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Reading Material

ONE YEAR ADVANCED DIPLOMA IN DRAFTING, NEGOTIATION AND ENFORCEMENT OF CONTRACTS

1.4 REMEDIES FOR ENFORCEMENT, BREACH AND PERFORMANCE OF CONTRACTS

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MODULE I: INTRODUCTION TO COMMERCIAL LAW AND EQUITY

Until not too long ago, the term commercial law had no formal or fixed meaning in India. The Contract Act does not make any distinction between commercial and non-commercial contracts. The element of Consideration has always been as essential tenet of any contract. This is an essential reason why all jurisprudence and enactments were generic in the manner of their application to both commercial and non-commercial contracts.

THE COMMERCIAL COURTS ACT 2015

The advent of the Commercial Courts Act in 2015 attempted to draw a line of distinction in the case of commercial contracts. Section 2 (c) of this Act attempts at defining a "commercial dispute" by listing out certain types of disputes while also keeping the definition fluid by enabling the Central Government to notify additional types of disputes under the ambit of this definition. A perusal of this list suggests that the intent was to include all such disputes and claims arising from varied transactions with the exception of those agreements dealing solely in transfer of immovable property.

While this development was much needed to help the Parties avail timely relief from specialized courts, the jurisprudence in this domain is still at a nascent stage. Needless to say, each dispute arising from a commercial transaction would be unique in its own cause unless the breach is resultant from a common and larger event such as pandemic that the world is currently witnessing. Hence each dispute and the underlying breach needs to be reviewed on its own merits and demerits instead of directly attempting to find precedence.

While we await the development of concrete jurisprudence from the Commercial Courts, it is pertinent to note that both the Commercial Courts and the Commercial Divisions of the High Courts have the jurisdiction to try ALL suits and <u>applications</u> relating to the commercial disputes provided they are of the value specified under the Act. Hence, unless an exception exists, the various applications for reliefs such as injunctions etc. sought by the Parties would need to be filed before the Commercial Courts.

THE PURPOSE OF CONTRACT LAW

The traditional thought about the purpose of Contract Law was that it meant to secure cooperation of individuals for the underlying transaction which is based on nothing more than mutual undertakings. However, questions always existed on the justification for contract law. Afterall, as individuals, we make promises in every turn of our lives and not all of them are of the nature that we expect to be held accountable before the machineries of the State albeit the moral implications they bear upon us public standing we are bestowed with. Hence the essential question – why avail the support of the state for a private matter.

While the traditional justifications have been 'economic' and 'utilitarian' [1], i.e., facilitation of mutually beneficial exchanges and promoting overall social welfare (wealth), with the contemporary developments around growth of corporations, cross jurisdictional transactions, e-contracts etc., there has been an increased interest in the theory and purpose of Contract Law. However, the foundational principles of contract law have proven to be agnostic both from the perspective of jurisdiction and technology. There are some obvious logistical factors that differ in terms of evidencing consent, form of acceptance, requirement of Stamp Duty etc. which one encounters in practice and implementation.

It is commented that philosophers and lawyers may have different perspectives in examining contract law wherein the former are often concerned ethical and other reasons for recognizing and enforcing contracts while the later are concerned about determining whether the contract resulted in a legally binding arrangement. [2] Irrespective of the perspectives, there are functions that Contract Law serves which again are agnostic to these varied perspectives and at the least, the three most valuable functions served are – <u>prediction, explanation and justification</u>.[3]

While prediction is a function that can be closely ascribed to lawyers seeking to determine whether the arrangement done is legally enforceable or not, it involves predicting how Courts would view the arrangement when presented before them. The motivation for lawyers is to ensure that the arrangement is drafted in a way to persuade and convince the Courts to enforce it. It is hence that a lot of weightage is given to precedence and replicating tried and tested legal terminologies. That said, the trend today has been to move towards contract simplification – both in the size of the contract and quantum of legalese being used.

Explanations are to be understood as a tool for effective prediction as they focus on underlying causes which in turn assist in prediction. While explanations seek to understand the jurisprudential evolution, they also focus on the role of the law in society by drawing from economic, sociological and historical perspectives. [4] More often explanations end up serving an academic purpose as lawyers may not be able to rely on them to fit an existing commercial dispute on facts. While explanations look at causes and address the question of 'what', the function of justifications is to answer 'why' by diving into the practices of the society and is an important tool for initiating discussions on reforms and revisions. For eg., the cardinal belief that breaking promises is wrong and ought to be remedied is a basic justification for the existence of Contract Law. It is the differentiating threads in the societal practices that results in variation to local country practices as they find it justified in their jurisdiction. This is best exemplified by a practice in Indonesia which mandates that termination of employment contracts require

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[1] Stephen A Smith, Atiyah's Introduction to the Law of Contract, (Clarendon Press, 6th Ed. Oxford 2005)
[2] Michael D. Bayles, Introduction: The Purposes of Contract Law, (The Berkeley Electronic Press, 1983)
[3] Id.
[4] Supra note 2.

certain procedural formalities to be complied with and the mutual termination agreement is also to be registered with the appropriate court.[5] It is not common for such practices to be found in other jurisdiction, but if we reach a stage where more and more global organizations enter into our country solely to exploit the labor for its low costs and create a rampant practice of terminating jobs at will in an unjustified manner, the society may demand for similar regulations in India, thereby justifying the change in law.

WHAT IS EQUITY?

The often-overlooked Preamble of the Indian Contract Act states "*Whereas it is expedient to define and amend certain parts of the law relating to contracts*". This goes with the canonical standards of Common Law where the law is not sourced from the statues (alone) but there is a large role of the Courts where the decisions serve precedential value. As opposed to the civil law systems where remedies found in codified law are applied to the established facts of a case, the common law systems allow the judges to interpret the laws by relying on precedents established by case law in order to apply them to the individual cases.

