in a Court of Law. Whether an agreement can be termed as illegal or not may depend on the degree to which it is opposed to public policy. For example, *an agreement in restraint of trade* is void but we may not term it as an *"illegal" agreement* as we do when it is an agreement to commit a crime.

An *illegal agreement* is that agreement which is actually forbidden by law. It is a void agreement. To distinguish an *illegal agreement* from other *void agreement*, it is stated that while in case of a *void agreement* a collateral transaction may not also be void, but in case of an *illegal agreement*, the collateral transaction is also held void. For example, *A* gives money to *B* to enable him to pay his wagering debt. The wager is the main transaction which is void, but loan given by *A* is subsidiary to it, which is not void and *A* can recover his money from *B*. On the other hand, where *A* gives loan to *B* to smuggle goods. Smuggling is the main transaction and loan is subsidiary to it. But, loan transaction is also said to be tainted with the same illegality and *A* will not be able to recover his money.[1]

THE AGREEMENT (OFFER AND ACCEPTANCE)

It has been noted above that an agreement between the parties is one of the essentials for creating a contract. An agreement arises by an "offer" or proposal by one of the parties and the "acceptance" of such offer by the other. The rules regarding proposal and acceptance are being discussed below.

PROPOSAL OR OFFER

The term "proposal" has been defined in Section 2(a) of *the Indian Contract Act, 1872* as follows—

> "When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

The term *'proposal'* used in the Indian Contract Act is synonymous with the term *'offer'* used in English law. The willingness to do or to abstain from doing something, *i.e., the proposal* or the offer may be made *with a view to obtaining the assent of the other party thereto.* For example, *A*'s willingness to sell his radio set to *B* for Rs. 500 if *B* accepts to purchase the same, amounts to proposal by *A* for the sale of the radio set. But if a statement is made *without any intention to obtain the assent of the other party thereto,* that cannot be termed as *proposal.*

1. See also *Gherulal Parekh* v. *Mahadeo Das*, A.I.R. 1959 S.C. 781.

Offer and Invitation to treat (offer) distinguished

A *proposal,* or *an offer* has to be distinguished from *an invitation to offer or treat.*

Sometimes a person may not offer to sell his goods, but make some statement or give some information with a view to inviting others to make offers on that basis. For example, a book seller sends catalogue of books indicating prices of various books to many persons. This catalogue is not an offer to sell those books at prices indicated against those books. This is an 'invitation to treat'. If any person is interested in purchasing the book or books mentioned in the catalogue, he may make an offer and the person circulating the catalogue has a discretion to accept or not to accept the offer.

Likewise, inviting persons to an auction, where goods to be auctioned are displayed, is not an offer for the sale of goods. The offer is made by the intending buyers in the form of bid. Such an offer (bid), when accepted by the fall of hammer or in some other customary way, will result in a contract.[1]

In the same way, the advertisement calling for tenders is not a proposal or offer but merely an invitation to the contractors for making an offer. The *'submission of a tender'* is in the nature of an offer. It will result in a contract only when the tender is accepted. Making of the highest bid will not automatically result in a contract. The contract will arise only when the highest bid is accepted by the competent authority and the said acceptance is communicated to the tenderer.[2]

Nobody is bound to accept an offer. An auctioneer, therefore, may not accept even the highest bid (offer).[3] An advertisement by the auctioneer to sell goods by an auction being **an invitation to treat rather than an offer,** he does not incur any liability by not accepting the offer which is in the form of a bid. An auctioneer is even free to cancel an auction sale announced by him. In **Harris v. Nickerson,**[4] the defendant advertised a sale by auction. The plaintiff travelled to the advertised place of auction to find that the defendant had cancelled the auction sale. He brought an action against the defendant to recover the expenses of his travel. It was held that he was not entitled to the same as there was as yet no contract between the two parties, which could make the defendant liable.

Display of goods either in a show-window or inside the shop and such goods bear price-tags, would not amounts to an offer to

1. See Section 64(2) of the *Sale of Goods Act, 1930.*
2. See *Executive Engineer, Sundergarh* v. *M.P. Sahu,* A.I.R. 1990 Orissa 26.
3. See *infra,* 32.
4. (1873) L.R. 8 Q.B. 286.

sell goods at prices mentioned on the price tags. It would be mere invitation to treat. In **Pharmaceutical Society of Great Britain v. Boots Cash Chemists Ltd.**,[1] it was held that if an intending buyer was willing to purchase the goods at a price mentioned on the tag, he could make an offer to buy the goods. The shopkeeper had the option to accept the offer or reject the same. The contract would arise only when the offer was accepted. No customer can force the shopkeeper to sell the goods at the price mentioned on the tag. In the instant case, the defendants were having the business of retail sale of drugs. Medicines were displayed on the shelves and their retail prices were also indicated. They had "self-service" system. On entry into the shop a customer was given a wire basket. After selecting the articles needed by a customer he could put them in the basket and take them to the cash desk. The defendants had put a registered pharmacist near the cash counter, who had been authorised to stop any customer removing any drug from the premises.

