The Doctrine of Promissory Estoppel and Consideration Requirement to Enforce Promises: Recent Trends

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Abstract.

In England, under common law, consideration is one of the essential ingredients for formation of contract. The same requirement is there under Indian Contract Act, 1872. The requirement of consideration may cause hardship and may result in injustice in some cases when a person has acted on the unequivocal representation of other to his detriment but there is no consideration in formal sense. The equity has evolved the doctrine of promissory estoppel to do justice in such cases. In the present paper, an attempt is made to study the doctrine of consideration and promissory estoppel in the context of each other. In this regard, developments of promissory estoppel in England and India have been considered.

Key Words: Consideration, Promissory Estoppel, Equity,

Introduction

Equity, in one sense, is synonymous with Justice. In almost every system, there develops a need for justice over and above that available in strict law. The function of equity is to mitigate the rigours of strict law, in its application to individual cases, and to procure a humane and liberal interpretation of the law itself. Equity arises in the process of application of law.[1] The doctrine of promissory estoppel, in modern times, has been evolved by equity, to do justice in situation where strict requirement of consideration in agreements between two parties results in injustice to one party who has acted upon the promise of other party. In 18th century, Lord Mansfield, made vigorous efforts to dent the common law doctrine of consideration.[2] He was of the opinion that in usage and law of merchant's consideration should not be an objection and consideration is merely an evidence of the intention to enter

[1] R.W.M Dias,*Jurisprudence*, 319(Aditya, Books Private Limited,New Delhi, 5th edition, 1994)
[2] Bernard L. Shientag, *Lord Mansfield Revisited-- A Modern Assessment*, 10 Fordham L. Rev. 345 (1941). Available at: http://ir.lawnet.fordham.edu/flr/vol10/iss3/1 visited on 22 February 2016

into a contract. In the 20th Century, Lord Denning made an assault on consideration requirement. The principle expounded by him is known as the doctrine of promissory estoppel.

Traditonal Concept of Consideration.

Traditionally, English Law enforces bargains and not gratuitous promises. Law is naturally hesitant about enforcing all agreements and requires some "additional element" such as for or consideration.[3] Accordingly, in general terms, a promise will be unenforceable unless, it is contained in deed or is supported by consideration. The rule that agreement without consideration is not enforceable was laid down in 1602 by Lord Coke in Penny v. Cole,[4] popularly known as Pinnal`s Case. In this decision Court of Common Plea held that an agreement to accept only part of the amount contracted under previous debt contract by creditor from debtor cannot be enforced as there is no consideration for the agreement. The debtor has done only what he was legally bound to do. In Foaks v Beer,[5]the creditor agreed with the debtor to receive decreed debt on deferred dates and promised that she would not take any other proceeding against him if all her amount is paid in agreed manner. Upon the payment of all the debt, she however sued the debtor for interest upon decreed amount. Earl of Selborne LC and Lord Blackburn in their separate Judgements held that the debtor has not provided any consideration for the Creditor's promise not to sue him hence the promise does not amount to binding contract. Lord Blackburn, in his judgement also mentioned the "High Authority" of Lord Coke in Pinnel`s case[6] but also stated that "merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole."

Indian Contract Act, 1872 following the same principle makes Consideration sine qua non for an agreement to be a Contract within the meaning of the act. Under, Section. 2(h) of the Act, a "contract" is an agreement enforceable by law. Under Section 2(e), every promise is an agreement. But unless the agreement is supported by "consideration", the agreement would be void under section 25. Therefore, unless a promise is supported by

[3] G.W *Textbook of Jurisprudence*,439(Oxford University press, Newyork,4th edition,2005)
[4] (1602) 5 Co Rep 117a
[5] (1884) 9 App Cas 605(HL)
[6] Supra at 17

"consideration" it will not, ordinarily, be enforceable by law. Section 2(d) defines consideration as follows:- " When at the desire of the promisor, the promise 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 the promise." Hence, when a person makes a promise, unless the promise does, has done or promises to do something, at the desire of the promisor, the promise would be without consideration and the promise cannot be enforced in law.