The law of equity is based on precedent but primarily hinges on the reason that mere monetary compensation in the form of damages for breach is not just adequate and at times, a deserving party acting in an equitable manner should be entitled for grant of equitable remedies. It can be rightly stated that as long as the judged stay empowered to create precedent, new law can be created in equity. There are generally recognized maxims of equity established through precedent. These are[6]:

i. Equity will not suffer a wrong to be without a remedy
ii. Equity follows the law
iii. He who seeks equity must do equity
iv. He who comes to equity must come with clean hands
v. Delay defeats equity
vi. Equality is Equity
vii. Equity looks to intent rather than the form
viii. Equity look on that as done which ought to have been done
ix. Equity imputes an intention to fulfil an obligation
x. Equity acts in personam
xi. Where the equities are equal, the first in time prevails
xii. Where the equities are equal, the law prevails

The common forms of equitable remedies include:

i. **Injunctions** (will be dealt in more detail in the later part of this module)

[5] *https://www.lexology.com/library/detail.aspx?g=5f580a11-d4b2-4088-8eff-df04c89c6781*
[6] Each of these maxims is based on individual case laws but the consolidated list of 12 maxims can be sourced from any reliable primary source. For eg., AK Jain on Specific Relief Act.

a. Interlocutory
b. Qui Timet
c. Mareva

ii. **Anton Piller Orders**

They are also known as search orders and draw their reference from a 1976 case. They are used in instances to prevent the defendant from destroying evidence or such other material which can help the plaintiff in the trial. These are usually granted ex-parte to maintain the element of surprise. A good example of their use in instances of misuse of software license terms or use of pirated software by certain organizations where the owner of the software seeks an order to conduct a surprise visit and scan the computer systems of the defendant before the traces of misuse are wiped clean.

iii. **Specific Performance** (will be dealt in more detail in the later part of this module)

iv. **Rescission** (will be dealt in more detail in the later part of this module)

Other forms of equitable reliefs are – account of profits, declaratory relief, rectification, subrogation, equitable lien, constructive trusts or tracing and these are granted at the discretion of the Courts purely on the basis of the merits of the cases at hand.

Equity and Indian Law

Apart from the Indian Contract Act and the Specific Relief Act, equity finds statutory recognition in certain other laws like Indian Trust Act, 1882 (principles of justice, equity and good conscience); Transfer of Property Act, 1882 (doctrine of part performance, right of redemption); Indian Succession Act, 1925 (doctrine of election); additionally, inherent powers are bestowed upon various hierarchies of our Courts through the Code of Civil Procedure, 1908, Code of Criminal Procedure, 1973 and the Constitution of India.

Post independence, the Specific Relief Act, 1963 which repealed the erstwhile Act of 1877 codified most equitable concepts and made them statutory rights. As per the scheme of the 1963 Act, these were laid down as follows:

S. 5-8	Recovery of Possession of Immovable Property
S. 9-25	Specific Performance of Contracts
S. 26	Rectification of Instruments
S. 27-30	Recession of Contracts
S. 31-33	Cancellation of Instruments
S. 34&35	Declaratory Decree
S. 36-42	Injunctions

The impact of such codification is that these remedies need to be specifically pleaded for in order to seek their enforcement. The bright side however, being that they are no longer discretionary but are enforceable rights under the ambit of the Act. These provisions will be dealt with in greater detail in the later part of this Module.

ECONOMIC ANALYSIS OF CONTRACT LAW AND CONTRACTS

The economic perspective of any legislation was traditionally considered from the perspective of imposing negative consequences to ensure that non-compliance ends up financially troubling for the troublemakers[7] or in the context of Contract Law – the party at breach. The modern perspective is more holistic by focusing on social welfare and to attain a position to ensure that parties are motivated to comply irrespective of the consequences of their defiance, thereby bringing in more prominence to the equitable principles.

All contracts (whether considered commercial or not) need to have 'consideration' as an essential component and the consequence of monetary damages follows from a breach – thereby ensuring that the economic angle is always a cardinal touch point right from the stages of negotiations leading to the formation of the contract as well as the dispute resolution discussions that are initiated pursuant to a breach or when a dispute arises on the interpretation of certain clauses. It is not an exaggeration to say that 99% of the instances involving dispute as to the interpretation of the clauses has a financial implication resulting in one of the parties having to consume certain costs or losses.[8]

The Economics of Contract Compliance

Utilitarian philosophy subconsciously influences the human nature in taking decisions. Self-interested parties would opt to breach whenever the value of breach exceeds the value of performance. For example, in a contract where the aggregate liability is capped to $1Million but the breach of confidentiality obligations inures a profit of $3Million, it incentivizes breach. Similarly, in a situation where the seller after execution of an Agreement to Sell with A refuses to execute the sale deed upon receipt of a better offer from B, the seller was optimizing his profits. Hence from an economic point of view, the breaching party is making an optimal decision.

The law responds to these situations by:

- Situation 1: permitting injunctions against further breach of confidentiality, in some jurisdictions judge made law has ensured that certain breaches like

[7] Referred to as the Holmesian 'bad man' who focus on pursuing their own self-interest. *https://columbialawreview.org/content/economic-analysis-of-contract-law-from-the-internal-point-of-view/*

[8] For eg., a contract which does not clarify if the price is inclusive or exclusive of taxes, usually leads to a dispute in case of variation in applicable tax rates and the outcome ends up with one of the parties having to take up the burden of upward revision of taxes and one party benefiting from the downward revision of taxes.

confidentiality obligations cannot have a cap on liability for damages or the parties; or permitting parties with the flexibility to contractually exclude the application of liability caps to certain categories of breach. Though not a legal implication, the loss of good will is another factor that plays its part in the decision surrounding contract compliance as such loss in turn results in impacting the business at large and again has its own economics in choice making process.

- Situation 2: mandating specific performance and permitting the parties to impose specific damages high enough to serve as a penalty negating the benefit of the breach.

In other opposing situations where the situations surrounding the contract turn adverse that they impose an economic hardship on one of the parties to an extent that the consideration is no longer adequate let alone the turning of tables on the anticipated profits, law has responded in certain jurisdictions to enable economic hardship clauses in the contract through the intervention of courts and tribunals by permitting adaptation of the contract. In this process, the courts are empowered to examine the change in circumstances such as imposition of deterrent taxes and factoring their proportion into revising the commercials of the contract. This way a party intending to perform the contract is not forced to breach by making only an economically optimal choice.

