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The Jurisprudence of Capacity under the Law of Contract in Pakistan: A Critical Appraisal

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Abstract

This paper briefly discusses the formation of a contract and how it is different from an agreement. It discusses what is capacity? What does it mean? It critically discusses the doctrine of capacity as provided by the law and as is expounded by the jurisprudence of the Pakistani Superior courts. The main findings of this paper are that capacity/competence is one of the most important elements for there to be a legally enforceable contract. It refers to a person's qualification or competence under the law to enter into a contract. The law imposes three conditions of competence. The first is that the party in question must not be a minor to the law they are subject to. The second is that the party must not be insane, either permanently or temporarily when entering into a contract. Any contract made during the period the person is insane shall not be a valid contract. This also applies to those who have ingested intoxicants either for medical reasons or otherwise. In either case, the person would be held to be in a similar status as that of the insane person and thus such a contract in this case is also null and void. The courts have deliberated on capacity only to a certain extent. The methodology used in this paper is doctrinal.

Keywords: Contract, Agreement, Elements, Capacity/Competence, Minor, Unsound Mind

Introduction

This paper briefly discusses the formation of a contract and how it is different from an agreement; It discusses what is capacity; what does it mean; it discusses the doctrine of capacity/competence as is provided by the law; it critically discusses the jurisprudence of the Superior Courts in regards to capacity/competence; this paper appraises the doctrine of capacity/competence as under the Pakistani legal system.

Elements Of a Contract

A contract is a legally binding agreement. That is to say, all agreements lack certain elements, or certain ingredients that can convert it into a contract. These elements or ingredients are incorporated within Section 10 of the Contract Act of 1872 (hereinafter referred to as the "Act") which provides that "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." Hence, an agreement can be a contract if it contains the following elements, namely, free mutual consent of both parties or intention to create legal relations, both parties to the contract have the capacity to enter into a contract, that is to say, both parties are legally qualified or meet the qualifications under the law to enter into a contract, both parties have a lawful consideration for one another, that is to say, both parties must contribute something in the contract as both parties are getting something out of the contract. This is called quid pro quo and the last element is that the contract itself must contain a lawful objective or have a lawful purpose. The last element seems unnecessary as the whole point of a contract is to enter into a lawful relationship. No one enters into a contract

with an unlawful purpose. This last element in fact is nowhere to be found in Anglo-American jurisprudence and is in fact treated as an implied condition. Nonetheless, it has been incorporated expressly within our law and thus it shall be also considered an element of a contract. Perhaps one of the reasons for this is due to the fact that the Act itself was enacted all the way back in 1872 and has not been updated since then. Nevertheless, we must make do. These 4 elements are only for the sake of distinguishing between a lawful binding agreement (contract) and a non-lawful and non-binding agreement (agreement). In order for a contract to be formed, there must be an offer, an acceptance, free mutual consent, capacity/competency of both parties, consideration from both parties, and a lawful objective or purpose. If any of these elements are missing from the contract, then the contract shall be deemed to be null and void. In the most basic sense, we can simply say that every contract is an agreement but not every agreement is a contract. This much should suffice for our purposes as anything more would be beyond the scope of this work (Ibn Munir 2023).

