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Can Emojis lead to the Formation of Contracts?

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Contracts are the basic and inevitable in any commercial transaction. The Indian Contract Act 1872 lays down the general principles concerning the formation and breach of contracts. Technological advances have shifted the formation and execution of contracts from the traditional way to the modern way. This includes the usage of technology and digital communications. The formation and execution of electronic contracts are governed by The Information Technology Act 2000. The use of devices like mobiles, laptops etc. and digital means of communication like e-mails, WhatsApp, Telegram and other useful applications have made it very easy to enter into any commercial transactions. The emojis i.e. the smiley faces with different expressions are used widely. The emojis have swiftly entered into the legal arena. The Courts across the globe talking about the usage of emojis and their interpretation is now not novel. There has been a rise in cases that deal with the usage and interpretation of emojis and the cases reported to date include criminal cases, sexual harassment cases and a recent Canadian case. Can Emojis lead to the formation of contracts is my research study. The general principles of Contract Law and its application to the use of emojis in the formation of contracts are discussed in this article.

Keywords: *contract, emojis, acceptance, digital communications, e-contracts*

INTRODUCTION

The legally enforceable contracts need to be entered as per the principles laid down in the Indian Contract Act 1872. In the era of e-commerce and electronic media, there is a huge rise in the execution of e-contracts. The emojis that are widely used in digital communications can lead to the formation of contracts that will be enforceable in a Court of Law. To answer this question, we will have to first understand the validity of e-contracts, the essence of essential elements of the formation of contracts and judicial views on the use of emojis and then apply these together to get the answer to our question.

ENFORCEABILITY OF ELECTRONICALLY ENTERED CONTRACTS

With the advent of technology, we have moved from the traditional way of entering into contracts i.e. physical execution to electronic execution of contracts. Now, the contracts can be executed by the parties who are sitting at two corners of the globe, by way of electronic means. Different types of electronic contracts include shrink-wrap agreements, click-wrap agreements, browse-wrap agreements, electronic signatures, digital signatures, e-mails etc. The contracts entered electronically are equally enforceable as physically executed contracts. The basic principles for the formation of contracts apply to electronic contracts in the same way as physically executed contracts. In India, electronic contracts are governed by the Information Technology Act 2000 and the Indian Contract Act 1872.

ACCEPTANCE IS THE KEY ELEMENT IN THE FORMATION OF CONTRACTS

As per the definition, the contract is an agreement enforceable by law.¹ All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object are not hereby expressly declared to be void.²

‘Agreement’ simply means agreeing with the other person on the same thing in the same sense (*consensus-ad-idem*). It is an understanding between the parties. Every promise and set of

¹ Indian Contract Act 1872, s 2(h)

² Indian Contract Act 1872, s 10

promises, forming consideration for each other is an agreement.³ A person making the offer/proposal is accepted by the other person to whom the offer is made is said to be an acceptance. An accepted offer/proposal is an agreement.

Contract = Agreement + Legal Enforceability

Agreement = Offer + Acceptance

From the above elaboration, it can be inferred that acceptance is the key element in the formation of the contract. The very stage at which the contract comes into existence is acceptance. The absence of acceptance cannot lead to the formation of a contract. The indisputable importance of acceptance is rightly explained by Anson⁴ in the following words: '*Acceptance is to an offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone.*'

Just like a lighted matchstick when comes into contact with highly inflammable gunpowder, an explosion is inevitable, similarly, once the offer/proposal is accepted, the contract will come into existence and there is no chance of going back. An acceptance of the offer converts it into a contract which means that contractual obligations come into existence and parties are bound by the contract. Acceptance can be express or implied. Express acceptance means that the acceptance is communicated expressly i.e. orally or in writing. Implied acceptance means that acceptance is not expressly communicated, i.e. it is not accepted in oral or written, but it is communicated by actions, conduct, behavior etc. The interpretation of whether there was an implied acceptance or not would have to be decided upon the facts of each case.