Needless to say, economics also operate in the choice of remedy opted by the non-breaching party. Where the costs and time involved in termination of a party on account of delay in delivery involve finding an alternate party through a tendering process, negotiation of the terms of agreement, exit management process knowledge transfer by the exiting party etc., it would be preferable to cut the party some additional slack and excuse the delay and merely impose penalties for delay if permissible under the contract.

The role of both codified law and judge made law is to ensure that performance is more economically rewarding and to motivate behavior that promotes compliance.

MODULE II: INJUNCTIONS

Introduction

Injunction originates from English Jurisprudence and is derived from French word "*injungere*" which means, "*to join*." Injunction came through as one of the many equitable remedies, which was developed by the Chancery Court as it had become evident that the inadequacies of the Common Law required the introduction of other viable remedies.[9]

The law relating to injunctions in India is by and large governed by the principles laid down by the Courts of Chancery in England[10], as to whether or not the Chancery Courts borrowed these principles from Roman Law is a matter of interpretation[11]. Such remedies would be enforced and utilised in situations wherein it was clear that mere awarding of damages would not suffice.

Also, to ensure a significantly higher effectiveness in the adjudication system by granting just relief and filling the lacunae presented by the rigidity of common law, the intent of the development of equitable reliefs was clear. Nonetheless, it is important to note that equitable remedies and equity law is to be regarded with and not as a replacement of common law which is still prevalent. It is trite law that disobedience of any injunction order rendered by courts would be treated as contempt[12] and in certain cases may lead to civil imprisonment or attachment and sale of property.[13]

As the law relating to injunctions has its origin in Equity, many a times individuals would seek remedy from the courts equity wherein their rights lay in common law, for the equitable remedies were better suitable for the injury so caused.[14] When courts grant order for injunction it is based on principles of natural justice and equity.

MEANING

In common parlance injunction means any order of a competent authority or judicial body, which prevents or stops the commission or continuance of a wrongful act or orders

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[9] Bryan Garner (ed.), *Black's Law Dictionary* (7th edn., 1999)

[10] Lecture on "Principles of Equity and their Application to Indian Law" delivered by Dr. V. K. John, Honoursman of the Council of Legal Education, during Lecture Series at Madras Law College in the year 1927-28, reported as (1928) 28 LW (JS) 29

[11] Henry Summer Maine, *Ancient Law*, p. 27 (New York: Henry Holt and Company, 1888)

[12] Avatar Singh, *Contract Act & Specific Relief Act*, 948 (12th ed., 2017)

[13] Civil Procedure Code, 1908, § 94(c), Order 39, Rule 2-A; Pollock And Mulla, *The Indian Contract and Specific Relief Acts* 614 (7th edn., 1944)

[14] Penner J E, 2012, *The Law of Trusts*, 6 (9th edition, Oxford University Press, Oxford) - *For example, one suffering the smoke/bad smells of a neighbour's factory and is unsatisfied with money damages. He/she would apply to chancery for an injunction to shut the factory down; or would seek an order from chancery for the specific performance of the contract in such case where money damages for breach would not be enough to compensate to affecting party.*

a person to do an act, and wherein such remedy is not granted then it would be a contradiction to good faith and conscience. As per Burney "*injunction has been defined to be a judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another is restrained from continuing or commencing such wrongful act*".[15] According to Lord HALSBURY "*An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing*". It is regarded as a means to protect the legal rights of an individual wherein the payment of damages is not sufficient and/or adequate.

According to Black's Law Dictionary, "*A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law*."[16]

As per the Indian Law[17], injunctions are regarded as a type of preventive or restrictive relief, which is granted when there is enforceable right that needs to be protected with minimal harm caused to the plaintiff; this is at the discretion of the Court. However, the important aspect is that there should be an invasion of such legal or equitable right for courts to exercise their power to grant injunction.[18] Thereby, the discretionary power of the courts is further limited and provided for under set principles to act as a guiding mechanism. The codification of the rights available under the 1963 Act[19] has helped give the once equitable remedies the force of law. The courts still hold intrinsic powers to grant relief despite the matter being outside the purview of the Specific Relief Act, under Section 151 of the Code of Civil Procedure, 1908.

Illustration: A and his associates have been unlawfully encroaching upon land held by B. It is difficult to quantify such encroachment and thereby the necessity of injunction arises, which forbids A or any of his associates to enter into or interfere with the peaceful enjoyment of B's property.

Characteristics[20]- the intricate details that are prevalent in all order of injunction by courts of law are:

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[15] A.W. Renton *Encyclopaedia of the Laws of England*, Vol 6 (1st Edn) 464
[16] Blacks Law Dictionary 923 (4th Edn, 1968)
[17] Specific Relief Act, 1963, § 36
[18] *Day v Brownrigg* [1878] 10 Ch D 294, (CA)
[19] *Supra note* 17
[20] *Supra Note* 12

i. Judicial Order: an order for injunction is usually passed by a competent authority with statutory/legislative authority or mostly by the courts of law, which arises after it has been prayed for under a suit.

ii. Restraint or preventive Relief: injunctions are usually obtained wherein the wrong is happening and remedy is needed to restraint it from continuing further or where there is reasonable apprehension of such wrong being committed in the future, prevent it from happening.

iii. Act is wrongful: for an injunction order to be given, the act that needs to be retrained or prevented should be a wrongful act in the eyes of the prevalent law.

iv. Interference with right of the party: the act that is before the courts must be one that is contrary to the law or to the rights of the injured party.[21] Such right maybe an equitable right or a legal right. Any act could be wrongful but for an individual to claim the order of injunction such act should constitute an interference with legal or equitable rights of the plaintiff.

If we are to examine these characteristics with the examples above – the suit is before the court making it a judicial process; the relief obtained is a restraint and the act that was being committed by the defendant was a wrongful one, which interfered with the plaintiffs right to peaceful enjoyment of his property.