It was held that the display of articles, even on a "self-service" basis was not an offer but was merely an invitation to treat. When the customer selected an article and brought the same to the cash desk that amounted to an offer to buy the goods. The defendants were, therefore, free to accept the offer or not. The following observations of Lord Goddard, C.J.[2] are worth noting :—

> "I think that it is a well-established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell. I do not think I ought to hold that principle is completely reversed merely because there is self-service scheme, such as this, in operation. In my opinion, it comes to no more than that the customer is informed that he may himself pick up an article and bring it to the shopkeeper with a view to buying it, and if, but if, the shopkeeper then expresses his willingness to sell, the contract for sale is completed. *In fact, the offer is an offer to buy, and there is no offer to sell*; the customer brings the goods to the shopkeeper to see whether he will sell or not. In 99 cases out of a 100 he will sell and, if so, he accepts the customer's offer, but he need not do so. The very fact that the supervising pharmacist is at the place where the money has to be paid is an indication to the purchaser that the shopkeeper may not be willing to complete a contract with anybody who may

1. (1952) 2 Q.B. 795.
2. *Id.*, 801-802 (Emphasis added).

bring the goods to him."

Harvey v. Facey[1] is an example where *the quotation of the price was held not to be an offer.*

The defendants in this case, were the owners of a plot of land known as *Bumper Hall Pen.* The plaintiffs being interested in purchasing the same sent a telegram to the defendants, "*Will you sell us Bumper Hall Pen? Telegraph lowest cash price.*" The defendants in reply telegraphed—

"Lowest price for Bumper Hall Pen, £ 900."

The plaintiffs sent another telegram to the defendants saying, "We agree to buy Bumper Hall Pen for £ 900 asked by you. Please send us your title-deeds."

The defendants refused to sell the land. In a suit, the plaintiffs contended that the second telegram from the defendants quoting lowest price was an offer and the same had been accepted by the plaintiffs, and the contract was complete. The defendants, on the other hand, contended that quoting the price was not an offer which could be accepted. The Judicial Committee of the Privy Council held that exchange of the above stated telegrams had not resulted in a contract. It was observed that the first telegram had asked two questions, one regarding willingness to sell, and the other regarding the lowest price. In reply only lowest price was quoted, and this quoting of the price was not an offer. The third telegram from the plaintiffs saying, "we agree to buy" was only an offer and not the acceptance of an offer. Since this offer had not been accepted, there was no binding contract between the parties.

In **Badri Prasad v. State of Madhya Pradesh,**[2] the Divisional Forest Officer wrote to the plaintiff : "Kindly inform whether you are ready to pay further Rs. 17,000 for the contract of big trees......which (contract) is under dispute at present. The contract can be given to you on this compromise only......On receipt of your reply the State Government will be informed."

In reply to the above letter the plaintiff wrote back :—

> "I am ready to pay Rs. 17,000 provided my claim to have the refund of Rs. 17,000 already paid, from the owner of the Village or any other relief consequential to the judgment of that case remains unaffected......Subject to those conditions I shall pay Rs. 17,000 as required in your referred letter."

The Supreme Court held that by those letters no contract had

1. (1893) A.C. 552.
2. A.I.R. 1970 S.C. 706. Also see *Matanhella Brothers* v. *Mahabir Industries Pvt. Ltd.,* A.I.R. 1970 Patna 91.

been concluded between the plaintiff and the Government. The letter from the Divisional Forest Officer seemed to be merely invitation to offer rather than offer. The letter in reply from the plaintiff was an offer. It was further observed that even if the letter from the Divisional Forest Officer to the plaintiff is treated as an offer, there is no unconditional acceptance from the plaintiff and as such there is no contract in any case.

