

# **“CONSIDERATION” PERFORMANCE OF EXISTING LEGAL AND CONTRACTUAL OBLIGATION: IS PERFORMANCE OF LEGAL OBLIGATION A VALID CONSIDERATION?**

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## **Introduction**

Consideration is demarcated as an exchange between two parties for the purpose of forming a legal contract. It is one of the essential elements to establish a legitimate contract. The other elements are ‘agreement’, which is the meeting of minds of the parties involved to the terms and conditions of the contract and ‘intention’, which is the willingness to enter into the contract and create a legal relationship. Consideration is often emphasized because of the fact that gratuitous promise that is without anything done or given in return is not enforceable. An exchange between two parties is very important. It is in this light of this importance, the paper aims to discuss the element of consideration in the contract. The paper has covered the definition and the need of consideration in the course of formation of a contract. The research work has predominantly covered the doctrine of consideration and its relevance in the modern day law of contract.

Conventionally, existing duty rule performance was not considered to constitute a suitable consideration for a new promise, which was meant to pay some added benefits. This paper will discuss about how this rule has developed over time and now standing on a different platform. Therefore, the paper will attempt to answer the much-debated question of whether the performance of an existing legal obligation amount to a valid consideration for the formation of a contract. This question has been addressed by analyzing some Indian and international case laws for the purpose for of providing the readers a enhanced insight in this regard.

In the following section the researcher will deal with the essential and ceaseless dispute of whether the performance of the duty inflicted upon the parties through various terms and condition of the contract qualify or restrict as a valid consideration for some other contract between the same parties. For the purpose of covering this issue, the researcher will look into the matter of such considerations being qualified as valid consideration for a contract with a third party.

The paper attempts to answer the question of the preexisting contractual and legal obligations forming valid consideration, taking a stand suitable to a much-developed modern world and law of contract. The widened panorama of the contract law has been analyzed through evaluation of numerous cases decided under different jurisdictions over a period of time, which can prove helpful to address the problems of the new contractual environment.

The paper will start with the elucidation of the doctrine of consideration and its application. The next section will show the in depth position of law on the 'Existing Duty Rule'. The following sections will advocate the validity of consideration in 'Pre-Existing Contractual Obligations', 'Pre-Existing Legal Duty' and the obligation of a party towards a 'Third Party'. The paper will also deal with the strengths and weaknesses of this rule in the last section.

### ***The Doctrine of Consideration***

The definition of consideration is outlined in the Section 2(d)<sup>1</sup> of the Indian Contract Act. While the above-mentioned section defines consideration, the requirement of consideration as an essential element of contract is only revealed in Section 25 of the Indian Contract Act; which decrees an agreement without consideration void, subject to exceptions therein.<sup>2</sup>

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<sup>1</sup> Sec. 2(d), The Indian Contract Act, 1872; defines consideration as, "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 to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise".

<sup>2</sup> F. Pollock and D.F. Mulla, THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACTS, 1(54) (14th edn, 2012).

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 limits the freedom of individuals to make legally binding promises; only those promises which are supported by consideration are enforceable, others are not binding, even if the promisor intends to bind himself by the promise.<sup>3</sup> Among the limitations on the enforcement of the promises, the requirement of consideration is described as the most fundamental. It ensures that parties have decided to contract after deliberation, and not on impulse. It is an index of the earnestness of the parties to be bound by the bargain. Consideration also serves an evidential and ceremonial function. The requirement of consideration is peculiar to the countries modeled on the common law system. The mainland systems do not require consideration as an element of a contract, but most of them insist on some formality for gifts or donative promises and their contractual obligation arise when these parties intend to create legal relations.<sup>4</sup>

In *Combe v. Combe*<sup>5</sup> according to Lord Denning this doctrine should be taken to be a cardinal necessity of the formation of a contract as it is too firmly fixed to be thrown by a side wind.<sup>6</sup>

The definition emphasizes the notion of bargain upon which the English Law of contract may said to be based, and hence it is the price of a promise, a return or *quid pro quo* for a promise made.<sup>7</sup>

### ***Definition of existing duty rule***

Existing duty rule is demarcated, as a performance on a pre-existing duty cannot be used as consideration for variation in the contract.<sup>8</sup> When the promisee has to execute a legal duty under a contract, the execution does not institute consideration. Once both parties already agree to do something or withhold from doing a thing under a legitimate contract, both parties have no

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<sup>3</sup> P.S. Atiyah, AN INTRODUCTION TO THE LAW OF CONTRACTS, 118 (5<sup>th</sup> edn, 1995).

<sup>4</sup> M.P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT, 117 (15<sup>th</sup> edn., 2007).