NATURE OF REMEDY

As emphasised, injunctions are in the nature of an equitable relief, which is granted at the discretion of courts depending on the circumstances of each case. They also exist in the form of a legislative relief in India.[22] Section 151 of the Civil Procedure Code saves the inherent power of the courts to "*make such orders as may be necessary for the ends of justice*". These inherent powers can only be invoked when there is no clear provision for a particular scenario; this is due to the factor that it is nearly impossible for the law to cover all the circumstances.

The reason for it being referred to as an equitable remedy is that it is granted wherein the damages cannot be quantified or in the event it is not a sufficient remedy on its own. For example, if there exists a well which is being used for a significant amount of time by the people in the surrounding vicinity. Thereafter, a person claims the land unlawfully and begins constructing a wall around it. During the pendency of the dispute the court may grant an order of injunction so as to ensure the people have access to the water. In this scenario damages would not be an adequate measure or means to render justify, for any amount shall be speculative and if awarded after the suit, the damage shall already be done.

[21] *Agriculture Produce Market and Ors. v/s Girdhar Bhai Ramjibhai and Ors.* (1995) 5 SCC 468

[22] *Supra Note* 17; *Manohar Lal Chopra v. Hiralal,* AIR 1962 SC 527

Similarly, when dealing with aspects like IPR infringement or cases of breach of confidentiality for example, the damages may be exorbitant but if a firm loses its IP privileges or the confidential information leaked to everyone, the harm would be grave and damages insufficient.

Understandably because it may entail the survival of the business in its self, therefore in situations like this equitable remedies are deemed to be more just and appropriate in protecting the infringed legal rights. In England with the changes and acceptance of equity, the usage was increasing from separate litigation, tort and property to other miscellaneous areas of law.[23]

Expectation had risen to the fact that justice must be done even though it bends the strict sense of the law.[24] For this very reason it was difficult for common law judges to administer justice utilising the principles of equity, which gave rise to the courts of equity, Chancery Court.[25] Initially, the administrator of equity was the king[26] but the turn had begun and specialised courts were being set up.[27]

The separation was much needed as the restrictions that persisted with common law courts hindered the principles upon which equitable relief was founded upon.[28] Thereby, Chancery Courts were better placed to mould the relief according to the requirements of the case as per the principles of equity.[29] Allowing expansion of the standards was important to ensure that the rigidity of common law[30] did not become a continuing cause for miscarriage of justice. It instead ensured the introduction of tests,[31] legal literature,[32]

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[23] Raack, David W. (1986) "*A History of Injunctions in England Before 1700,*" Indiana Law Journal: Vol. 61: Iss. 4, Article 1.

[24] Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 Yale L.J. 1, 22 (1916).

[25] *Ibid.*

[26] D. Kerly, *A Historical Sketch of the Equitable Jurisdiction of the Court Of Chancery* 13 (1890).

[27] *The Origin of English Equity*, 16 Colum L. Rev. 87 (1916)

[28] *Ann Arbor & N. Mich. Ry. Co. v. Pa. Co.,* 54 F. 746, 751 (C.C.N.D. Ohio 1893) ("*The powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex relations and the protection of rights can demand*." (Quoting, *Rock Island & Pac. Ry. Co. v. Union Pac. Ry. Co*., 47 F. 15, 26 (C.C.D. Neb. 1891))

[29] *Ibid*

[30] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 158-62 (1991) (discussing how rules limit the power of judges or other decision makers).

[31] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987); Robert F. Nagel, Liberals and Balancing, 63 U. Colo. L. Rev. 319 (1992) (*arguing against use of balancing tests in judicial proceedings*)

[32] Lon L. Fuller, *Legal Fictions* 9 (1967) (*extending traditional definitions of legal fiction beyond "a statement propounded with a complete or partial consciousness of its falsity" to include "a false statement recognized as having utility*")

discretionary powers,[33] precedents,[34] and variable conducts, applied to each case separately in the interest of justice.

Being an equitable remedy, injunction is based on the various principles of equity and these are considered when granting or denying an application for injunction. It is important for the applicant to convince the court that he himself has acted in just and honest manner but the defendant acting in a *malafide* manner has caused him harm for which he requires the remedy.

Cardinal principle is that a wrong cannot be protected under the equitable remedies.[35] When deciding whether or not to exercise its discretion in granting injunction courts usually consider maxims "*he who comes to equity must come with clean hands*",[36] "*whenever there is a right there is a remedy*"[37] and "*he who seeks equity must do equity*"[38]. It is paramount for courts to determine that the applicant is not using these remedies to intervene with the rights of someone else. For example, a person unlawfully residing in a property cannot get an order of injunction against the true owner.[39]

The concept of equity involves that parties are to make full disclosure of facts and circumstances of the case and relevant matters, submitting all documents before the court to be able to obtain an equitable relief.[40] If any party supresses facts of the case or tries to mislead the court then it has full power to deny the applicant any equitable remedy.[41] As injunctions are granted at the discretion of the Courts[42], it lies within the power of the judge to grant or deny such order based on the circumstance of the case; thereby it is vital that a full and true disclosure is made by an applicant making such prayer in good faith. The exercise of discretion by Courts had to have been made after prudent analysis of the case and without any "*arbitrary or capricious discretion, dependent on the mere pleasure of the Judge*."[43]

<u>Preventive Remedy</u>

It is referred to as a preventive method for relief for the reason that this does not arise after the harm is done it arises before it happens or when it happens to curb further harm

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[33] Alan Paterson, *The Law Lords* 123-24 (1982) (*discussing conflict between justice and certainty and providing quotations regarding conflict*)
[34] Ruggero J. Aldisert, *When Do We Kiss It and When Do We Kill It*? 17 Pepp. L. Rev. 605 (1990) (*proposing and analysing four different models of precedent*)
[35] *Sopan Sukhdeo Sable vs. Assistant Charity Commissioner*, (2004) 3 SCC 137
[36] *Kanchusthabam Satyanarayana & Ors. vs Namuduri Atchutaramayya & Ors*. (2005) AIR SC 2010
[37] *Gujarat Bottling Co. Ltd. vs. Coca Cola Company and Ors*, 1995(5) SCC 545
[38] *Shiv Kumar Chadha vs. Municipal Corpn. Of Delhi* (1993) 3 SCC 161
[39] *Mahadeo Savlaram Shelke vs. Pune Municipal Corpn* (1995) 3 SCC 33
[40] *Paramount Surgimed Limited Vs Paramount Bed India Private Limited & Ors* (CS(COMM) 222/2017)
[41] *Warner Bros. Entertainment Inc. & Anr Vs. Harinder Kohli & Others* (155 (2008) DLT 56)
[42] *Supra Note* 17
[43] *District Board of Farrukhabad v. Ikhlaque Husain*, AIR (1933) All. 86

or in the event there is reasonable apprehension of harm. For this reason in situations damages would not suffice. The intent of equity has been to ensure that wherein exists a right it shall be protected by remedies under the law.

