

THE DEMISE OF CONSIDERATION

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The doctrine of consideration is a peculiar feature of the common law jurisdictions which prescribes that in the absence of consideration, no promise howsoever seriously made would be binding. The author argues in this article as to the redundancy of this doctrine in the light of developments in the last century in certain aspects of contract law.

The focus of this article is not on the unfairness that may be perpetrated by a strict adherence to the doctrine but on its conceptual non-sustainability in light of developments subsequent to its origin. It is the contention of the author that continuing with consideration as the central notion of contractual liability would be misconceived.

In the first part of the article, the author establishes the function this doctrine is supposed to serve in the arena of contract law.

Then the author argues how the same function can now be served by more evolved and equitable techniques and how the doctrine of consideration can at best play a subsidiary role. In the second part, the development of the two concepts which undermine the central position of the intention to create Legal Relationship and Promissory Estoppel, is explored both in the legal system of England and India.

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It is submitted that though the degree of development of these concepts in both the countries are varied, the cumulative impact is that the doctrine of consideration has been rendered a complicated and unnecessary position in the legal framework. The doctrine can still be of relevance in terms of its evidentiary function but an endeavour to place it in a pedestal any higher would be an ego-centric and superficial exercise.

Thus the traditionally sacrosanct position of the doctrine of consideration has lost its context and relevance. The legal systems of both these countries are inevitably progressing towards the extinction of the doctrine of consideration in its historical design.

I. INTRODUCTION

Law of contract can be explained in terms of its basic framework as the law of limiting principles.¹ This explanation refers to the fact that the law of contract is but a body of boundaries within which parties are permitted to enter into enforceable private understandings. These boundaries limit the scope of enforceability of these understandings in terms of content, modality, parties involved and other related parameters. The law of contract determines the conditions under which promises will be legally binding by setting forth a number of limiting principles subject to which the parties may create rights and duties for themselves which the law will uphold.

Most of the foundational principles of contract law are but limitations beyond which or in violation of which agreements will not be enforceable in law. The most obvious example would be the law relating to minority wherein unless the persons contracting are of the age of majority, the agreement remains unenforceable.²

¹ J. Beatson, A. Burrows & J. Cartwright (eds), *Anson's Law of Contract*, Oxford University Press, New York, pp. 1-2 (2010); "The law of contract may be provisionally described as that branch of the law which determines the circumstances in which a promise shall be legally binding on the person making it."

² Indian Contract Act, 1872, Section 10 & 11.

In common law jurisdictions, one of the ubiquitous principles is the principle of Consideration.³ Of all the limiting principles such as minority, free consent, mistake, frustration etc., the doctrine of consideration perhaps presents the most delicate dilemma in terms of its continued relevance.⁴

There has been mostly an overall agreement among jurists on the purpose of this particular doctrine. As has been the general opinion⁵ this doctrine is supposed to serve as a distinguishing marker between agreements which should be legally enforceable and those that should not be. It eliminates the possibility of agreements made on impulse being agitated in litigation and presupposes an inevitable deliberation on the part of the parties to finalise their understanding.⁶ It has been stressed that “Only those undertakings that are supported by legal consideration are legally binding; other undertakings are not binding even if the speaker intends to bind himself by his undertaking.”⁷ It has also been pointed out that consideration brings out the idea of reciprocity as the distinguishing mark of English in terms of the obligatory nature of a promise.⁸ The doctrine is supposed to identify the intention of the parties as to their desire to make the agreement legally enforceable.⁹ It has been to its reiterating relevance that the doctrine of consideration serves as a safeguard against possibilities where parties may accidentally bind themselves on impulse.¹⁰

³ See Arthur T. Von Mehren, *Civil-Law Analogues to Consideration; An Exercise in Comparative Analysis*, Harvard Law Review, Vol. 72 No.6 pp. 1009-1078, (April 1959); “Consideration stands, doctrinally speaking, at the very centre of common law’s approach to contract law.” Also see 1 R.G. Padia (ed), *Mulla & Pollock Indian Contract and Specific Relief Acts*, Lexis Nexis Butterworths, New Delhi, p.67 (13th ed. 2009); “The requirements of consideration are peculiar to the countries modeled on the common law system. The continental systems do not require consideration as an element of a contract, though most insist of some formality for gifts or donative promises; here contractual obligations can arise when the parties intend to create legal relations.”