<sup>5</sup> *Combe v. Combe*, [1951] 2 KB 215.

<sup>6</sup> S. Wheeler, Contract Law: Cases, Material and Commentary, 384 (1<sup>st</sup> edn., 1994).

<sup>7</sup> CHITTY ON CONTRACTS, 170(28<sup>th</sup> edn, 1999).

<sup>8</sup> R. Nathan, *Grappling With The Pre - Existing Duty Rule: A Proposal For A Statutory Amendment*, 23(4) AMERICAN BUSINESS LAW JOURNAL, 509, 527 (1986).

authority to change the term of contract without any new consideration. That is, when the promisee is already done something or forbear from doing something under a duty, the promisee cannot demand for supplementary benefit. For example, when the price of goods and services are categorical, the changes of price are unenforceable and no extra imbursements can be made.<sup>9</sup>

### ***Pre-Existing Contractual Obligations or the duty owed to the Promisor***

This section will discuss the performance of a pre-existing contractual obligation to the promisor himself, the relation with the third party is discussed in the later part of the paper.

The pre-existing contractual obligation, commonly known as pre existing duty rule, is a common law rule of Contract. According to this old rule, the party already contractually bound to perform his/her part, doesn't form a valid consideration for a new promise.<sup>10</sup> In more corporate terms, for the modification of the contract, one party's offer to perform an already existing obligation is an insufficient consideration.

The above-mentioned rule discusses whether a promise to perform or the actual performance of a pre existing duty can or cannot serve as a valid consideration to bind a promise.<sup>11</sup> This rule has been the source of a comprehensive and extensive comment. This rule is rarely meritorious and is often evaded. Two different standpoints have been taken according to various authors and judges. It is by and large a debatable issue. But the researcher has argued against the aforementioned position since it is timeworn rule and in the present world full of commercial transactions dependence upon the stance of this rule will lead to unjust enrichment to the already enriched parties. The major cause of this debate has been the inconsistent application by the courts even in the period as short as one month which gave rise to these conflicting assessment of the application of the rule.

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<sup>9</sup> B.F. Brody, *Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation*, 52 DENVER LAW JOURNAL, 433, 435 (1975).

<sup>10</sup> S. Malik, Supreme Court on Contract & Special Relief Act, 1, 371 (1<sup>st</sup> edn., 2014).

<sup>11</sup> J. Beatson and A. Burrows, *Anson's Law of Contract*, 23 (29<sup>th</sup> edn., 2010).

When the promise is already bound by a contract to pay the promisor the promise is enforceable or not is the question, which has largely arisen in the cases where only a part of the due amount is received when given, in satisfaction of a certain debt.<sup>12</sup> This rule is reflected to be the corollary of the doctrine of consideration. Common expression of the rule is that part payment of the debt cannot be a satisfaction of the whole.<sup>13</sup> But it is even older than the doctrine of consideration and is the result of survival of the formal logic of few medieval lawyers. Therefore, it is an unreserved misconception.

Also it is important to mention that, as discussed under the heading of 'Nature Obligation' under the panorama of Section 37<sup>14</sup> of The Indian Contract Act, contractual obligations must be distinguished from liberties. In the case of *Haryana Pesticides v. Bank of Rajasthan Ltd.*,<sup>15</sup> A contract of pledge of goods for the purpose of repayment of the bank the borrower of the goods was required to ensure the goods whereas the bank was had the entitlement of insuring the goods at the cost and risk of the borrower. Unfortunately the goods were destroyed. The bank was not held liable since the primary duty of insuring the goods was of the borrower. Therefore contractual obligation and liberties should not overlap each other.

A group of cases in the first half of the nineteenth century advocated the absence of consideration and thus no remedy but with time some modern cases changed the picture. The case stating absence of consideration was *Stilk v. Myrick*<sup>16</sup> Here, during a voyage two crewmembers deserted and the captain promised the remaining crew an equal share of the deserters' wages if they completed the voyage. The issue of good consideration for the additional payment was addressed and there wasn't good consideration. This case was reconsidered by the court of appeal in *Williams v. Roffey Bros & Nicholas (Contractors) Ltd.*<sup>17</sup> The defendants gave a contract to the plaintiff to refurbish 27 flats. After completing 9 flats he was paid £16200 and an agreement to pay a definite extra amount was made. After further working on few more flats

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<sup>12</sup> J.B. Ames, *Two Theories of Consideration. I. Unilateral Contracts*, 515, 525 Harvard Law Review (1899).

<sup>13</sup> *Id.*, at 527-528.

<sup>14</sup> Sec. 37, The Indian Contract Act, 1872.

