

ANATOMY OF CONTRACT ACT 1872

Should mala fide intention be restrained?

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ONCE the mankind's fondest dreams was 'to be able to be in more than one place at the same time', which obviously is a physical impossibility. Law has, nevertheless, has found a way for people to do legally what cannot be done physically and be there in more than one place simultaneously. A simple analysis of the nature of agency-principal relationship will make evident the rationale behind such aspiration. There is evidence in history to indicate that the concept of agency existed in the early mediaeval period, but was not that widely used during the same period, as it was seldom necessary for anyone to engage another to perform a service on his behalf in the community, which was small and self-sufficient.

With the passage of time, with the growth of the volume of trade and the rise of mercantile activities, the use of 'agents' became more and more important and widespread. By the late 18th century and throughout the 19th century, a rapid growth of industry and commerce created a perceived need for a common law response to combat issues that rapid industrial changes had brought about. Both the law of contract and the law of agency,

in their respective sphere, were a party to such response. Thus, the common law court and the chancery court mould the legal concept and ideas, from which the present society formed the basis of modern agency law in the world.

The Roman civil law maxim: *Qui facit per alium facit per se* (he who does through another does by himself) is the basis of principles of the 'law of agency' that exists in our time. It is said legal maxims are proverbs of the law. They have the same merits and demerits as other proverbs used to have, being brief and pithy statements of partial truth. They express general principles without the necessary qualifications, exceptions and cannot always essentially be taken as trustworthy guide towards the applicable laws, yet they establish and provide for useful means for the expression of leading doctrines of the law in a form, which is at the same time brief and comprehensible.

Often it is said that maxims constitute a species of legal shorthand, useful for lawyers but dangerous to anyone else, as they can be read only in light of expert knowledge of the relevant laws. Anyway, be that as it may, the colonial rulers of the then British India, to a great extent, relied on such maxims while formulating legal principles and enacting them as 'acts' for significant and noteworthy socio-legal segments of society to enable themselves to govern the colony in terms of their own longings. The Contract Act 1872, the Specific Relief Act 1877 and the Transfer of Property Act 1882 are all examples of such enactments and evidences behind the truth of such findings.

The law of contract today is considered the centre of modern business laws which prevails across different

regions and countries of the world, be in common law or civil law jurisdiction. With regard to Indian sub-continent, the Contract Act 1872 is the relevant law, which is still not only applicable to India, Pakistan and Bangladesh to cater the need of about 1.5 billion people but also, in fact, go to attain quasiquicentennial jubilee (146 years) of its existence, which is a glaring and evident example of the foresightedness of those draftsmen who were engaged in drafting it considering that 'law' always needs to satisfy the changing need of a society as society keeps on changing. Anyway, the anatomy of the act/statute reveals that originally there were 238 enacted sections, of which, a total of 74 sections have been repealed under two chapters, thereby suspending all provisions relating to the sale of goods (Section 76–123) and the Law of Partnership (Section 239–266) under Chapter VII and XI respectively. Obviously, this has been done to keep pace with the development and mercantile needs.

Therefore, in fact, several sections of the Contract Act 1872 remain vacant as they were omitted (to accommodate the two new subsequent legislations/enactments of the Sale of Goods Act 1930 and the Partnership Act 1932) thus, containing only 164 sections that relate to the general principles of contract, ie the 'making of a contract' (Section 1 to 75) and the rest composed of 89 sections towards provisions of special contracts, like principle of laws on bailment, pledge and agency. Thereby, creating an opportunity for the legislature to strengthen the existing provisions of laws that are required as 'need of the hour' and also may address and encompass new frontiers of legal development that has been necessitated on the opening of 'new windows' within the ambit of the Contract Act 1872.