The Modern Attitude towards Consideration Requirement

The modern attitude towards the doctrine of consideration is, however, changing fast and there is considerable body of juristic thought which believes that this doctrine is 'something of an anachronism'.[7] The reason of such modern attitude is that "promise as a social and economic institution becomes of the first importance in a commercial and industrial society and it is an expression of the moral sentiment of a civilized society that a man's word should be as good as his bond and his fellowmen should be able to rely on the one equally with the other."[8]

In Dunlop Pneumatic Tyre Company v. Selfrige & Co. Lord Dunedin,[9] while strongly criticising the doctrine of consideration observed as follows:

"I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of the doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair and which a person seeking to enforce it has a legitimate interest to invoke."[10]

The Law Commission of India, in its 13th report on Indian Contract Act, 1872,[11] accepted the fact that "great injustice is done sometimes where a promise is made which the promisor knows will be acted upon and which is in fact acted upon and then it is held that such promise is unenforceable on the ground of want of consideration".[12] The

[7] Bhagwati Justice, M.P Sugar Mills v State of U.P, AIR 1979 SC 621 at 634
[8] Ibid
[9] (1915) AC 847[H.L]
[10] Ibid at 855
[11] Law Commission of India, 13th Report on Contract Act, 1872(September, 1958).
[12] Ibid at Para. 10, Page 7

traditional doctrine of Consideration has been severely criticised both in England and America. Professor Holdsworth, has described the doctrine "as something of an anachronism", and observed that "the requirements of consideration in its present shape prevent the enforcement of many contracts, which ought to be enforced, if the law really wishes to give effect to the lawful intentions of the parties to them; and it would prevent the enforcement of many others, if the judges had not used their ingenuity to invent considerations. But the invention of considerations, by reasoning which is both devious and technical adds to the difficulties of the doctrine."[13]

The Law commission, however, hesitated to recommend the abolition of the doctrine as it felt that wholesale rejection of the doctrine would have the effect of overturning the very structure on which the doctrine is based.[14] The commission only recommended suitable changes in existing law which will have the effect of preventing the inequitable and anomalous consequences resulting from a rigid adherence to the law and with this object to add and exception to section 25.[15]

The doctrine of Promissory Estoppel

The doctrine of promissory estoppel seeks to enforce obligations arising from situations where there is no consideration in traditional sense. Towards the end of nineteenth century, the courts in England developed doctrine of promissory estoppel intending to prevent injustice arising out of the kind of situation where one party agrees to forego his strict legal rights under the contract and induces the other to rely on this position but the first party then goes back on the arrangement and seeks to enforce his strict rights.[16]

In 19th Century, the scope of estoppel was considerably curtailed by the doctrine of consideration. An agreement could not be enforced unless it was supported by consideration. Secondly, only representations of facts, as distinguished from future promises could be enforced in common law.[17] To overcome these hurdles, the solution was provided by "raising

[13] Holdsworth, History of English Law, vol viii, 47. (as quoted in Law Commission of India, 13 th Report on Contract Act ,1872(September , 1958).
[14] Law Commission of India, 13 th Report on Contract Act ,1872(September , 1958). At Para. 6, Page. 9
[15] Ibid
[16] Jill Poole, *Textbook on Contract Law,* Oxford University Press, *(*2006)
[17] Joden v. Money, (1854) 5 HL 185. The case has been discussed in detail at appropriate place in the present study.

equity".[18] The result was the development of doctrine which is now known as the doctrine of promissory estoppel. The credit of reinventing this doctrine goes to Lord Denning who strove to inject a new equity into the law in 20th century. In his words:

"If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had a new equity, to make good the omissions of the old"[19]

At another place, Lord Denning has said :

"It may be that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better"[20]

The principle of promissory estoppel, revived by Lord Denning in Central London property Trust v High Trees[21] case was among his successful experiments to revive equity. Lord Denning, himself stated the significance of this case in following words:

"The importance of the High Trees case, as I see it, is this: During the 19th century the Courts of Common Law had laid down strict rules of law expressed in archaic terms such as 'consideration' and 'estoppel.' Those strict rules had survived the Judicature Act, 1873 and were capable of causing injustice in many cases. There was a gap between those strict rules and social necessities of the 20th century, The High Trees case helped to narrow the gap"[22]

Lord Denning in Central London Properties v. High Trees,[23] refers to "series of decisions, over the last fifty years which although they are stated to be cases of estoppel are not really such."[24] He stated that these are "not the cases of estoppel in strict sense." Long Denning, further observed:

"in the cases to which I refer to the proper inference was, that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it even though under the old common law, it might be difficult to find any consideration for it."[25]

[18] Hughes v London Metropoliton Company, (1877) 2 AC 439

[19] Solale v Butcher[1950] 1 KB 671 at 695
[20] Re AG's Application, A-G v. Butterworth,[1963] 1 QB 696 at 719
[21] [1947] KB 130
[22] Lord Denning, *The Discipline of Law*, 119(Butterworths, London,1979)
[23] [1947] KB 130
[24] Ibid at Page. 134
[25] Ibid