⁴ *Infra* Note 31,32, 49,50 & 53.

⁵ See 1 R.G. Padia *Supra* Note 3, p.66; “The purpose of the doctrine of consideration is to put some legal limits on enforceability of agreements and to establish which promises should be legally enforceable. It ensures that parties have decided to contract after deliberation and not on impulse. It is an index of the seriousness of the parties to be bound by the bargain. Consideration also serves an evidential and formal function”

⁶ *Ibid.*

⁷ P.S Atiyah & Stephen A. Smith, *Atiyah’s Introduction to the Law of Contract*, Oxford University Press, New York, p. 107 (6th ed. 2007).

⁸ See J. Beatson, *Supra* Note 1, p. 91.

⁹ *Ibid.*

¹⁰ *Ibid.*

From the above observations, it can be safely summarised that consideration is not simply a proof of the intention of the parties to legally bind themselves, but has been identified as the as the only proof of such intention. As can be seen from the general opinion of jurists and from a consistent judicial policy,¹¹ in the absence of consideration, no other proof of legal intention, howsoever persuasive can cure the defect.

In fact, that seems to be not only the function the doctrine serves today, but the very reason for its evolution in the first place. The doctrine of consideration is viewed as one of the principal achievements of the sixteenth and early seventeenth centuries as it developed as the doctrine to define the scope of newly recognised promissory liability.¹² As eloquently put by Cheshire; “A consideration meant a motivating reason. The essence of the doctrine was the idea that the actionability of a parol promise should depend upon an examination of the reason why the promise was made. The reason for the promise became the reason why it should be enforced or not enforced.” To date, there remains a vigorous debate as to the exact source of its origin,¹³ but the functional utility for which it gained the widespread recognition and the purpose is has come to serve in the Common Law Contract System is by far undisputed.¹⁴

¹¹ *Balfour v. Balfour* (1918-19) All E.R. 860 (CA), *White v Bluett* 23 L.J. Ex. (N.S.) 36 (1853), *Jones v. Padavatton* 1969 All E.R. 616.

¹² M.P. Furmston (ed), Cheshire, Fifoot and Furmston’s Law of Contract, Oxford University Press, New York, p. 8 (1st Indian ed. 2007).

¹³ For a detailed discussion on the matter, see Pheroza Shah N. Daruvala, *The Doctrine of Consideration Treated Historically and Comparatively*, Butterworths and Co. (India) Ltd. Calcutta, pp. 99-113 (1914). Also See M.P. Furmston, *Supra* Note 12, p. 10: “Whether the doctrine of consideration was an indigenous product, or in part derived from the doctrine of *causapromissionis* of canon or civil law, has long been a matter of controversy, and it cannot be said that its pedigree has yet been explained in a fully satisfactory way.”

¹⁴ See P.S. Atiyah, *Supra* Note 7 pp.107-109; though the author presents a nuanced understanding of the perspective that the Doctrine of Consideration does not serve a single purpose, the overwhelming function it serves is quite evident. p. 108; “As we shall see, the reality appears to be that no unitary explanation can explain every aspect of the consideration doctrine.” p. 109 “As this historical view suggests, the key to understanding consideration is to recognize that it has served a variety of functions.”

Not that the doctrine has been wholly appreciated in course of its entrenched indispensability,¹⁵ Lord Mansfield refused to recognise it as the vital criterion of a contract and regarded it not as the only proof but merely as one of the proofs of the intention of the parties to be bound. He opined that if the same intention could be ascertained otherwise, there would be no logic in insisting on consideration as an essential element in all enforceable agreements.¹⁶ Though his resistance turned out to be a mere blip,¹⁷ it resonates with particular relevance when appreciated for the pragmatism it sought to exude.

The comments of Lord Dunedin in the famous case of *Dunlop*¹⁸ do not reflect the technical insight which one could glean from Lord Mansfield, but it documents the absurdity of the doctrine in its inability to serve fairness in more situations than one. He stated; “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 that 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 the person seeking to enforce has a legitimate interest to enforce.”

