

Advanced Contracts, Tendering and Public Procurement
Prof. (Dr.) Sairam Bhat
Professor of Law
National Law School of India University
Lecture 04: Development of Contract Law

(Refer Slide Time: 0:18)



Development of Contract Law: Principles

- Law of obligations [vinculum juris]
 - Moral obligations
 - contractual obligations
- Law of unjust enrichment
- Law of restitution [Injurious reliance]



Continuing on our discussion on understanding the basic principles of contract law, we have to understand that contracts come from the law of obligations. As we discussed previously one of the simplest definitions of contracts is that it is nothing but an exchange of promises between two parties and that is why we say that contract law is law of promises.

When two parties make promise to each other, for instance it could be the promise of the seller to the buyer, there is an obligation that is incurred as soon as the promise is made. And this obligation is important, it is an obligation that you owe to the other party, because the other party will now have expectations of fulfilling the promise and hence, contract law actually is a branch of the laws of obligation.

But broadly to understand the laws on obligations we have two obligations that we generally discuss, one, is moral obligation the other is contractual obligations. Moral obligations are based on high value systems in a given society, these are moral

obligations that men and women have to fulfill in society and these are obligations probably that are laid down by personal or religious laws.

Moral obligations are very significant. Sometimes moral obligations are more valued in society more than the legal obligations. But moral obligations are a choice based. They depend upon the consciousness of a given individual. He can actually follow the moral obligation or he need not follow the moral obligations. For example, we say there is a moral obligation to stay married, but of course divorce can definitely happen, so these are moral obligations that we look forward as a man and a woman in a marriage to be equal partners, but the legal obligation is that the man has to maintain the woman. The aspect of maintaining a wife or even maintaining your parents, there is a law that imposes obligation on citizens to maintain their elderly parents. The necessity of bringing the legal obligation is because the moral obligations were not being fulfilled. The morality of individual would always say that he cannot abandon his parents or his wife even after they have separated, if she has no means of taking care of herself. So, the moral obligation was already there but unfortunately when the moral obligations are not going to get complied with, are not going to be enforced, are not going to be fulfilled by persons in the given society, then there is a law that actually converts that moral obligation into a legal obligation.

Similarly, fulfilling your promises is also a moral obligation. So, when you make a promise, there is a moral obligation to complete what you promised to the other party. These contractual promises are also called as gentlemen promises, which literally means that if you are a gentleman you will actually complete that promise and you do not need law to enforce your promise, this is an example of moral obligation in contracts. If you have no intention to fulfill the promise do not even make a promise, but because many people do not fulfill their promises, do not fulfil their moral obligation, the moral obligation has to be converted into a contractual obligation, a legal obligation. And that is where the law of contract actually came in. It prescribed, that If promises are not going to be fulfilled because people do not care about morality, people do not value their promises and they are at their free will of breaching that moral obligation, then a law has to be brought in to make the promises enforceable.

The law will bring about an obligation, recognize that obligation and any breach of the same is going to be provided with some kind of remedies. In this way, contract law can also be understood from the premise of obligations and some of these obligations are either externally imposed and some of these obligations are self-imposed.

Contractual obligations are self-imposed, i.e. you can take it, you need not take it, it is not something that the law always expects you to do. But some of the contractual obligations are imposed by law such as quasi contracts, where whether you like it or not the law wants you to fulfill some of these obligations. But mostly contractual obligations are self-imposed, rarely the contractual obligations are externally imposed. Quasi contractual obligations will be covered later on in the course, at least not in government contracts and in understanding special contracts, quasi contract plays a very, very important role and the next principle will help us in better understanding the same.

Understanding the basic law on obligation helps us understand the law of contracts because it helps us understand the evolution of contract law as one of the laws that fulfills obligation, it is one of those laws that promotes promises, it is one of those laws that recognizes that promises have some legal system, legal value and any breach of the promises must have consequences, must have sanctions and must have remedies.

Contract law is based on the bedrock of two very interesting principles, one is the law of unjust enrichment and second is the law of restitution. The law of unjust enrichment is a principle that governs contract, not only at the stage of its formation. At this stage please note that contract law has three stages. One, contract law that defines the stage of formation. The rules, right from Section 2 to Section 36 are the rules of formation. Two, the contract law that defines the stage of performance because there is a lot of sections in the Indian Contract Act that actually define the rules of performance, if you want to refer to Section 37 to almost to Section 75 including the law of damages, all of them can actually be attributed as the rules of performance, so how should you perform once you have made a contract. Third, are the rules of breach of contract, so if parties do not perform and they fail to perform, there is a breach and so what happens in case of breach is the third stage.

Now, interestingly the law of unjust enrichment or the principle of unjust enrichment applies to each of these three stages. Look at it from the perspective of just enrichment and unjust enrichment. Just enrichment is possible, you are allowed to do it everyone has the right to profit, because contracts is about commercial transactions, you are in market, you are in trade, you are in economy, you have every business to actually perform get into profits and enrich yourself, just enrichment vis a vis unjust enrichment.

The law actually has to step in when just enrichment seems to be exploited, just enrichment seems to be abused, just enrichment is now going to be unjust. Unjust enrichment is a principle for judges, the courts to intervene in contracts, if they find that one of the parties of the contract is exploiting the other party, he is making unjust enrichment.