USE OF EMOJIS AND THE JUDICIAL VIEW ACROSS THE GLOBE

'Is a thumb-up emoji assent to a legal contract?'⁵ is receiving attention amongst the legal fraternity these days. The recent verdict given by the Canadian Court wherein the Court held a

³ Indian Contract Act 1872, s 2(e)

⁴ Jack Beatson et al., *Anson's Law of Contract* (23rd edn, OUP 2016) 55

⁵ Rishika Singh, 'Can a thumbs-up emoji signal agreement to a legal contract? Here's is what a Canadian court ruled' (*The Indian express*, 10 July 2023) <<https://indianexpress.com/article/explained/explained-law/canada-court-emoji-agreement-explained-8821796/>> accessed 09 August 2023

thumbs-up emoji as an acceptance of the contract is one of its kind. The particular verdict was given to suit the facts of that particular case and cannot be generalized or said to have a general application. There have been many other cases, generally about sexual harassment and criminal complaints that have also dealt with the role of emojis.

In 2016, the French Court convicted a 22-year-old boy as he texted his ex-girlfriend a gun emoji along with a flurry of messages. The court interpreted that the usage of a gun emoji was a death threat.⁶ The New Zealand Court in 2017 said that sending an emoji can be a jailable offense and sentenced the accused to 8 months in jail for stalking.⁷

In a similar case of usage of use of emojis, the Madras High Court in June 2018 quashed the criminal complaint which was filed by the applicant against 46 BSNL employees who had put the 'smiling face with tears' emoji in the official WhatsApp group. The applicant had posted video footage of three customers expressing their grievances about BSNL on the official WhatsApp group, with the intention that members of the group would share their ideas to improve the service of BSNL. The Single Judge Bench S. S. Sundar of Madras High Court in this case expressed that 'Emoji is sent to express one's feelings about something and cannot be treated as an overt act by others.'⁸

Let's look into the facts of the Canadian court case.⁹

There was a long-term relationship of approximately five (5) years that was existing between the parties. Achter Land & Cattle (Achter) was a farmer and used to provide grains to South West Terminal Ltd. (SWT) by way of different contracts entered at different times. Earlier the SWT used to send the contract draft to Achter through its salesperson and Achter used to accept it face-to-face. During the Covid-19 pandemic, when the actual meeting of the parties was not

⁶ 'Jilted Frenchman jailed for texting gun emoji to ex' (*The Local France*, 31 March 2016) <<https://www.thelocal.fr/20160331/man-jailed-after-texting-gun-emoji-to-ex-girlfriend>> accessed 09 August 2023

⁷ Marilyn McMahan and Elizabeth Kirley, 'Sending an emoji can be a jailable offense' (*New York Post*, 5 December 2017) <<https://nypost.com/2017/12/05/sending-an-emoji-can-be-a-jailable-offense/>> accessed 09 August 2023

⁸ *I. Linga Bhaskar & Anrs. v The State & Vijayalaxmi* CrI MP No 6773/2017

⁹ *South West Terminal Ltd. v Achter Land & Cattle* [2023] SSKB 116

possible, SWT used to take a photo of the contract and send it to Achter, to which generally at earlier events Achter responded with 'looks good', 'ok', 'yup' etc. During these transactions, never no dispute had arisen between the parties. Concerning this transaction, SWT sent the photo of the contract via phone to which Achter responded with a thumbs-up emoji. However, Achter failed to deliver the flax to SWT and hence SWT filed the case for compensation against Achter. The Court ordered compensation of 82,000 Canadian Dollars as Achter failed to deliver the flax as per the contract.

The issues before the Court of law were:

1. Whether there was consensus-ad-idem between the parties.
2. Whether there was an intention to create a legal relationship.

The Court considering how the earlier transactions had culminated held that the thumbs-up emoji in this case can be interpreted as the mode of exercising the acceptance. The Court interpreted a thumbs-up emoji as 'a thumbs-up emoji is used to express assent, approval or encouragement in digital communications.' Achter pleaded that a thumbs-up emoji was sent just to acknowledge the receipt of the photo and nowhere had he meant to accept the contract. The court while analyzing this plea commented that emoji should be understood as what it generally would mean to an informed objective bystander and not what Achter meant to say.

HOW CAN WE APPLY CONTRACT LAW TO THIS DIGITAL WORLD OF EMOJIS?