<sup>15</sup> *Haryana Pesticides v. Bank of Rajasthan Ltd.*, AIR 2004 P&H 83; the judgement was given by Justice Viney Mittal.

<sup>16</sup> *Stilk v. Myrick*, (1809) 2 Camp 317.

<sup>17</sup> *Williams v. Roffey Bros & Nicholas (Contractors) Ltd.*, (1990) 1 All ER 512.

he was paid less than the decided amount and thus stopped working. It was held that the plaintiff was already obliged but there was good consideration. The defendant gained a practical benefit from the promise of additional payment. Through this it can be concluded that the more practical decisions reflect the need for modifying agreements in modern business, in the public interest for parties to renegotiate if no economic duress. Consideration doesn't not happen to be the key factor in these agreements because businesses are unlikely to promise additional payment unless they believe beneficial.<sup>18</sup>

Shortly after 1800 English law has changed character and concept and the executor contract became the paradigm of Contract Theory.<sup>19</sup> In the case of *Hartley v. Ponsonby*<sup>20</sup> exceeding obligations were taken as to be good consideration when during a voyage the sailor promised extra wages to the half of the crew, which didn't desert. The crew was reduced, as it was dangerous to sail. The crew on board was eligible for compensation as they exceeded their contractual obligation.

### ***Pre-Existing Legal Duty or Duty Imposed by Law***

A pre-existing legal duty is the one in which any person or entity already has an obligation to do something by law, and therefore for which it cannot claim additional compensation for its performance. This is because consideration is supposed to be more than the thing the promisee is bound to do already by keying into a contract. It is discussed under the wide ambit of Section 25<sup>21</sup> of The Indian Contract Act.

Under various statutes it is appreciated that a person who is by his official status or through the operation of the law is under a public duty to act in a certain way, is not regarded as furnishing consideration merely by promising discharge of that duty. For example, no one would expect a

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<sup>18</sup> G.C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69(1) NOTRE DAME LAW REVIEW, 1, 38 (1993-1994).

<sup>19</sup> P.S. Atiyah, THE RISE AND FALL OF FREEDOM OF CONTRACT, 419 (1<sup>st</sup> edn., 1979).

<sup>20</sup> *Hartley v. Ponsonby*, (1857) 7 EL & BL 872.

<sup>21</sup> Sec. 25, The Indian Contract Act, 1872.

policeman to bargain with a citizen to for the price of his protection. Here a public duty is imposed upon the plaintiff by law. The rule of performing something one is already bound to do either by general or specific law doesn't amount to good consideration of the promise has been well settled in England through the case of *Collins v. Godefroy*<sup>22</sup>. The reason for this is that it does not add anything to the already existing obligation. And, such performance is no legal burden to the promise but on the contrary it relieves one from the duty. The position was started in 1831, in the aforementioned case wherein the plaintiff had attended on subpoena to give evidence on the defendant's behalf in a case in which the defendant was a litigant and he alleged that the defendant has promised to pay him 6 guineas for his trouble. Lord Tenterden held that there was no consideration for this promise.

Further when a general law had been imposing a duty, any agreement taking private reward for doing it will be against the public policy. In this regard, in the year 1868, a considerable period before the Indian Contract Act came into force, the Madras high court decided the *R. Sashannah Chetti v. P. Ramaswami Chetti*<sup>23</sup> case following the above principle. It was held that a person bound by subpoena is by law, bound to attend and give evidence to the court. The compensation to him for loss of time or inconvenience was void for want of consideration.<sup>24</sup>

There are instances when a man, being already under a legal duty to do something, undertakes to do something more than is contained. By doing or agreeing to do more than one's official duty or in different terms forgoing the choice which law allows him to do is served as consideration.

For the reason of the obvious character of the argument, there are a few cases in which it has been raised and some of them are at least disclose a tendency to uphold the agreement by assuming that something more was undertaken than the bare discharge of the duty.<sup>25</sup> This can be termed as the things done in excess of the existing legal obligation or duty imposed by a law or a

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<sup>22</sup> *Collins v Godefroy*, (1831) 1 B & Ad 950.

<sup>23</sup> *R. Sashannah Chetti v P.Ramaswami Chetti*, (1868) 4, 7 (Madras High Court); The facts of the case were that the plaintiff was served with summons requiring him to give evidence before a court of law. The defendant gave him a promissory note assuring to pay him money for his trouble.

<sup>24</sup> A. Wadhwa, Mulla on The INDIAN CONTRACT ACT, 116 (13<sup>th</sup> edn., 2011).

