2) Compensation for past voluntary services

- When something has been done “at the desire of the promisor”, that constitutes a good consideration in respect of a subsequent promise to compensate for what has already been done. The second exception to Section 25 covers “cases where a person without the knowledge of the promisor, or otherwise than at his request does the latter some service, and the promisor undertakes to recompense him for it. The promise to compensate, though without consideration, is binding because of this exception. The exception also covers a situation where the promise is for doing something voluntarily “which the promisor was legally compellable to do.”



### (3) Promise to pay a time barred debt

Another situation when an agreement is a valid contract even without any consideration is a promise to pay a time-barred debt. Section 25 (3) requires the following essentials to be satisfied in such a case.

1. The promise must be to pay wholly or in part a time-barred debt, i.e. a debt of which the creditor might have enforced payment but for the law for the limitation of suits.
2. The promise must be in writing and signed by the person to be charged therewith, or his duly authorised agent.

It is necessary that the debt must be one of which the creditor might have enforced payment but for the law for limitation of suits.

It, therefore, does not cover such debts which are un-enforceable for some other reasons.

Thus if an insolvent debtor has been discharged from payment under the insolvency law a subsequent promise by him to pay that debt cannot be enforced unless there is a fresh consideration for the same.

Similarly, if the payment of the debt cannot be enforced because the debt was contracted by a person during his minority, the same is not now enforceable if, on attaining majority, a promise is made to pay the same, because a minor's agreement which is void is incapable of being validated by ratification.

4. Completed gifts

5. Agency