The focus of this article is not on the unfairness that may be perpetrated by a strict adherence to the doctrine but on its conceptual non-sustainability in light of developments subsequent to its origin. It is the contention of the author that continuing with consideration as an essential element in the legal system of today is an exercise in redundancy.

There are two sets of developments which have contributed to this perspective on the part of the author. Both these developments will be considered in terms of their variances and consequential impact in England as well as in India.

¹⁵ Wright, *Ought the Doctrine of Consideration to Be Abolished From the Common Law*, *Harvard Law Review*, Vol. 49 No. 8, pp. 1225-1253 [Jun., 1936]; “But I sit in appellate tribunals which administer laws other than the common law, such as the laws of South Africa and Ceylon where the basic law is the Roman Dutch law, or of Scotland where the basic law is the civil law: in these jurisdictions consideration has no place; nor has it a place in the laws of France, Italy, Spain, Germany, Switzerland and Japan. These are all civilised countries with a highly developed system of law; how then is it possible to regard the common law rule of consideration as axiomatic or as an inevitable element in any code of law?”

¹⁶ *Pillans v. Van Mierop* (1765) 3 Burr 1664.

¹⁷ *Rann v. Hughes* (1778) 7 Term Rep 350.

¹⁸ *Dunlop Pneumatic Tyre Co.Ltd. v.Selfidge and Co. Ltd.* 1915 A.C. 847.

The two developments are the concepts of (i) Intention to Create Legal Relationship and (ii) Promissory Estoppel.

II. INTENTION TO CREATE LEGAL RELATIONSHIP - ENGLAND

With a long line of judicial pronouncements, mainly in the 20th Century,¹⁹ the intention to create legal relationship is a firmly rooted requirement in English Law of Contract in order to sustain the legal enforceability of any contract. This requirement is in addition to the other classical elements like free consent, competence of parties and even consideration.²⁰ Simply put, this principle requires that only such agreements should result in legally binding obligations which were concluded with that intended result. Agreement concluded without contemplation of legal consequences should not be enforceable. The development of this doctrine has been explained on the ground of the necessity to distinguish between agreements which are mere social engagements and those that are intended to have legal consequences attached.²¹ This distinction has been very starkly mentioned in the case of *Balfour v. Balfour* where Atkin L.J. states the principle thus; "...it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract..."²²

The emphasis of this doctrine is not on the supposition that certain social engagements are incapable of being legally enforced. The focus at all times is to determine the true nature of the transaction between the parties. Thus seemingly social agreements have been held to be legally enforceable²³ and

¹⁹ *Balfour v. Balfour* (1918-19) All E.R. 860 (CA), *Jones v. Padavatton* 1969 All E.R. 616, *Rose and Frank Co. v. Crompton and Bros Ltd.* [1925] AC 445.

²⁰ Edwin Peel (ed.), *Trietel on the Law of Contract*, Sweet and Maxwell, p. 190 (12th ed. 2007). It has been emphasised that the element of Intention to Create Legal Intention is an independent and additional requirement in creating contractual liabilities apart from the other traditional elements.

²¹ See J. Beatson, *Supra* Note 1, p. 70.

²² *Balfour v. Balfour* (1918-19) All E.R. 860 (CA).

²³ *Meritt v. Meritt* (1970) 1 WLR 211.

prima facie commercial agreements have been denied legal enforceability.²⁴ The difference lies primarily in the initial presumption of the law. As has been put forth in the case of *Rose and Frank Co. v. Crompton and Bros Ltd*; “in the case of agreements regulating social relations, it follows almost as a matter of course that the parties do not intend legal consequences to follow. In the case of agreements regulating business relations, it equally follows almost as a matter of course that the parties intend legal consequences to follow.”²⁵ Cheshire also notes that in case of social, family or other domestic agreements, presence or absence of intention is to be ascertained by an analysis of the circumstances, whereas in case of commercial agreements, this intention is presumed and must be rebutted by the party seeking to deny it.²⁶

It has been clear from a long line of judicial pronouncements²⁷ that this requirement of Intention to create Legal Relationship is a necessity in addition to the requirement of Consideration as an element in the transaction.²⁸

This development seems incongruous and confused. With consideration serving as an evidence of the intention to create legal relationships, the additional requirement to prove intention to create legal relationship as an independent element suggests that Consideration is no longer a given proof of the intention of the parties to bind themselves legally.