Please note, enrichment is not necessarily monetary enrichment, it could be enrichment of a higher amount or quantity of goods, it could be even that, so it's not only monetary, it could be anything of that. So, unjust enrichment very clearly says that you should enter into contracts, you should make promises but it should be a win-win situation for both the parties, one person cannot dominate the contract in such a way that he runs away with everything that is there in the contract.

So unjust enrichment is the rule to intervene, to moderate, to kind of temper down any such contract which can actually give undue advantage only to one party as against the other party. So, the principle of unjust enrichment is almost applied in most cases where the courts want to intervene and hold a contract to be voidable and to actually remedy the aggrieved or the party that feels aggrieved from the contract and the unfairness in the contract.

The second principle is the law on restitution. The law of restitution is also very important because very often than not the duty of the court is that when parties litigate, the parties bring their grievance before the court because the contract is unfair, it is one-sided, it is arbitrary, it has caused a loss to one party then the court will have to put a rule of restitution, what does the court do? The court tries to remedy the wrong, so restoring the party to a position where the wrong can be negated or remedied is what is the duty of

the court. So, the law of restitution actually speaks about the kind of remedies for the breach of obligation, if a promise is not fulfilled how should a party be restored with the kind of remedies or rights that the law recognizes.

So, the law of restitution is also very important. However, you will notice that there is nothing like an absolute restitution, but yes, the courts do apply the principles such as principles of damages, principles of specific performance, also the principles of substituted performance, the suit for price, the right of lien and so on and so forth.

So there are many such restitutory kind of remedies that the parties can actually seek in a court of law and that is how the obligation is enforced in the court of law, the court actually comes to the rescue of the injured party or the aggrieved party and actually puts him in a position as if no contract has been made.

Thus, the law of unjust enrichment and the law of restitution are the guiding principles for contractual obligation and the duty of the court is to ensure that contracts result in a just contract and a fair deal between both the parties and the legal system protects the interest of not only the parties but also the market, the economy and vis-à-vis the country as such. So, what does the courts do? It lays down the principles for contractual obligation. Contract law is not only about the law, it is about the doctrines and the principles that the courts have evolved from time to time and these principles guide the application of contract law as we go forward.

(Refer Slide Time: 13:31)

The slide features a large orange semi-circle on the left containing the text "Assignment 1". To its right, a bullet point asks "• Whether 'Will' is a contract?". In the top right corner is the NPTEL logo. A small video inset in the bottom right shows a man speaking. A yellow dashed line is also visible on the slide.

Now, let us take one assignment just for our understanding. Whether a will is a contract? Let us first understand what a will is. A will is a kind of a declaration of an individual who intends to give his property after his death to probably someone who is surviving the drafter of the will.

Please note will is your declaration of intention, what should happen to your property after your death, that is what is the expression of the will, now please note, it is a kind of an expression, it is kind of a promise it says that after my death this is what will happen to my property. So, in a sense, it is kind of a commercial transaction with an expression of intention.

There are two parties to the will and the will can be registered, need not be registered. In India it plays quite a significant part in how the property is going to be managed after the death of an individual. Now, interestingly when we talk about inheritance of property, who are the people - who are children or the surviving spouse can actually inherit the property of the deceased. Inheritance of property is kind of a law that actually provides a succession to property and this is quite an important principle as we go forward. Now, can Will be considered as a contract, can will be brought under the contract law, does it fulfill all the essentials of a contract and suppose there is a breach of will can parties actually litigate under contract law?

Now, please remember will is covered under the Indian succession law, it is not covered necessarily under the contract law. Now, the Indian Succession Act does talk about the different attributes or requirements of will and it very looks, will resembles the contract, it looks like a contract, it is like I am giving property to someone else and this is a transaction, it is commercial transaction, it is an expression of my intention.

Probably it is an expression of my promise to my son. Please remember will can be to family members or will can actually give property to someone else as well, so we have seen a lot of controversies on will in India, a lot of litigation that have gone to the court on whether the will is right, wrong, was the will done under coercion and so on and so forth. It is kind of a similar litigation that will be looked into and that is why many of us may think that will is nothing but a contract, but the distinction between will and the contract is as follows. While will is covered under the Succession Act, contract is covered under Indian Contract Act. So, there are two different laws that govern and will is probably into a special legislation altogether. Point two, Will actually comes into reality after the death of an individual, so it is not something that comes into execution as soon as the will is made, contracts are actually executed simultaneously most often than not, so today if I assign a contract I probably transfer the property today itself, during my lifetime. Thus, the purpose of the will is slightly different and the purpose of contracts are slightly different. Thirdly, in most contract there is a consideration that has to be supported in a contract. Will probably does not have consideration at all, so while will looks like a document close to contract, it is not necessarily to be treated as one, so we have to remove will from contract law and actually treat it under some other legislation.

And the remedies of contract are not necessarily the remedies that are going to be applied for the will, because remember if suppose what is written in the will and if it is written in my favor is not done who will I sue? Because the executor of the will may be appointed but the draft of the will is already dead, so I cannot sue for breach saying that look what you have written I have not actually got it, your promise is not going to be fulfilled, so I cannot sue the deceased drafter of the will.

So, there are numerous reasons why we want to treat will differently and hence there was a statute that was enacted to treat will and hence this was taken out probably from the domain of contract law. However, contracts today are different, they have a different contextualization and will is not considered as a contract. So, this is just a kind of evaluation of relationships and evaluation of documents in a society for a better understanding of what it is.