<sup>25</sup> *Supra* note 4, at 115.

statute. Thus, Lord Denman in *England v. Davidson*<sup>26</sup> stated a ratio favoring validity of consideration.

The following lines emphasize the facts of the case. The defendant offered a reward of £50 to anyone who will give information leading to conviction of a felon, the offender who broke into his house. The plaintiff a police constable gave that evidence but the defendant refused to pay and pleaded that the plaintiff had not only done his duty but the contract was against the public policy. But Lord Denman rejected these two pleas and said,

*"I think there may be services which the constable is not bound to render and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear."*<sup>27</sup>

It was held that the contract was enforceable and the reward should be paid to the police officer who had given information leading to the conviction of a criminal.

Following this principle in all such cases, courts must make sure that the service rendered is really beyond the scope of official duty and not mere presence for extracting money. An In the case of *Hogan v. Stophelt* held that, If a constable for making extraordinary efforts to perform an ordinary official act, may not only receive, but also collect by law a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators and judges might, and soon would, put their extraordinary efforts in the markets, to be had by the higher bidder. This is sickening and revolting view of the subject.<sup>28</sup>

Similar arguments were considered and then rejected in the English case of *Glassbrook Brothers Ltd v. Glamorgan County Council*<sup>29</sup> in which the question raised was of best method to protect a coal mine from strike. The colliery manager applied for police protection for his colliery and

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<sup>26</sup> *England v. Davidson* (1840) 11 Ad & E 856

<sup>27</sup> E.W. Patterson, *An Apology for Consideration*, COLUMBIA LAW REVIEW, 929, 942 (1958).

<sup>28</sup> *Hogan v. Stophelt*, (1899) 170 Ill 150 (Supreme Court of Illinois).

<sup>29</sup> *Glassbrook Brothers Ltd v. Glamorgan County Council*, [1925] AC 270.



insisted that billeting a police force on the colliery premises could only efficiently protect it. The police superintendent was prepared to provide what in his opinion was adequate protection by means of mobile force, but refused to billet police officers at the colliery except on the terms of the manager agreeing to pay for the force so provided at 2200. The company refused to pay and pleaded absence of consideration. But the House of the Lords favored the plaintiff and it was held by Viscount Cave LC that there was nothing illegal in the agreement, nor was it void for want of consideration.<sup>30</sup>

In *Harris v. Sheffield United Football Club Ltd.*<sup>31</sup> the defendants were obliged to pay the policeman who were present to maintain the large number of crowd watching a match.

Gradually the readiness of the judges to find a consideration is seen throughout the case laws discussed in the paper. This readiness is more evident from *Ward v. Byham*<sup>32</sup> in which the issue of sufficient consideration was raised and held that since the party had gone beyond her legal duty such exceeding of the legal obligations was a sufficient consideration.

### ***Plaintiff already bound by an existing contractual duty to a 'Third Party'***

This is the case where the plaintiff either performs or promises to perform an obligation already imposed upon him by an existing contract, not between him and the defendant but between himself and the third party. This section will discuss whether such a promise or performance affords sufficient consideration.

The validity of the promise must be accepted; the insufficiency of performance is open to criticism. This issue has been an open ended due to the effect of some 17<sup>th</sup> century cases which

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<sup>30</sup> *Supra* note 5, at 115.

<sup>31</sup> *Harris v. Sheffield United Football Club Ltd.*, [1988] QB 77.

<sup>32</sup> *Ward v. Byham*, [1956] 2 All ER 318.

courts themselves do not seek to in modern times.<sup>33</sup> Therefore, the new cases uniformly uphold either promise or performance as sufficient consideration.

The first case to be discussed in this regard is *Shadwell v. Shadwell*.<sup>34</sup> In this case, defendant who was plaintiff's uncle promised to pay him £150 yearly during defendant's life until plaintiff's annual income reached 600 guineas by working chancery barrister. The consideration was the plaintiff marrying Ellen Nicholl, which was done anyway since he had promised to marry. Plaintiff never earned as much as 600 guineas. The uncle fulfilled his promise until he died and his estate refused to continue the annual payments to P. It was held by Justice Byles that, Performance of an existing contractual duty owed to a 3rd party is a sufficient consideration for a promise, it does not seem to matter if promisee cannot prove that he/she has suffered a detriment or that the promisor has earned a benefit. The marriage was an 'object of interest' to the uncle and he benefited by its taking place, thus there was consideration.<sup>35</sup>