This duplication of functions by these separate elements has not been unnoticed. Williston has strongly suggested that the separate element of intention is foreign to the common law, imported from the Continent by academic influences in the nineteenth century and useful only in systems which lack the test of consideration to enable them to determine the boundaries of contract.²⁹

²⁴ *Rose and Frank Co. v Crompton and Bros Ltd*. [1925] AC 445.

²⁵ *Ibid*.

²⁶ See M.P. Furmston, *Supra* Note 12, pp. 143-44.

²⁷ *Supra* Note 19.

²⁸ See Edwin Peel *Supra* Note 20, p. 190.

²⁹ Williston on Contracts, (3rded.) Cited in M.P. Furmston, *Supra* Note 12, pp. 142-43.

The point is well made when we consider that the very presence of consideration is supposed to normally imply the existence of a legal intention. When the said element is supposed to be already present in the transaction through the element of consideration, the requirement to essentially prescribe a separate proof of the intention is but institutionalising redundancy.

If this insight has to be taken to its due logical conclusion, it would seem that either one of the doctrines must give way to the other because the presence of both in the legal system is prone to create more confusion.

In this scenario, it is the contention of the author that it is the doctrine of consideration which must be marginalised as an essential requirement of all contracts. The test of intention to create legal relationship undertakes a wider perspective of human interaction. As has been judicially recognised in earlier cases³⁰, the presence of consideration does not always mean that the parties intended to create legal relations. Though the converse is yet to be recognised, it should be well within the realm of legal understanding that absence of consideration by itself must not preclude the presence of intention to create legal relationship.³¹ The doctrine of Consideration may serve as a persuasive element to infer intention to create legal relationship but need not necessarily act as the only stepping stone to the said intention.³² This marginalised application of the doctrine of consideration has also been advocated by Prof. William S. Holdsworth.³³ He has stressed that every contract entered into with the intention to affect legal relations should be enforceable if it is in writing or if it is supported by consideration. In this approach, consideration serves only an evidentiary purpose to support the

³⁰ See *Balfour v. Balfour* (1918-19) All E.R. 860 (CA), *Jones v. Padavatton* 1969 All E.R. 616.

³¹ See Wright *Supra* Note 15; "I may, however, first note that, if consideration is taken by the common law as the 'sole' test of contractual intention (it being always herein understood that the formality of the deed is not in the question), it is not true to say that this test is by itself conclusive or that the necessity of deciding whether there is a deliberate intention to enter into an enforceable contract is eliminated because there is consideration."

³² *Ibid* ; "It is thus clear that even at common law, consideration cannot be regarded as the conclusive test of a deliberate mind to contract: whether there is such a mind must always remain as the decisive and overriding question. In any system of law, consideration may be introduced as evidence of that deliberate mind; but it cannot, even under the common law, be decisive: the only question is whether it can be put on a pedestal as the 'sole' test."

³³ William S. Holdsworth, *A History of English Law*, Methuen & Co. Ltd., London, pp. 46-48 (1925).

greater requirement of the intention to create legal relationship. In the absence of consideration, the said intention can also be evidenced by the contract being reduced to writing. This view has also been endorsed by the Law Revision Committee in England.³⁴

The thrust of the test has to be as to whether the parties intended to be legally bound. If parties are willing to bind themselves legally without a reciprocating benefit in the form of consideration, then the same does not violate any fundamental objectives of contract law. In fact, the said approach would be more in line with the idea of consent as the touchstone of contract law. The earlier hesitancy to accept the requirement of intention to create legal relationship on the ground that it is not possible for law to judge the inwards of the man's heart has long since vanished.³⁵