The case of **Mac Pherson v. Appanna**[1] is another illustration of an invitation to treat. The plaintiff having already offered to pay Rs. 6,000 to the defendant for his property, again wrote to the defendant's agent asking whether his offer had been accepted and also stating that he was willing to pay even higher price if found reasonable. The defendant's agent replied that the defendant would not accept less than Rs. 10,000. The plaintiff then wrote that he was willing to pay Rs. 10,000. The plaintiff contended that the offer of Rs. 10,000 had been accepted by him (the plaintiff) and sued for specific performance of the contract. It was held that in this case the letter from the defendant's agent was not a counter offer but was a mere quotation amounting to invitation to offer. The plaintiff's willingness to pay Rs. 10,000 was an offer and since the same had not yet been accepted, there was no binding contract between the parties.

In **State Bank of Patiala v. Ramesh Chander Kanoji**,[2] pursuant to Voluntary Retirement Scheme (VRS) framed by the appellant bank, the respondent employee made an offer by making an application seeking voluntary retirement. In the scheme 15 days' time was given to the employee to opt for the scheme. It was also provided that application once made could not be withdrawn. Hence withdrawal, after date of closure of Scheme, was not permissible. The Supreme Court observed that as scheme was an *invitation to offer and not an offer* and such Scheme being funded Scheme, employee if permitted to withdraw at any time after closure, then in such event, all calculations of management would fail.[3]

Assurance Given by Official of a Company

Assurance given by official not authorized to make agreement on behalf of the company cannot be termed as an *offer.*

In **I.B.P. Co. Ltd. v. Ramashish Prasad Singh**,[4] an official of the appellant/defendant company, furnished information in the presence

1. A.I.R. 1951 S.C. 184.
2. A.I.R. 2004 S.C. 2016.
3. *Ibid.*
4. A.I.R. 2006 Pat. 91.

of some others that certain dealers were going to be employed by the I.B.P., one such being a dealer being at a particular spot and encouraged the plaintiff/respondent that he being, a local man had better prospects for the job and satisfied the criteria laid down by the company for its illegibility. Such an assurance or information furnished by the official, the Patna High Court ruled, could not be termed to be a proposal/offer in the eyes of law. The Court explained that oral instruction, information and assurance given by the official who was not authorized to make an agreement on behalf of the company could not be termed as an oral contract.

Intention to create legal relationship

In order that an offer, after acceptance, can result in valid contract, it is necessary that the offer should be made with an intention to create legal relationship. Promise in the case of social engagements is generally without an intention to create legal relationship. Such an agreement, therefore, cannot be considered to be a contract. Thus, an agreement to go for a walk, to go to a movie, to play some game, or entertain another person with a dinner, cannot be enforced in a court of law. Sometimes the parties may expressly mention that it is not a formal or legal agreement,[1] whereas in some other cases such an intention could be presumed from their agreement.[2] The test to know the intention of the parties is objective and not subjective, merely because the promisor contends that there was no intention to create legal obligation would not exempt him from liability.[3]

In **Rose and Frank Co.** v. **Crompton & Bros. Ltd.**,[4] the agreement between the parties to the contract provided that :—

> "That arrangement is not entered into......as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts......that it (the agreement) will be carried through by the parties with mutual loyalty and friendly co-operation."

One of the parties made a breach of this agreement. In an action by the other party to enforce the agreement, it was held that since the agreement had provided that it was not a formal or legal agreement, the same was not enforceable.

1. *Appleson* v. *Littlewood Ltd.*, (1939) 1 All E.R. 464; *Rose and Frank Co.* v. *Crompton & Bros. Ltd.*, (1925) A.C. 445.
2. *Balfour* v. *Balfour*, (1919) 2 K.B. 571; *Simpkins* v. *Pays*, (1955) 1 W.I.R. 975; *Jones* v. *Padavatton*, (1969) 1 W.L.R. 328.
3. See *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256.
4. (1925) A.C. 445.

An intention not to create legal relationship may be implied from the circumstances of the case. In the case of **Balfour v. Balfour**,[1] the defendant, who was employed on a government job in Ceylon, went to England with his wife on leave. For health reasons the wife was unable to accompany the husband again to Ceylon. The husband promised to pay £ 30 per month to his wife as maintenance for the period she had to live apart. The husband having failed to pay this amount, was sued by the wife for the same. It was held that there being no intention to create legal relationship, the husband was not liable. Atkin L.J. observed[2]—

> "It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, *one of the most usual forms of agreements which does not constitute a contract appears to me to be the arrangements which are made between husband and wife*......To my mind those agreements or many of them, do not result in contracts at all......even though there may be what as between other parties would constitute consideration......*They are not contracts because the parties did not intend that they should be attended by legal consequences.*"