What are emojis? - Emojis were created by Japanese artist Shigetaka Kurita in 1999 and since then emojis have gained large acceptance and usage across the globe in day-to-day life, be it personal communications or commercial communications. Emojis are widely used in digital communications because they add color and taste to the communications. Emoji is defined as 'a small digital image or icon used to express an idea or emotion. Emoji liven up your text messages with tiny smiley faces.'

IS THE GENERAL APPLICATION OF EMOJIS FEASIBLE?

There are a huge number of emojis in different devices and applications. The interpretation of emojis change from person to person, device to device, app to app, culture to culture and different geographical area and the perception of an individual. Every person uses emojis as per their convenience and understanding. The perception of every person is different. For example, a thumbs-up emoji can mean just an acknowledgment to one person and a go-ahead signal to some other person. Similarly, an emoji is displayed differently on different devices, so a person sending an emoji from one device may carry a different interpretation or display on the device of the person who has received it. Also, there are over 3,000 emojis that exist in the digital world. It is next to impossible to interpret and define the existing emojis considering their volume as well as they would keep adding as technology advances. Also, even if an attempt is made to evolve an emoji dictionary, there is the possibility that with advances in technology, the emojis might be replaced or upgraded to some other version, till the time such a dictionary comes into existence. Thus, it is not feasible to have an exact definition or interpretation of the emojis used and therefore, the general application of the use of emojis in contractual transactions is not feasible.

ISSUES ARISING FROM FACTS OF EACH CASE

Every case is different and therefore the application of law to each case would differ. As the contract law only gives the general principles applicable to the formation and execution of contracts, it is not possible to devise any straight jacket formula. Here, the courts will keep playing the crucial role of interpreting the application of law as per the facts of each case in dispute. There can be many points to consider like:

1. Whether the person using the emoji from a particular device is authorized to use the same in his official capacity.
2. What if the device from which the emoji is sent inadvertently by some random person having access to that device?

There can be many other issues as per the circumstances. Emojis generally express feelings and can be used as a tool to interpret the intention of the parties, following which whether acceptance is communicated by the emoji can be decided.

INTENTION TO CREATE LEGAL RELATIONSHIP & CONSENSUS-AD-IDEM

The intention to create a legal relationship is one of the key factors of any contract. It is a well-settled law that every contract can come into existence if there is an intention to create a legal relationship. Another important factor is consensus-ad-idem, which means parties to the contract agree upon the same thing in the same sense. These two factors have to be present in a contract, along with the other requirements of contract law as discussed above. Can emojis suffice the purpose of these two factors? It is difficult considering the interpretation issues involved which are discussed above. It can be thus inferred that emojis can convey feelings and can be used cumulatively with all other facts of the case to interpret the different factors like the intention of the parties, mutual consent and acceptance.

CONCLUSION

The news about emojis as an acceptance to the contract is gaining attention across the globe and there is a discussion that the use of emojis has to be done vigilantly to prevent any legal glitches sounds a little exaggerated. It is an acceptable fact that emojis are ruling the expanse of digital communications and its usage is huge. It is also acceptable that emojis can be construed as part of actual communication and care has to be taken in its usage, especially in criminal cases. But as far as contractual cases are considered, the use of emojis solely cannot prove the fact of contract formation. It is pertinent to note that contractual transactions comprise many important and inevitable factors that include communication of the offer and its acceptance, consensus-ad-idem, intention to create a legal relationship, free consent, lawful object and lawful consideration and express validity under law. These all factors cannot be simply judged based on the usage of emojis and all surrounding facts are equally important. Considering the challenges of interpretation of emojis it is quite unacceptable that they can be used in the formation of contracts or contractual transactions. Emojis can be considered as a mode of communication of

acceptance and can be said to act as a digital signature, as discussed in the case above, only if, there are other circumstances to support this particular plea. To conclude, it can be said that the usage of emojis has started receiving legal acceptance but still, it's a long way to a day when emojis will be accepted totally in contractual relationships like e-mails are accepted today. It is, therefore, advisable to use the emojis judiciously but that doesn't mean that it has received any general application. The application of law to the usage of emojis still is in the infancy stage and we will witness its dynamic application in the future as a society will keep making technological advances.