III. PROMISSORY ESTOPPEL- ENGLAND

The development of the principle of Promissory Estoppel can be traced back as a more satisfactory approach to the problems posed by the common law rules as to waiver in the sense of forbearance.³⁶ The new approach put more concentration on the conduct of the party and its effect on the position of the party rather than on the intention of the party granting forbearance.³⁷ Promissory estoppel is one strand in a broader equitable principle whereby parties to a transaction who have conducted their dealings relying on an underlying assumption as to a present, past or future state of affairs, or on a promise or representation by words or conduct, will not be allowed to go back on that assumption, promise or representation when it would be unfair or unjust to do so.³⁸ Thus the principle of promissory estoppel protects the interests of a party who on the faith of a promise made to him has altered his

³⁴ Sixth Interim Report of the Law Revision Committee, 1937, cited in the 13th Report of the Law Commission of India, 1958 on Contract Act 1872, July 13, 2013, <http://lawcommissionofindia.nic.in/1-50/Report13.pdf>.

³⁵ See M.P. Furmston, *Supra* Note 12, p.15: "Another new development was the reception of a requirement that there must be an intention to create legal relations for there to be a binding contract. The earlier common law scorned at such a requirement for "of the intent inwards of the heart man's law cannot judge." The doctrine in one form or another was commonplace in continental legal thought."

³⁶ See Edwin Peel, *Supra* Note 20, p. 114 .

³⁷ *Ibid.*

³⁸ See J. Beatson, *Supra* Note 1, p. 117.

position and who would not otherwise be entitled to a contractual remedy due to the lack of a reciprocal consideration against the said promise.

The most categorical extent of this doctrine has been laid down by Lord Denning J. in the case of *Central London Property Trust Ltd. v. High Trees House Ltd.*³⁹ Though the observations by Lord Denning were more in the nature of an obiter as they dealt with a hypothetical conduct on the part of the claimant,⁴⁰ his observations truly reflect the evolved standard of promissory estoppel. The spirit of promissory estoppel, which even Lord Denning relied on and which established the phenomena of promissory estoppel in the English legal framework can be traced back to the case of *Hughes v Metropolitan Railway Co.*⁴¹

While the essential parameters in relation to the application of the principle of Promissory Estoppel are clearly established,⁴² the contention which deserves the greatest attention is the scope of utilising the principle of Promissory Estoppel as a cause of action. As can be seen in the case of *Hughes v. Metropolitan Railway Co.*, the principle of promissory estoppel has been used in cases where parties are already contractually bound and a promise has been made to waive, modify or suspend the legal rights under that contract to enforce this said promise even when it is without consideration.⁴³ The next aspect in a logical sequence would be to consider whether the same principle of promissory estoppel can be applied in the formation of contracts dispensing with the requirement of consideration as

³⁹ 1947 K.B. 130.

⁴⁰ The claimant argued that he had allowed a reduction of rent in 1940 as a temporary expedient while the flats could not be fully let due to the ongoing war. The war had ceased in 1945 and thus he was claiming full rent for only the last two quarters of 1945. The understanding of promissory estoppel can be derived from the statements of Lord Denning that had the claimant sued for the full rent between 1940 and 1945, it would have been stopped by its promise from asserting its legal right to demand payment in full.

⁴¹ 1877 2 App Cas 439.

⁴² A clear promise, alteration of position etc... See J. Beatson, *Supra* Note 1, pp. 119-122, See See Edwin Peel, *Supra* Note 20, pp. 114-120.

⁴³ The dispensability of consideration for modification of contracts is also reflected in the United Nations Convention on International Sale of Goods. See United Nations Convention on Contracts for the International Sale of Goods, Art. 29, April 11, 1980 A/CONF.97/19 1489 UNTS 3. An even more evolved can be seen in the UNDRIT Principles where consideration is not a necessity even for creation of contractual liabilities. See The UNDRIT Principles of International Commercial Contracts, 2010, art. 3.1.2, (July 13, 2013) <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

one of the elements in the transaction. The question is whether a person who on the faith of a promise made to him has acted upon it and has altered his position can claim for its enforcement as a plaintiff when there is no consideration in exchange of the said promise?