In case of other close relationships also, *e.g.*, those of parents and their children, the same rules are applicable as are applicable to the husband and wife. The case of **Jones v. Padavatton**[3] is an illustration of the agreement between a mother and her daughter. Mrs. Jones herself lived in Trinidad. Her daughter, who had been divorced and had a young son, lived in Washington and was serving in the Indian Embassy there. Mrs. Jones persuaded her daughter to leave her job in Washington and study for the bar in England to become a Barrister. Mrs. Jones offered to pay her daughter a monthly allowance during her studies for the bar in England. The daughter reluctantly agreed to the suggestion, left the job and went to England in 1962. In 1964, Mrs. Jones bought a house in England. The daughter was allowed to stay in a part of the house whereas the other part was let out. The rent received from the part of the house was given to the daughter to cover her expenses. In 1967, some differences had arisen between Mrs. Jones and her daughter and Mrs. Jones brought

1. (1919) 2 K.B. 571.
2. *Id.*, 578-579 (Emphasis added).
3. (1969) All E.R. 616.

an action to evict her daughter. Till that time the daughter had not completed her studies for the bar. The daughter contended that in view of the promise made by her mother, she was legally bound to maintain her until she completed her studies. It was held that there was nothing to indicate that there was an intention to create legal relationship between the parties, as was evident from the fact that neither the agreement was reduced to writing nor the duration for which she was to be maintained had been mentioned. The mother's action against the daughter for eviction succeeded.

It may be noted that although in the case of close relationships, there may be generally no intention to create legal relationship but there is nothing which prevents these persons from agreeing to be bound by their promises. Thus, if an arrangement clearly contemplates an intention to create legal relationship, the parties become bound thereby.

In **Meritt v. Meritt,**[1] the husband and wife were the joint owners of a building which was subject to a mortgage to a building society. The husband left the matrimonial home to live with another woman. At that time, at the insistence of the wife, the husband signed a note saying that the wife will pay all outstanding amount in respect of the house and in return "I will agree to transfer the property into your sole ownership." It was held that in this case it was clear that the parties intended to create legal relationship and, therefore, the husband was bound by the contract.

It is still an open question, whether, in view of the express provisions in *the Indian Contract Act, 1872*, the requirement of *"intention to contract"* is applicable in India.[2]

In **S.V.R. Mudaliar v. Rajababu,**[3] it has been held by the Supreme Court that even if an agreement was described as gentleman's understanding, yet if there was a clear agreement that the property which was being conveyed would be re-conveyed to the vendor, the agreement was binding and there was no need to prove that there was intention to create legal relationship, because that was presumed in such a case.

Offer Must be Communicated

Section 2(a) of *the Indian Contract Act, 1872* explains that a person is said to make a proposal "when he signifies to another person his willingness to do or to abstain from doing something."

1. (1970) 2 All E.R. 760; Also see *Mc Gregor* v. *Mc Gregor*, (1888) 21 Q.B.D. 424.
2. See *C.W.T.* v. *Abdul Hussain*, (1988) 3 S.C.C. 562.
3. A.I.R. 1995 SC 1607.

The emphasis, here, is upon the requirement that the willingness to make a proposal should be "*signified*". The term signify means to or communicate to make known.[1] It thus requires that the offer must be communicated to the other person, *i.e.*, the *offeree*.

Offer—How Communicated

The question as to how an offer is communicated is explained in Section 3 of *the Act*, *1872*. This Section says that the communication of proposals is—

> deemed to be made by any act or omission of the party proposing... by which he intends to communicate such proposal... or which has the effect of communicating it.

It, thus, follows that an *offer* may be communicated by the offeror —by any act or omission by which the offeror—

(a) intends to communicate such offer; or

(b) which has the effect of communicating the *offer*.

Thus, an *offer* may be made by words of mouth, or by writing or conducting in a manner, which has the effect of communicating the offer to the offeree.

An *offer* may, therefore, be an *express offer*, *i.e.*, which is made by some positive act on the part of the offeror, or it may be *implied offer*, which is inferred from the conduct of the offeror.

Express and Implied Offers

Section 9 of *the Indian Contract Act*, *1872* says :

> *In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.*

An offer would be an *express offer* when it is made by words of mouth or by writing.

Implied Offer

As explained in Section 9 above, an offer made otherwise than in words, is said to be an *implied offer*. It is an offer inferred from the conduct of the party. For example, a bid at an auction is an *implied offer*. In such a case the conduct may take the place of written or spoken words in the offer and the intention of the party is a matter of inference from his conduct and the inference is more or less easily drawn according to the circumstances of the case.[2] For

1. The Concise Oxford Dictionary, 1166.
2. Anson's *Law of Contract*, 2002, 30.