Capacity

What is capacity? What do we mean by capacity? It has been defined as “the attribute of a person who can acquire new rights, or transfer rights, or assume duties, according to the mere dictates of his own will, as manifested in juristic acts, without any restraint or hindrance arising from his status or legal condition.” (Black, 1910). It has also been defined as “ability; qualification; legal power or right. Applied in this sense to the attribute of persons (natural or artificial) growing out of their status or juristic condition, which enables them to perform civil acts; a s capacity to hold lands, capacity to devise, etc” (Black, 1910). Another definition provides that capacity refers to “the ability, capability, or fitness to do something; a legal right, power, or competency to perform some act. An ability to comprehend both the nature and consequences of one’s acts.” (West, 2005). It has also been referred to as “soundness of mind and an intelligent understanding and perception of one’s actions. It is the power either to create or to enter into a legal relation under the same conditions or circumstances as a person of sound mind or normal intelligence would have the power to create or to enter.” (West, 2005). Hence, capacity is quite simply the competence or ability of a power to perform or not to perform a particular act. This competence or ability is highlighted in the law. It could refer to someone’s particular age, or someone’s mental maturity, or any other qualification provided within the law. Thus, it is the legal qualification of a person that enables him to enter into a contract. It is one of the elements of a legally binding contract as discussed briefly hereinabove. Section 11 of the Act provides that any person who has reached the age of majority as per the law he is subject to is sane, and is not disqualified by any other law to enter into a contract can make a contract. Hence, the Act has imposed three conditions for one to be legally qualified or be deemed competent to enter into a contract. The first is that he is to be the age of majority according to the law to which he is subject. For Pakistan, the required age is incorporated within Section 3 of the Majority Act 1875, which provides the age of majority to be 18 for anyone who has a court appointed guardian to take care of him and his property and 21 for anyone whom the court themselves are the guardians for their property. (Majority Act, 1875). It should be noted however that in Pakistan, the age of majority is different in different pieces of legislation for different purposes (Ibn Munir, 2023). The second condition is that he is to be of sound mind, that is to say, he should be able to use his rational faculties to make a reasonable decision on the potential effects or consequences that the decision would grant him as any man of ordinary prudence would do. Section 12 of the Act provides that for the sake of entering into a contract, a person at the time of making such a contract should be capable of understanding it and make a rational judgement upon the potential effects and implications upon himself is considered to be a sane person. The provision also provides that any person who is suffering from temporary insanity may make a contract during the times he is sane and able to do so and not during the times he is insane and unable to do so.

Hence, the law provides for not just permanent sanity but also temporary sanity. Hence, a sane person would be someone who is able to apply his rational mind and use his reasoning to determine the

potential benefits or consequences of any decision he would make, which would also include the making of the contract before him. He should be able to distinguish between the potential benefits and consequences and should be able to make a decision based on his best interests. However, should there be an insane person who at times can still function as a sane adult and therefore be able to reason properly, then he can also make a contract. Of course, this also applies to the person who is occasionally sane but at times becomes insane, and thus when he is in an insane state, he would not be able to enter into any agreement with anyone else. Aftab Ahmed calls this as lucid intervals or the state of unsoundness of mind which denotes periodic insanity with lucid intervals thrown in. (Ahmed, 1987). He further observes that in such a case, the contracts made during the lucid period can only be valid unless the lunatic person proves that his insanity was known to the other party when he was incapable of forming a rational judgement. (Ahmed, 1987). This also takes into consideration a person who is intoxicated for any reason. That is to say, a person who has been intoxicated for medical reasons or is intoxicated due to consuming intoxicants for any other reasons. Aftab Ahmed observes that “a person in a state of complete intoxication is said to have no ‘agreeing mind’ and the contractual capacity of a drunken person is the same as that of one who is mentally inflicted” (Ahmed, 1987).

The last condition is that he should be disqualified for any other reason by the law to which he is subject. Thus, this applies to a person who may be disqualified under the law for reasons other than age or sanity. For example, a person could be disqualified under the law to enter into a contract by court order, or he would be disqualified under the law due to committing an act that is forbidden in the Pakistan Penal Code (PPC). An example could be of a person consuming forbidden intoxicants when he does not need as mentioned hereinabove. Thus, this is the criterion on which a person’s capacity or competence is judged. Aftab Ahmed in his contemplation of the scope of this provision also provides three conditions, namely, whether the person has acquired the age of majority or not, whether the person is sane or insane, and lastly, whether the person is disqualified by personal law to enter into a contract. (Ahmed, 1987). He is correct to a certain extent. He has forgotten to include whether the person is qualified under the other laws of the contract, such as the PPC, or Transfer of Property Act 1882 (TOP), etc.

Any contract made by a person who is not competent or legally qualified under law to contract will be void ab initio, that is to say, it shall be considered a void contract since the start, that it had no legal status and had no legal effect since the inception or making of the contract and it cannot be ratified or enforced by any party (Ahmed, 1987). We will discuss this further below.

Jurisprudence of the Pakistani Superior Courts

We shall now critically analyze the jurisprudence that has been set by the court on capacity. In a case where the proposition was whether a minor’s guardian could enter into a contract on his behalf? The court while relying on Indian case law and “Muhammadan Law” held that a minor’s guardian can enter into a contract on the minor’s behalf provided that the said contract was in the minor’s best interest and benefit. (M.A. Faruqi v. Sajid Ali Khan, PLD 1957 (W. P.) Karachi 631).

In another case where a man who was standing trial for murder transferred his property to his infant child, the proposition was whether this transaction was null and void owing to the fact that the transferee was an infant child. The district held it to be void on this rationale. However, on appeal to the High Court, Constantine J. reversed the decision of the district and held that while a minor cannot be a party to a contract, he can still be a transferee. (Mst. Amnat v. Mahboob Hussain, PLD 1959 (W. P.) Karachi 362).