The facts and the decision in *Chinchester v. Cobb*<sup>36</sup> were also similar for the practical purpose and it is noteworthy that J. Blackburn experienced no difficulty in discovering consideration on those facts.<sup>37</sup> The third to be discussed under this section is *Scotson v. Pegg*<sup>38</sup> in which, a purchaser of some coal paid the defendant to carry and to unload the coal. The claimant was the supplier of the coal who had also paid the defendant to carry and unload the coal. The claimant brought an action to recover the money paid arguing the defendant was already under an existing duty to carry and unload the coal and thus provided no consideration. It was held that, an existing contractual duty owed to a third party to the contract could amount to valid consideration for a new promise. Performance of an obligation to a party does not preclude that performance from serving as consideration to a different contract to a third party. Consequently the claimant could

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<sup>33</sup> P.S. Atiyah, *An Introduction to the Law of Contract*, 59 (1<sup>st</sup> edn., 1961).

<sup>34</sup> *Shadwell v. Shadwell*, 1860, 9 CBNS 159, 30, LJCP 145.

<sup>35</sup> C. C. Langdel, *A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS*, 229 (1871).

<sup>36</sup> *Chinchester v. Cobb*, 1866, 14 LT 433.

<sup>37</sup> A.L. Corbin, *Does a Pre-Existing Duty Defeat Consideration? Recent Noteworthy Decisions*, *YALE LAW JOURNAL* 362, 362 (1918).

<sup>38</sup> *Scotson v. Pegg*, 1861, 6 H&N, 295, 3 LT 753.

not recover the sums paid and the defendant was entitled to get paid twice for doing the same thing.<sup>39</sup>

All three above mentioned cases accord with the sentiments of the businessmen and point in the same way and directs the researcher to conclude that both promise and performance can act as sufficient consideration in an existing contractual duty to a third party.

### ***Strengths and Weaknesses of the Existing Duty Rule***

The existing duty rule can avoid parties used threats or non-performance to demand for additional benefits or payments to those is already provided under original contract. This is one of the strengths of the rule. But the rule ignores the commercial realistic and it may neglect the additional risks from the original contract. It becomes unfair to both parties since renegotiations are very common in daily commercial practices.<sup>40</sup>

It was originally created to eschew parties who used threats or non-performance to draw out additional benefits or payments to those are provided under original contract. Today, the modern law of 'economic duress' can deal with the problem of parties who used threats of non-performance to extract additional payments or benefits. The rule of 'practical benefits' of such situation will be allowed to use.<sup>41</sup>

### **Conclusion**

Consideration is considered to be the essence of every contract. Its existence is undeniably crucial for the creation of any contract. Any agreement cannot be made enforceable by law when not supported by consideration. This makes consideration nearly inseparable from a contract.

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<sup>39</sup> G.C. Cheshire, Law of Contracts, 104 (11<sup>th</sup> edn. 1956).

<sup>40</sup> M.A. Eisenberg, *Principles of Consideration*, 67(4) CORNELL LAW REVIEW, 640, 652 (1981-82).

<sup>41</sup> K.M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47, ALABAMA LAW REVIEW, 387 (1995).

The doctrine of consideration lays emphasis on the prerequisite element of consideration to establish contractual obligation between any two parties.

The paper in the initial part dealt with the issue of a contractual obligations qualifying as valid consideration. A promise to perform an existing contractual obligation is a good consideration when it is not based on the continuation of the same obligations. Change in the mode of prevailing obligation amount to good consideration.

The matter of the performance of a duty already been imposed by law qualifies as consideration or not, has been contested for a long time. The timeworn rule suggests that the performance of any existing legal duty doesn't become consideration in a promise. It also gives an exception of a setup is when such performance is extended by an act that is done in excess of one's legal duty which makes the performance of legal duty qualified for valid consideration.

However, several case laws helped the researcher to establish that, after the nineteenth century there have been an increase in the number of cases which do not fall in the expanse of the archive rule. It can be concluded that in the matter of performance of previous obligations the facts of the instant case should be examined with utmost vigilance and there should be more logical application of the laws.

The possibility of obligations of one party towards the 'Third Party' constituting valid consideration providing leeway and scope for extortive renegotiations was also dealt with in detail in this paper.

Much desired result of changing the position of the rule has not yet been completely achieved because often the Judges do not attempt to overrule or go contrary to the law.

Authorities found difficulty in reconciling the theory of consideration. It is accomplished that consideration is an act or forbearance given in exchange for a promise. But the given qualification is the call for logical simplicity in the law. The paper has attempted to achieve the

purpose of bridging the gap between the theoretical understanding and the practical orientation and challenges of the rule.

In conclusion, a new approach of existing duty rule has been set which is the performance of a pre-existing duty may constitute good consideration in return for a promise of additional payments. New cases have given new horizons and have largely influenced the existing duty rule.