Thereby, utilising injunctions in the manner of preventing harm from befalling the plaintiff or from continuing upon the plaintiff. This is one of the key covenants of injunctions, specifically when drawing the nexus with equity. For example if there exists a contract for personal service, if the terms are deemed to be onerous then the courts have the discretion[44] to stay its performance and thereby prevent any harm that may have been caused. In this type of a situation, damages or specific performance or other like remedies would not have sufficed.[45]

Restrictive Remedy

Injunctions also act as a restraint from continuing a wrongful act, which is in contravention with the rights of the Plaintiff. The *Mareva* judgement has helped restrain people from unlawfully doing away with assets, with intent to defraud debtors. Restraints exist in the form of prohibitive orders given by courts based on the facts and the balance of justice.[46]

The intent is to protect the rights of the applicant safe guarding them from any prejudicial or possible prejudicial acts of the other party, thereby impeding the possibility of injury being caused and ensuring that status quo is maintained till the final disposition of the case.

Against whom it may lie[47]

When analysing the law related to injunctions, it is important to understand whom it may be sought against. Traditionally, an injunction is a remedy, which applies *in personam*[48] i.e., it operates against the defendant(s) to the suit and not against a stranger or a third party[49] or a non-party.[50]

i. States and Public authorities: it is well established that when filing a suit against the Government or any public officer, 2 months notice period is required,[51]

[44] *Ravi Singhal v Manali Singhal*, (2001) 8 SCC 1, *in an application for interim relief in respect of a settlement, the court said that it is at the discretion of the court to grant interim relief and exercise of discretion should not be perverse or irrational.*
[45] *Supra Note* 17, § 37
[46] *Supra Note* 16
[47] *Supra Note* 12
[48] *Prabhakara Adiga v. Gowri*, (2017) 4 SCC 97; *Board of Governors of Hospital for Sick Children v. Walt Disney Productions Inc*, [1968] Ch 52, (1967) 1 All ER 1005 (CA).
[49] *L.D. Meston School Society v. Kashi Nath*, AIR 1951 All 558; *Fakira v. Rumsukhibai*, AIR 1946 Nag 428; *Marwari Sabha v. Kanhaya Lal*, AIR 1973 All 298.
[50] *W.B. Housing Board v. Parmila Sanfui* (2016) 1 SCC 743.
[51] Civil Procedure Code, 1908, § 80

however wherein matter involves an act that is about to be done and if such act is done it may cause irreparable harm then and injunction may be granted, foregoing the 2 months notice requirement.[52] For example, if the government intends to construct something along a road and as such harms the right of easement of an individual, a dispute arises hence the court may grant injunction till the suit is finally dispensed.

When dealing with decisions given by municipal corporations, it is important for plaintiffs to seek relief from the corporation beforehand and approach the courts after a decision is rendered or such decision is unjustly being delayed causing continuous harm.[53] Courts have paid a significant attention to suits concerning public policy and projects, if injunctions are likely to cause undesirable delay to a project that is beneficial for the public, such may be denied.[54]

ii. <u>Individuals</u>: the consideration is based on the principles established in law – prima facie case, irreparable injury and balance of convenience.[55] An injunction may be denied even if it is evident that a remedy exists in law, which would right the contravention so committed. This is possible as this is an equitable relief granted at the discretion of the courts, any other ostensible and equal remedy if feasible shall be opted for in lieu of injunction. For the injury to the plaintiff must be looked at with the possible impact on the Defendant as well.[56] Individuals include corporations and businesses as well.[57]

<u>When injunctions are issued</u>[58]

Despite the fact that Indian law is derived heavily from the English Laws, the jurisprudence is discretionary whilst in India it has been codified under the Specific Relief Act, 1963.

i. Appropriate relief: whilst considering the grant of injunction it necessary for courts to ascertain whether given the facts and circumstances of the case. This is what gives it an equitable nature of remedy. It is upon the courts discretion to look into the case and adjudge whether or not injunction would be an appropriate relief. The intent is to ensure that injunction would help prevent the contraventions

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[52] *State Of Madras vs N.C. Ramalinga Reddiar And Ors* (1967) 2 MLJ 131; *Sawai Singhai Nirmal Chand vs Union Of India,* AIR (1966) SC 1068

[53] *Kuldip Singh v Subhash Chander Jain*, (2000) 4 SCC 50; Avatar Singh, *Contract & Specific Relief*, 955 (12th ed., 2017)

[54] *Bhagat v. Jagbir* AIR (1941) Cal 670.