In a case where there was a land dispute and there was an allegation of one of the parties being insane at the time of the agreement, the court after relying on Indian case law held that the burden of proof of insanity lies on the party who alleges it. (Rohini Kumar Deb Nath v. Bhagaban Chandra Deb Nath, PLD 1963 Dacca 253).

Where the proposition was whether someone who made an agreement on behalf of a minor is void or not? The court after relying on the jurisprudence set by the Indian courts and the Privy Council respectively held that a property can be purchased on his behalf by the minor's guardian for the minor's benefit and also observed that the important point for consideration in cases where a guardian agrees to a contract on behalf of the minor is whether minor's charge is legally qualified to enter into a transaction on the minor's behalf or not. (Muhammad Mursaleen v. Syed Noor Muhammad Hussaini, PLD 1968 Karachi 163).

Where there was a dispute on the party's appointment to his post and was forced to have a compulsory retirement, the court while contemplating the scope of a void contract observed that any agreement made by a person who is legally disqualified to do so shall be absolutely null and void and is incapable of being enforced. The legal disqualification discussed here refers to anyone who is below the age of majority and anyone who is insane (The Chairman, District Screening Committee, Lahore v. Sharif Ahmad Hashmi, PLD 1976 Supreme Court 258). This observation is laudable. Any contract made by a minor or someone of an unsound mind shall be void ab initio and cannot be enforced or ratified by either party.

This case was relied on by Akhtar J. in another case where there was a dispute on the sale of land, one of the parties had filed a suit for specific performance against the other party who were minors at the time the sale deed was signed, the Court observed that under the law, anyone under the age of majority cannot enter into an agreement as it will be an absolute nullity and will have no existence in the eye of the law. (Muhammad Iqbal v. Muhammad Rafique, 2005 YLR 3158 [Lahore]). A similar observation was also taken by Anwar J. in another case where he upheld the judgement of the Additional Session Judge that the transaction of the sale is held to be void against the petitioner as he was a minor at the time of the sale (Muhammad Arif v. Muhammad Hafeez, 2007 MLD 1983 [Lahore]).

Where there was a dispute for the sale of a house and there was a suit of specific performance for the sale of the house. The district judge ruled in favor of the respondent. The respondent was a minor at the time of the suit who was represented by his father. The appellants contested the decision of the lower court, arguing that the agreement was without consideration and also that the agreement was void as the respondent was a minor at the time the agreement was executed. The Court ruled that although the minor cannot enter into a contract, he can still be made a transferee and thus enforce any such transaction made in his best interest for a worthy consideration, especially when he will not incur any duty that arises from the agreement. Hence, he is able to acquire a title to anything. (Muhammad Saleem v. Muhammad Tariq, 2009 CLC 1295 [Lahore]).

This observation is laudable to a certain as the minor was not the original party to the agreement and the suit was filed by his father and not him. He can therefore be made a transferee of the property as there was no liability incurred by him, however, the court's observation that a minor can enforce a contract is incorrect as a contract made by a person who is not legally qualified to do so is void ab initio and cannot be enforced by either party, regardless of whoever the party was, minor or not. It should be noted however that the guardian of the minor can enforce the contract on the minor's behalf provided it is done so in his best interest and legal authorization to do so was given.

Where the respondent challenged the exchange of her land and subsequent sale of the same by her attorney who had committed the transactions when she was a minor. The court while contemplating on the scope of a contract with a minor held that the transactions were incapable of ratification or confirmation and observed that it is an established principle that any contract that was entered into with a minor is void ab initio as the minor is not capable of being able to give consent or enter into a binding contract. (Abdul Ghani v. Mst. Yasmeen Khan, 2011 SCMR 837).

While relying on various Indian case laws, he further observed that as per the law, the minor is completely incompetent to enter into any contract and that such a contract would have no legal

existence at all and thus could not be confirmed or enforced even after the minor becomes a major. In fact, a minor could not be burdened with any rights and obligations that would arise out of a contract. (*Abdul Ghani v. Mst. Yasmeen Khan*, 2011 SCMR 837).