The definitive answer by the courts in England has been an emphatic negative. As was observed by Roskill LJ; “it would be wrong to extend the doctrine of promissory estoppel, whatever its precise limits at the present day, to the extent of abolishing in a back-handed way the doctrine of consideration.”⁴⁴ An even more categorical assertion has been made by Denning LJ in the case of *Combe v. Combe*;⁴⁵ “... the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. *The doctrine of consideration is too firmly fixed to be overthrown by a side-wind.*”⁴⁶ Its ill-effects have been largely mitigated of late, but *it still remains a cardinal necessity of the formation of contract*,⁴⁷ though not of its modification or discharge.”

This line of reasoning has been unequivocally confirmed in the case of *Baird Textile Holdings Ltd. v. Marks & Spencer plc.*⁴⁸ It is the submission of this author that clear as it may be, these protective instincts⁴⁹ are misplaced and seeks to hold onto a legal tradition that has outlived its utility.⁵⁰ As is clear from the developments in India⁵¹ and in some other jurisdictions⁵², this perspective defeats the objectives of justice with a view to protect a disproportionate and misplaced importance⁵³ of the doctrine of

⁴⁴ *Brikom Investment Ltd. v. Carr* 1979 Q.B. 467, at 484.

⁴⁵ 1951 2 K.B. 215, at 220.

⁴⁶ Emphasis Supplied.

⁴⁷ Emphasis Supplied.

⁴⁸ 2002 All E.R. (Comm) 737.

⁴⁹ See J. Beatson, *Supra* Note 1, p. 125: “The step taken in *Walton Stores* has not been taken in England, in part because of the perceived need to protect the doctrine of consideration.”

⁵⁰ See Wright *Supra* Note 15; “Rules of law like everything else in this age must be prepared to justify themselves against attacks and cannot shelter behind antiquity or prescription.”

⁵¹ *Infra* Note 60,61 & 62.

⁵² *Waltons Stores [Interstate] Ltd. v Maher* (1988) 164 CLR 387; (Australia).

⁵³ See Wright *Supra* Note 15; “If it is neither theoretically necessary nor practically satisfactory, is there any need to preserve the idea other than legal conservatism?” Also See 13th Report of the Law Commission of India, *Supra* Note 34, pp. 4-8.

consideration. While in India, the principle of Promissory Estoppel has been allowed to expand with the clear idea that even if it hampers the position of the doctrine of consideration, it is an acceptable bargain; the law in Australia has developed with an understanding that allowing promissory estoppel to find a cause of action would not abolish the doctrine of consideration as contracts founded on promissory estoppel would protect promisee's reliance and contract founded on consideration would protect the promisee's expectation.⁵⁴

The introduction of an intention to create a legal relationship as an independent element has already drawn a line over the continued relevance of the doctrine of consideration. A line which not everybody is prepared to recognise. It would be only a matter of time before the futility of this redundancy dawns upon the legal fraternity and the logical consequence understood. Expanding the operational scope of promissory estoppel would hopefully hasten this realisation in terms of its proper implication. If promissory estoppel were to be utilised for generating cause of action, it might be the beginning of the process by which the doctrine of consideration would undergo its inevitable marginalisation. In itself, the expanded approach to promissory estoppel may not render the doctrine of consideration completely irrelevant⁵⁵ but would marginalise its importance in popular consciousness. In terms of the actual content of law, consideration is already a reduced technique but the same needs to be effectively permeate into the consciousness of the English Legal System. The law in terms of its technicality should now be considered free from the rigid requirement of consideration but the rigid mindset needs to reflect on and admit to this reality.

⁵⁴ *Supra* Note 52; This distinction has not been approved universally with the realization that the reach of promissory estoppel can very well extend beyond the current dependency on reliance. See J. Beatson, *Supra* Note 1, p. 126.

⁵⁵ There is a school of thought, which formed the basis of the decision in the case of *Walton Store* [*Supra* note] that the doctrine of consideration and the doctrine of promissory estoppel protect different interests and would not overshadow the other. See J. Beatson, *Supra* Note 1, p. 125.

IV. INTENTION TO CREATE LEGAL RELATIONSHIP- INDIA

The position in India in relation to the doctrine of Intention to Create Legal Relationship is less straightforward. Unlike England, where the law of contract developed through a progression of judicial decisions, the contract law in India is primarily governed by the statutory framework created in the Indian Contract Act, 1872. As has been firmly established⁵⁶ it is not proper to refer to English Law to decide a question arising under an Indian Statute unless the matter is such that it cannot be understood without assistance from English Law.