Lord Denning, however, did not endeavour to stretch the doctrine of promissory estoppel too far; for he feared that the doctrine will be endangered. He described the doctrine as a "shield" but not as a "sword"; it cannot be used to found a claim, but only to avert one or to rebut a defence which otherwise be available. In Combe v. Combe,[26] where a Husband, after decree *nisi* for divorce, promise, gratuitously to pay his wife a certain amount, per annum, as maintenance, and the wife, in consequence(though not at the husband's request), forbore to apply to the court for an order for maintenance, it was held, by Lord Denning, that the wife could not invoke her voluntary forbearance in order to force the husband to keep his promise. The promise was made without consideration, and it was not made under the seal, therefore, no legal claim could be founded upon it.

In India,Justice Bhagwati, adopted more expansive approach than Lord Denning in Motilal Padampat Sugar Mills v State of U.P. [27] Justice Bhagwati, in this case, observed that promissory estoppel is a doctrine evolved by equity to avoid injustice and it is "neither in the realm of contract nor in the realm of estoppel." This phrase implies that while applying the doctrine of promissory estoppel will be applied on the principles of equity and the limitations inherent in traditional doctrines of estoppel or contract will not stultify its operation. While stating the reason of severe criticism of the doctrine of consideration, observed "that promise as a social and economic institution becomes of the first importance in a commercial and industrial society and it is an expression of the moral sentiment of a civilised society that a man's word should be 'as good as his bond' and his fellowmen should be able to rely on the one equally with the other."[28]

Justice Bhagwati, after taking account of general criticism of doctrine in England and an India, concluded, that "having regard the general opprobrium to which the doctrine of consideration has been accepted by eminent jurists, we need not be unduly anxious to protect this doctrine, against assault or erosion, nor allow it to be dwarf or stultify the full development of the equity, of promissory estoppel or inhibit or curtail the its operational efficacy as a juristic device for preventing justice"[29]

[26] [1951] 2 K.B. 215
[27] (1979) 2 SCC 409
[28] Ibid at Para. 12, Page. 430
[29] Ibid

It is due to their reverence for the doctrine of consideration that the English Judges have not allowed the doctrine of promissory estoppel as cause of action but only allowed as defence. In India, more bold and active approach was adopted by Bhagwati Justice. In his words:

"It is true that to allow promissory estoppel to found a cause of action would seriously dilute the principle which requires consideration to support a contractual obligation, but that is not reason why this new principle which is a child of equity brought into the world with a view to promoting honesty, and good faith and bringing law closer to justice, should be held in fetters and not allowed to operate in all its activist magnitude, so that it may fulfil the principle for which it was conceived and born."[30]

The limitations of the doctrine of Promissory Estoppel are highlighted by Justice Bhagwati in this case are as follows:

(1) Since the doctrine of promissory estoppels is an equitable doctrine, it must yield when equity so requires.
(2) No representation can be enforced which is prohibited by law in the sense that the person or authority making the representation must have power to carry out the promise.
(3) There can be no promissory estoppels against the legislature in the exercise of its legislative functions.
(4) The courts will not enforce promises by Government if public interest would be prejudiced if government were required to carry on the promise.

The Law commission of India, in its 108th report, suggested that since the doctrine of promissory estoppel is a beneficial doctrine based on equity, exclusion of its operation may be allowed only where absolutely necessary. The Committee, further suggested insertion of new section in Indian Contract Act, 1872 after Section 25 of the Act to the effect that unequivocal promise, intended to create legal relation, acted upon by a person to whom it is made, will be binding on the person making it "notwithstanding that the

[30] Supra at 20

promise is without consideration." In the same suggestion, the Commission added that the court shall have regard to "the dealings which have taken between the parties."[31]

Conclusion:

In India, the Judgement of the Division Bench in Motilal Padampat v. State of Uttar Pradesh,[32] has been followed by the Apex Court in a series of cases, and it is almost undisputed authority on the subject till date. The Recommendations of Law Commission have not been given effect and Consideration remains an essential ingredient of Contract. However, the doctrine of promissory estoppel is firmly established in Indian Law. The Judicial expansion of the doctrine of promissory estoppel can be seen as a step towards increasing irrelevance in relation to the doctrine of consideration.[33] The Courts enforce the promises where equity so requires and it is in public interest to do so.

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R.P Tripathy,"The Demise of Consideration",[2013] 3.1 NULJ 1

[31] Law Commission of India, 108th Report on Promissory Estoppel (December 1984) at Para 6.2
[32] (1979) 2 SCC 409
[33] R.P Tripathy,"The Demise of Consideration",[2013] 3.1 NULJ 1