[55] *M. Gurudas and Ors. Vs. Rasaranjan & Ors*. AIR (2006) SC 3275

[56] Supra Note 37

[57] Civil Procedure Code, 1908, Order 39, Rule 5

[58] *Damodar Valley Corporation vs Haripada Das And Ors.* (AIR 1978 Cal 489, 82 CWN 1093, 1979 (39) FLR 180); Supra Note 12

against the plaintiffs' rights and the harm caused thereof.[59] Ensuring that status quo is maintained up until final adjudication of the matter.

ii. Damages not appropriate: damages are not the feasible remedy given the circumstances of the case. This is usually the case wherein the matter deals with cases that if the wrongful conduct or act is allowed to happen then such damage may occur that may not be undone by awarding of damages. For example the removal of all trees in the vicinity by a defendant damages after the fact shall not suffice to undo the harm to environment and the people, therefore, in such a scenario injunction would be a better relief than damages.[60]

iii. Plaintiff has acted equitably: this imbibed from the equity principle of "*he who comes to equity must come with clean hands*". The courts have established that for an order of equitable relief to lie in favour of an applicant he must have conducted himself in a bona fide manner and ensured that he presented before the court all facts.[61]

iv. Injunction would be inequitable: "*he who seeks equity must do equity*"[62], as it is a remedy based on the principles of equity courts must adjudge whether grant of such injunction would unjustly prejudice the defendant. In the 'Mexican Balm' case, B was selling the Mexican Balm claiming it contained rare essences and medicinal qualities, but in reality it was a scented stuff. The description was dishonest. Hence the court refused to grant an injunction against B who was making and selling in the same name. If the plaintiff has made dishonest representations, he loses the assistance of the court. To assist him would amount to aiding or sanctioning an exclusive privilege.

When dealing with injunctions it is a cardinal rule that an injunction may not be denied merely upon the Courts own estimate for balance of convenience wherein a continuance nuisance is affecting an individual's right.[63]

Refusal of Injunction[64]

The Specific Relief Act provides for explicit grounds upon, which a grant of injunction may be refused by a Court. The grounds are:

i. Relief sought is to restrict a person from initiating a new case for a matter *sub-judice*, unless such restraint is necessary to prevent multiplicity of proceedings;[65]

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[59] *ITO v. M.K. Mohd. Kunhi*, AIR (1969) SC 430

[60] *Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd.*, AIR (1999) SC 3105

[61] *Supra Note* 37

[62] *Supra Note* 30; *Supra Note* 41

[63] Pollock And Mulla, *The Indian Contract and Specific Relief Acts* 774 (7th edn., 1944).

[64] Specific Relief Act, 1963, § 41; Supra Note 12, p. 959 - 960

ii. Restraint from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is prayed;[66]

iii. Restrict any person from applying to any legislative body;

iv. Restraint from instituting or prosecuting any proceeding in a criminal matter;[67]

v. Prevent the breach of a contract the performance of which would not be specifically enforced;[68]

vi. Preventing, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

vii. Prevent a continuing breach in which the plaintiff has assented;

viii. Equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;[69]

ix. Conduct of the plaintiff or his agents has been such as to disentitle him to be the assistance of the court;[70]

x. Plaintiff has no personal interest in the matter.[71]

xi. If it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.

Section 41 (b) precludes the courts from accepting an injunction in restraint from prosecuting or instituting any proceeding in another court at par or of higher jurisdiction than it.[72] The section is not applicable wherein a court grants injunction pertaining to

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[65] *Kukkala Balakrishna v Vijaya Oil Mills,* AIR (2009) NOC 648 (AP); R Yashod Vardhan and Chitra Narayan, *Pollock And Mulla : The Indian Contract and Specific Relief Acts* 2195 (Lexis Nexis, 2nd vol, 15th edn., 2017)

[66] *SBI v Madhumita Construction (P) Ltd,* AIR (2003) Cal 7

[67] *Sangram Singh v State of U.P*., AIR (2010) All 65

[68] *M/s Republic Stores (Trade) v Jagajit Industries Ltd*., AIR (1978) NOC 76 Cal - *Where the contract was determinable having a clause in it entitling either party to terminate the same by giving 30 days' notice, no suit will lie for mandatory injunction and injunction cannot be granted as the contract cannot be specifically enforced.*

[69] *R. Ramani v Shanthi Damodaran*, AIR (2011) Mad 60

[70] *Supra Note* 28 "*He who comes to equity must come with clean hands*."; *Premji Ratansey Shah v Union of India,* (1994) 5 SCC 547 at p. 550, *no injunction can be issued in favour of a trespasser or a person who gained unlawful possession as against the true owner.*

[71] *Municipal Corp., Bombay v Govind Laxman*, 1949 A.B. 229 - *Every taxpayer is directly interested in the proper application of municipal funds. Any tax-payer therefore may sue the municipality for an injunction restraining the municipality from misapplying its funds.*

[72] *V/O Tractoro Export, Moscow v A/S Tarapore & Co*., A IR (1971) SC 1

proceedings instituted before it.[73]

TYPES OF INJUNCTION

1. *Temporary Injunction*

Also known as interlocutory injunction or interim injunction. Courts grant these for a specific period or up until such further order by the court, during the pendency of a suit at any stage wherein it is deemed necessary in the interests of justice.[74] Temporary injunctions are governed by rules stipulated under the Code of Civil Procedure, 1908.[75] Specifically, Order 39 Rules 1 & 2. It is passed in order to ensure that status quo is maintained until final adjudication, for it were not to be granted then damages would not suffice and in the facts of the case the equity lies with the applicant. They act as a means to protect and prevent any future possible injury and to maintain status quo until final adjudication.[76] This is the rationale to protect his right wherein if the case were decided in his favour, damages would not suffice as the just remedy.[77]

The granting of interim injunction is based on three factors, which are prima facie case, irreparable loss and balance of convenience.[78] The courts consider and evaluate the plaintiffs' case and ascertain whether or not they are entitled to the remedy, based on the weightage of the plaintiffs claim in the dispute. Without such an order by Court there is likely to cause a grave injustice to the plaintiff and based on the concept of convenience no such harm shall befall the defendant if the order is granted.[79]

For a temporary injunction to be granted it is important for the applicant to have such right that may be enforced through the order.[80] The plaintiff in a suit for partition is entitled to a temporary injunction even against his fellow splitters to protect his protection owned when living exclusively in the warehouses and doing business on it.[81] Section 94[82] provides Courts to engage supplemental proceedings to ensure that the ends of justice are not defeated and if it is found that the injunction was granted on inequitable terms then it may compensate the defendant.[83]