The Indian Contract Act, 1872 in Section 10 lists the essential requirements for a contract to be enforceable in a court of law. It is to be noted that intention to create legal relationship has not been incorporated as an element essential for determining the enforceability of a contract. Nevertheless, there seems to be perception that the English principle of Intention to Create Legal Relationship is automatically applicable in India.⁵⁷

In the absence of any statutory requirement for the same, unless there is a definitive pronouncement by the Supreme Court on the issue, it would not be possible to maintain that intention to create legal relationship is a necessity as it is in England. The issue of whether intention to create legal obligations is a mandatory requirement for a contract to be valid was raised in the case of *Commissioner of Wealth Tax v. Abdhul Hussain*⁵⁸ but as per the facts of the case, the court restrained itself from providing a ruling on the issue stating that resolving this issue was not necessary for the disposal of the case. The same was done because the initial argument raised from the side of Mr. Abdul Hussain was for exemption from wealth tax on the basis that the transaction lacked legal character due to a certain Muslim custom. The plea in terms of lack of intention to create legal relationship in the arena of contract law was raised from the first time before the Supreme Court and not in any of the lower courts. In the words of the court;

⁵⁶ State of West Bengal v. B.K. Mondal & Sons A.I.R. 1962 SC 779.

⁵⁷ See I R.G. Padia *Supra* Note 3, p. 57.

⁵⁸ A.I.R. 1988 SC 1417, ¶ 11.

“The non-enforceability of debt was pleaded not as a part of what is permissible in law of contracts, but specifically as some inexorable incident of a particular tenet peculiar to and characteristic of the personal law of the Muslims. That not having been established, no appeal, in our opinion, could be made to the principle of permissibility of exclusion of legal obligations in the law of contracts.”

Thus as yet, intention to create legal relationship cannot be assertively claimed as an essential element in contract formation in India.

V. PROMISSORY ESTOPPEL- INDIA

Promissory Estoppel⁵⁹ as a doctrine has found a more expansive interpretation in India. In addition to its role as a shield against claims of liability, it has also been held that this principle can be used as a cause of action to enforce promises made when not enforcing the promise would lead to inequitable and unjust results.⁶⁰

The most authoritative and landmark pronouncement in this regard was made in the case of *MP Sugar Mills v. State of U.P.*⁶¹ This case concerning the representation made by the Govt. of U.P. in relation to exemption of sales tax to new industrial units for a definite period covers a very dynamic approach to this doctrine otherwise rooted in traditional rigidity. The court in this case took notice of the fact that allowing promissory estoppel to found a cause of action would severely dilute the doctrine of consideration but held that the same cannot be a sufficient reason in itself to restrain the progressive evolution of an equitable principle. The court held;⁶² “...having regard to the general opprobrium to which the doctrine of consideration has been subjected by eminent jurists, we need not be unduly anxious to project this doctrine against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel or inhibit or curtail its operational efficacy as a justice device for preventing injustice.”

Thus the position of consideration as the sole basis on which one may be

⁵⁹ For meaning, see *Supra* Note 38.

⁶⁰ *MotilalPadampat Sugar Mills Co Ltd. v. State of U.P.*, A.I.R. 1979 SC 621.

⁶¹ A.I.R. 1979 SC 621.

⁶² *Ibid*¶17.

sued upon a promise has been effectively compromised by this liberal interpretation. Though the court has limited the widespread application of this principle by incorporating the caveat that this approach may be adopted where this becomes the only way in which injustice can be avoided, the very recognition of the fact that a promise unsupported by consideration can nevertheless be enforced is a substantial development in a system mostly rooted in common law traditions.

The court summarised the principle of promissory estoppel in the following words;

“...where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not.”⁶³

It needs to be noted that one of the primary requirements in order to apply the principle of promissory estoppel is that the promise must have been made with the intention to create legal relations and with knowledge or intention that the said promise may be acted upon. In addition to that, there are two substantial elements which are necessary;

- a. That the promise must have been acted upon.
- b. It would be inequitable to allow the promissory to go back on his promise.