The court's observation is laudable. As the minor is disqualified by law to enter into a contract, such a contract shall be void and be of no effect at all. It cannot be enforced by either the minor himself or by the other contracting party. Even more appreciative was his observation that the minor could not be burdened with any liability that arises out of a void contract. This observation was relied upon by Panhwar J. in another case where he observed that an absence of legal authorization also serves as a legal disqualification under Section 11 of the Act. (*Shahzad Ali v. Raees Khadim Hussain*, 2016 CLC Note 55 [Sindh (Hyderabad Bench)]).

In another case, the court observed that a minor transaction made on behalf of the minor cannot be ratified later on and the minor cannot be burdened with the liabilities arising out of a contract that is void as any contract that is made with a minor is void ab initio and the minor cannot consent to the contract as well thus there is not legal binding effect being created. (*Abdul Waheed Khan v. Mst. Ruqia Bibi*, 2016 CLC Note 147 [Peshawar (D.I. Khan Bench)].) A similar observation was also made in a subsequent case where the court held that any contract any contract made with a minor is void as the minor does not have the competency to contract (*Muhammad Mujtaba Khan v. Rahat Siddiq*, 2017 YLR Note 290 [Lahore (Multan Bench)]).

The courts have also held that anyone who does not have legal authorization to execute any sale deed is disqualified or incompetent under the meaning of Section 11 of the Act. (*Sikander Ali v. Baddar-U-Din*, 2019 CLC 1046 [Sindh (Larkana Bench)]).

The Lahore High Court in a recent case held that as per the law, a minor cannot at all enter into a binding agreement and the same would be rendered invalid. The Court further held that even the minor's guardian cannot enter into a sale agreement with anyone unless or until it is determined that the transaction is for the minor's benefit and the Court's permission has been obtained. (*Ifthikhar Ali v. Riaz-Ul-Haq alias Riaz Ahmed*, 2023 YLR 854 [Lahore (Bahawalpur Bench)]).

The court's observation is laudable. A minor cannot enter into a contract and any contract which is executed by the minors or on behalf of the minors would be invalid without any legal authorization. Even an appointed guardian of a minor's property could not enter into a contract to sell the minor's property except it is made with the minor's best interest and benefit but would still nonetheless require the permission of the court.

The upshot of the above discussion is that any transaction entered into by a minor is void ab initio, that is to say, it shall not exist at all under law. However, a minor can be a transferee of a conveyance and his guardian or charge can also enter into binding agreements on his behalf provided it is in the minor's best interest and benefit. Overtime, the court's permission was not necessary before but it is necessary when the guardian wishes to sell the property of the minor. Any contract that has been made without any lawful authorization stands for a disqualification within Section 11 of the Act. Also, any allegation of insanity by the other party must prove that allegation of insanity. Otherwise, the court may also investigate the insanity by appraising the evidence in the instant case as well. (*Suleman v. Kala*, 1994 MLD 747 [Lahore]) However, this can only be done by a higher court in its appellate jurisdiction. Thus, the trial courts must do their utmost best to appraise the evidence in these types of cases.

Conclusion

From the above discussion, we can now conclude that capacity/competence is one of the necessary elements in order for there to be a legally enforceable transaction. It refers to a person's qualification or competence under the law to enter into a binding agreement. Section 11 of the Act imposes three

conditions of competence. The first is that the party in question must not be a minor to the law they are subject to. The second is that the party must not be insane when entering into a contract. He must be of sane mind so he can apply proper reasoning to make a reasonable decision. This also applies to those who have temporary insanity, provided that during the lucid interval period, they are able to prove that the other person knew of their insanity and thus are able to form a rational judgement. Any contract made during the period the person is insane shall not be a valid contract. This also applies to those who have ingested intoxicants either for medical reasons or otherwise. In either case, the person would be held to be in a similar status as that of the insane person and thus such a contract in this case is also null and void. The courts have deliberated on capacity only to a certain extent. They have ruled that any transaction entered into by a minor is void ab initio. However, the minor can be the transferee of a conveyance. The minor's charge can also enter into transactions on his behalf provided it is in the minor's best interest and benefit. Overtime, the court's permission was not necessary before but it is necessary when the guardian wishes to sell the property of the minor. Any contract that has been made without any lawful authorization stands for a disqualification within Section 11 of the Act. Also, any allegation of insanity by the other party must prove that allegation of insanity. Otherwise, the court may also investigate the insanity by appraising the evidence in the instant case as well. However, this can only be done so by a higher court in its appellate jurisdiction. Thus, the trial courts must do their utmost best to appraise the evidence in these types of cases.

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