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[73] *Raghavan v Sankaran,* AIR (1993) Ker 178; *Cotton Corporation Of India vs. United Industrial Bank*, (1983) SCR (3) 962
[74] Specific Relief Act, 1963, § 37 (1)
[75] *Best Sellers Retail (India) (P) Ltd v Aditya Birla Nuvo Ltd,* (2012) 6 SCC 792
[76] *Polins v. Gray*, (1879) LR 12 ChD 438; *ITO v. M.K. Mohd Kunhi*, AIR (1969) SC 430; *Manohar Lal Chopra v. Seth Hiralal,* AIR (1962) SC 527.
[77] *Supra Note* 37
[78] *Dalpat Kumar v. Pralhad Singh*, AIR (1993) SC 27
[79] *Ibid*
[80] *Agricultural Produce Market Committee v. Girdharbhai Ramjibhai Chhaniyara* AIR (1997) SC 2674
[81] *I P Bhankanarayana v. PRajeshwar Rao* AIR (1991) Ori 92
[82] Civil Procedure Code, 1908
[83] *Ibid*, § 95

Order 39, Rules 1 & 2[84] stipulate that temporary injunctions may be granted for:

i. Protecting interest in property (Rule 1) –

   a) Any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
   b) The defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,
   c) The defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.[85]

ii. Restrain repetition or continuance of breach (Rule 2) – obtained against the defendant in a suit to restrict them from committing a breach of contract or cause injury to the plaintiff.

The requirement of a notice may be dispensed if it would defeat the purpose of such injunction,[86] a vacation may be ordered for an already granted interim injunction.[87] In case of an injunction against a corporation such injunction is applicable on its employees and members as well.[88] It is a discretionary relief granted by courts,[89] which may grant a temporary relief as well in case a permanent injunction is prayed for pending disposal of suit.[90]

A temporary injunction seeks to preserve the subject matter of the dispute in the condition that it was or that is ostensibly possible given the case. With the understanding that if such order is not issued there is no remedy that may equitably satisfy the loss the plaintiff would likely suffer. Thereby, Courts order interim injunction up till an issue or the entire dispute is resolved.

2. *Permanent Injunction*

Also known as a perpetual injunction. It can only be only be granted by the decree made at the hearing and upon the merits of the suit, the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.[91] Therefore, a permanent injunction is granted after

[84] *Ibid*
[85] *Volition Investment (P) Ltd v Madhuri Jitendra Mashroo*, AIR (2003) Bom 360
[86] Civil Procedure Code, 1908, Order 39, Rule 3
[87] *Ibid,* Rule 4
[88] *Ibid,* Rule 5
[89] *Supra Note* 44
[90] *Gujarat Electricity Board v Mahesh kumar & Co*, (1982) 2 Guj LR 479; *Ishwarbhai v Bbanushali Hiralal Mohanlal Nanda*, AIR (2002) Guj 328
[91] Specific Relief Act, 1963, § 37 (2)

final decree of the court after examining the dispute on its merits. Decides the rights of the parties to a suit in finality.

Illustration: A is B's medical adviser. He demands money of B, which B declines to pay. A then threatens to make known the effect of B's communication to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.

In *Jujhar Singh vs. Giani Talok Singh*,[92] a permanent injunction against the Karta was rejected, as the remedy existed under Hindu Law (challenging the sale in a suit after completion of the sale), further such injunction would interfere with the rights granted to the Karta under Hindu Law (appropriate property due to necessities).

Injunction sought to prevent defendants from making an application for winding-up, as a court cannot grant an injunction restraining one from initiating judicial proceedings in a court higher than it.[93] Furthermore, subject matter is such that grant of an injunction would be a contravention to the ground provided under Section 41 (b) of the Specific Relief Act, 1963.

Section 38 of the Specific Relief Act, 1963, provides for instances when a permanent injunction may be granted by the Court:

i. Prevent breach of an implied or express obligation existing in his favour;

ii. When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II;

iii. When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely—

a) Where the defendant is trustee of the property for the plaintiff;
b) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
c) Where the invasion is such that compensation in money would not afford adequate relief;
d) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.[94]

Pre-requisites[95] for the application of Section 38 are –

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[92] AIR (1987) P&H 34

[93] *Cotton Corporation of India vs. United Industrial Bank*, (1983) SCR (3) 962

[94] R Yashod Vardhan and Chitra Narayan, *Pollock And Mulla: The Indian Contract and Specific Relief Acts* 2195 (Lexis Nexis, 2nd vol, 15 edn., 2017

[95] *Supra Note* 4, 952 - 953

i. Existing legal right in favour of the applicant;[96]
ii. Preventing continuous injury and violation of legal right of plaintiff;[97]
iii. Outside the scope of restrictions u/s 41;[98]
iv. Weightage on harm being greater if injunction is refused;[99]

Suppression of material facts disentitles the applicant from getting an order of permanent injunction in his favour, as it is still an equitable discretionary remedy.[100]

3. <u>*Mandatory Injunction*</u>

Salmond defines mandatory injunction as "*an order requiring the defendant to do a positive act for the purpose of putting an end to a wrongful state of things created by him, or otherwise, in fulfilment of the legal obligations, for example, an order to pull down a building which he has already erected to the obstruction of the plaintiff's lights*".[101]

Section 39 of the Specific Relief Act, 1963, reads: "*When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts*."

Illustration: A threatens to publish statements concerning B, which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

The Supreme Court in *Dorab Cawasji Warden vs. Coomi Sorab Warden*,[102] laid down guidelines for interim mandatory injunctions are laid down: -

i. The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction;
ii. It is necessary to prevent irreparable or serious injury, which normally cannot be compensated in terms of money; and
iii. The balance of convenience is in favour of the one seeking such relief.

When considering whether or not to grant a mandatory injunction it is important for the Courts to –

a) Evaluate what must be done in order to prevent a breach; and
b) Act must be such that the court is capable of enforcing.