⁶³ *Ibid* ¶13.

Thus, that the promise must have been made with the intention to create legal relationship is just one of the requirements and is not sufficient in itself to sustain the enforceability of a promise but this must be appreciated as the only legal formulation where the element of intention to create legal relationship has been recognised.

This proposition of the Supreme Court has also been endorsed⁶⁴ by the Law Commission of India in its 108th Report⁶⁵ wherein it has recommended the insertion of a new provision (Section 25A) in the Indian Contract Act to provide a statutory and standardised basis to this proposition. The relevant portion of the said recommendation is as follows;

Section 25A

(1) Where

- (a) A person, has, by words or conduct made to another person, an unequivocal promise which is intended to create legal relations or to affect a legal relationship to arise in the future; and
- (b) Such person knows or intends that the promise would be acted upon by the person whom the promise is made; and
- (c) The promise, is, in fact so acted upon by the other person, by altering his position, then, notwithstanding, that the promise is without consideration, it shall be binding on the person making it, if, having regard to the dealings which have been taken place between the parties, it would be unjust not to hold him so bound.

The author admits that the actual impact of this decision of the Supreme Court and the subsequent recommendation by the Law Commission can be appreciated more at the conceptual level than in the realm of real operation

⁶⁴ The decision has been criticized by the Law Commission of India on many counts but when one peruses the final recommendations made, one can see that many aspects of the decision in the said case have been retained in the recommendations of the Law Commission.

⁶⁵ 108th Report of the Law Commission of India on Promissory Estoppel, July 13, 2013, <http://lawcommissionofindia.nic.in/101-169/Report108.pdf> p. 25.

of law because of the severe caution which has been made in inherent in applying the doctrine of promissory estoppel as a cause of action. This development though, provides the most real reflection of the fact that the domain of contractual liabilities cannot forever be constrained by the rigours of the doctrine of consideration and that the true test of contractual liability must eventually rest with the intention which the parties had while entering a transaction.⁶⁶

Unless and until intention to create legal relationship is recognised as a driving force in itself to validate the enforceability of a promise, the doctrine of consideration will hold sway but the judicial expansion of the scope of promissory estoppel can be seen as the step towards an increasing irreverence in relation to the doctrine of consideration.

VI. CONCLUSION

The position in England and in India in relation to the doctrine of consideration is but a picture of inversed reality. In England, the legal development on the principle of intention to create legal relationship has ensured that the marginalisation of consideration only as an evidentiary factor is all but inevitable, but there is great resistance which can be seen in judgments connected with promissory estoppel to accept this reality. There is still a strong current to somehow retain the doctrine of consideration in terms of its indispensability.

On the other hand, in India, there is no such reverence towards the doctrine of consideration. The courts have been extremely categorical that the tradition of the doctrine cannot be its saving grace and that evolution of law will not be curtailed in order to maintain the relevance of the doctrine. Consequently, there has been remarkable dynamism in expanding the operational affectivity of the doctrine of promissory estoppel and reducing doctrine of consideration from its sacrosanct heights to the level of a dispensable legal doctrine. The substantial change in the contours of law,

⁶⁶ See Wright *Supra* Note 15; “The test of contractual intention is thus external, objective, realistic. The question is, why any such external test is needed? Why is not the contractual intention, if it is properly established, enough in itself?”

though, is yet to take effect. Till date, there has been no authoritative statutory or judicial pronouncement which would necessitate the proof of intention to create legal relationship as a non-negotiable element in the formulation of binding contractual liabilities.⁶⁷

Regardless of the fact that the evolution of law and legal approach in both these countries is at a different stage, it is the conclusion of this author that the extinction of the doctrine of consideration in its former self is not simply the logical evolution but inevitability. It may serve an evidentiary purpose in the larger scheme of proving the intention to create legal relationship but can no longer sustain itself as the fulcrum of contract law in either of these jurisdictions.

⁶⁷ It is not so that the same can be done without some structural adjustments in the scheme of the Indian Contract Act. It would require a reconfiguration of certain established legal principles connected with contract law in India. The same may be discussed in another place as this paper does not offer the scope to explore that perspective in detail.