In this context, rationalising and streamlining the legal regime of the law of agency in Bangladesh to cater to better licensing and franchising options for Bangladeshi merchants/traders to enable them to attain an upper edge in the negotiation process of business deals deserve an immediate attention of lawmakers, along with the possibility of having new laws/provisions to ensure suitable safeguards for merchants and traders (who act as agents/indenters from Bangladesh) within the legal framework, thereby securing for them the position and opportunity to bargain and negotiate with the financial might of large/giant multinational corporations of the world (who are the principals). Windows are open to make use of those omitted sections (around 74 of the Contract Act 1872) to make provisions towards these ends.

In recent days, it is seen that whether an entity chooses to 'franchise' and 'license' largely depends on the amount of control and level of ongoing responsibilities that they are willing to commit in their business.

Licence agreements are written contracts where licensor gives another person or entity/licensee the right to use something. Usually, intellectual property licence is an agreement that provides a licensee with the right to use a brand, logos, trademarks, copyright, know-how or any other type of intellectual property rights owned by the licensor. But at times, licence can be very specific in terms of what intellectual property rights the licensees can use and how they can use it.

On the other hand, a franchise arrangement is also a type of contract like a licence agreement. But the distinctive feature of a franchise arrangement is that a franchisor exercises significantly more control over franchisees than a licensor and unlike a licence agreement, franchise arrangements obviously contain specific

directions on how the franchise operate the business and also give detail specifications on the level and the type of marketing that each franchisee must carry out when dealing with their customers.

The purpose behind the statements relating to the law of agency, or for that matter franchising, was, in fact, to portray that generally a contract is a voluntarily-entered bipartite understanding between two entities to do something within the ambit of acceptable laws, be that a simple contract, bailment or agency. Thus, the essence of such bipartite understanding is that free will of the parties will be the driving force of such contracts and that too will be voluntarily agreed on in a bona fide manner. But the reality suggests that in this 21st century, question remains how far merchants and traders of a developing community do apply their free will/wish voluntarily in the process of such engagement and to what extent unless the legal regime of a specific country make provisions to safeguard their business rights to enable and empower them legally to negotiate with their giant principals from abroad.

There are and were many occasions where merchants and traders as agents for their giant principals either compromise with the principals' standard forms and conditions of agency contracts and, to certain extent, work within such ambit only in as much as between them there exists a binding written contract beyond which any manoeuvre would be considered a breach and there may be specific claim of damage and compensation too.

As an example of recent times, Writ Petition No 4779 of 2018, Special Original Jurisdiction, the High Court Division under Article 102 of the constitution of Bangladesh where the petitioner being a businessman involved in agency business had to seek redress asking for a ruling against such giant international

manufacturer who tends to bypass and breach the normal business norms and, thereby, appoint different entities to sell products in a particular given territorial jurisdiction, thereby jeopardising the vested interests and rights in Bangladesh that had enjoyed the same rights for quite long and also had to spend time and energy on meeting the principals' estimated sale targets.

In earlier times, big multinational companies/principals used to manage their marketing to meet their expected business targets by themselves. But with the passage of time, the scenario has changed as nowadays multinational companies, instead of promoting their business on their own in a particular territory, rather prefer to appoint multiple agents and try to achieve their targets that creates unjust business competitions among the agents appointed, either by themselves or their other agents within the umbrella of agency contract that hinders rights of agents (but this is being done under the law and all such agencies are valid in the eyes of law) although they cannot be considered bona fide business acts under business norms.

Thus, to redress their rights, agents have no options but to seek court's interference against such mala fide practices of giant multinationals, as in the writ petition referred to above, seeking writ jurisdiction, having no efficacious remedy under the law of agency, which could easily be addressed or mitigated with little amendments to the law of agency, as indicated earlier that there remain some vacant sections which were there originally but now omitted under the Contract Act 1872.

In this context, we may refer the example from neighbouring India, where it has proposed an amendment in 2017 to the Contract Act 1872, by inserting Chapter VIA, providing Section 75A–75H enacting provisions

relating to 'farming contracts' considering the need of the time and to protect farmer's interest vis-à-vis large corporations which could help farmers to ameliorate their plight.