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[96] *Basanti Paikaray v Prananath Paikaray*, AIR (2016) NOC 555 (Ori)
[97] *Supra Note* 85; *Parkasho Devi v Tarsem Lai*, AIR (2003) P&H 245
[98] *Surya Nath Singh v Khedu Singh*, (1994) Supp (3) SCC 561
[99] *Raja Maheshwar Dayal Seth v Yuvraj Dutt Sing*h, AIR (1946) Oudh 42
[100] *M. Hari Narayana v P. Swaroopa Rani*, AIR (2009) NOC 257 (AP)
[101] Salmond, *The Law of Torts*, 186 (13th Edn, 1961, changed in later editions)
[102] AIR 1990 S.C.867

Further the courts can deny granting mandatory injunction if –

a) The plaintiff had been sitting on his rights;
b) The remedy of damages would suffice any harm that the plaintiff faces; and
c) Balance of convenience is with the defendant.

In instances wherein a person has been lawfully residing in a place with the permission of the owner, the courts may order mandatory injunction against eviction after the permission was revoked.[103]

4. *Quia Timet Injunction*

Quia Timet is actually a Latin word, which means, "*Because he fears or apprehends*".[104] In legal terminology it has been defined as an action by which a person may obtain an injunction to prevent or restrain some threatened act being done which, if done, would cause him substantial damage, and for which money would be no adequate or sufficient remedy.[105]

In *Purshottamdas Parbhudas Patel v Bai Dahi*,[106] it was observed by Ker that –

"*The mere prospect or apprehension of injury or the mere belief that the act complained of may, or will, be done is not sufficient; but if an intention to do the act complained of can be shown to exist, or if a man insists on his right to do, or begins to do, or threatens to do, or gives notice of his intention to do, an act which must, in the opinion of the Court, if completed, give a ground of action, there is a foundation for the exercise of the jurisdiction*."

The Delhi High Court in the *Mars*[107] Judgment laid down the following principles when dealing grant of Quia Timet injunctions:

i. *Whether it is likely to cause confusion or to deceive the purchasers as to source or origin of the trade mark or the goods to be sold in future under the said mark irrespective of the fact whether goods intended to be sold are competitive goods or not;*

ii. *Whether the intention to use of infringed trade mark is to trade or cash upon the reputation and goodwill of the plaintiff earned over the years through extensive advertisement and huge expenses;*

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[103] *Gowri v Shanthi*, (2014) 11 SCO 664
[104] *Mars Incorporated v Kumar Krishna Mukerjee*, 2003 (26) PTC 60 Del
[105] Osborne's Concise Law Dictionary (London: Sweet and Maxwell, 8th edn. 1993, Bone and Rutherford)
[106] AIR 1940 Bom 205
[107] *Supra Note* 104, *para* 29

iii. *Whether there is likelihood of real or tangible damage or injury to the plaintiff or reasonable probability if the same would take place. In other words whether use of the trademark by the defendant is likely to be associated with the plaintiff's trade mark or business;*

iv. *Whether the hardship suffered by the plaintiff would be greater than that of the defendants if injunction is not granted against the defendants.*

The Supreme Court in the case of *Kuldip Singh vs. Subhash Chander Jain & Ors.,*[108] has quoted the judgment of the Chancery Division in the case of *Fletcher vs. Bealey*,[109] and was held that a Quia Timet action is a bill in equity which action is a preventive in nature and a specie of precautionary justice intended to prevent apprehended wrong or anticipated mischief and not to undo a wrong or mischief when it has already been done. In such an action the Court, if convinced, may interfere by appointment of receiver or by directing security to be furnished or by issuing an injunction or any other remedial process.

In *Fletcher v. Bealey*, Justice Pearson explained the two necessary aspects for an action of Quia Timet action -

i. *There must, if no actual damage is proved, be proof of imminent danger; and*

ii. *There must also be proof that the apprehended damage will, if it comes, be very substantial*.

These standards set by the High Court and Supreme Court are paramount in determining grant or rejection of an application for Quia Timet Injunctions.

PRINCIPLES

<u>*Equity*</u>

Injunctions despite having its place in Statutes now, remain nonetheless an equitable relief that is granted at the discretion courts. Such discretion is to be based thoughtful consideration based on the facts of the case and it must be exercised with prudence and in good faith so as to ensure that the possibility of any harm is vitiated. Certain maxims taken into consideration are -

i. "*One who seeks equity must come with clean hands*"[110] – not only is the defendant questioned but the plaintiff as well in order to determine whether or not they had acted in good faith and conscience during the course of the transaction.[111]

[108] (2000) 4 SCC 50
[109] (1885) 28 Ch D 688
[110] *Seema Arshad Zaheer & Ors. Vs, Municipal Corporation of Greater Mumbai & Ors*. – (2006) 5 SCALE 263
[111] *Supra Note* 36

Specifically when dealing with contracts, any action committed with *malafide* intent must be considered and be a ground for rejecting the application. For example, if the party to the contract had subverted the conditions and created a grievous situation for the other party, now the former seeks an injunction against the latter, in such a situation injunction must be denied, for the intent was to subvert the other party.

It has been stated earlier and is well established that injunctions cannot be ordered against a person who has the legal right. If a person seeks to obtain this remedy after being guilty of misrepresentation or fraud, it shall not be made available to them.[112]

ii. "*Whenever there is a right there is a remedy*" – Contracts in recent times are entered into of high commercial value and complex nature, more times than not the archaic systems subvert the intent and cause more harm than justice. Therefore, equitable remedies exist to ensure that injury is not caused but avoided and the rights protected.

Contracts tend to lose their efficacy and if not handled properly through the justice system can cause irreparable harm, therefore injunction becomes a very important remedy, before and after adjudication of the dispute. Common law was not flexible, the addition of equity gave the courts flexibility at their discretion based on a case-to-case basis. The courts exercised this discretion with caution whilst ensuring that if there exists a legitimate right, it would be protected, as that was the purpose of the law. The discretion had to be based on the consideration of the spirit and letter of the law, striking a correct balance between the two.

iii. "*He who seeks equity must do equity*" – Power to grant injunction is an extraordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. The Courts have to be more cautious when the said power is being exercised without notice[113] or hearing the party who is to be affected by the order so passed.

For the applicants' plea on injunction to be heard it is important for him to present a fair and complete account of facts of the case, suppression is seen to be inequitable and often results in rejection of the plea, even if harm happens or may happen. The principles of equity act as a guiding force in the expanse of the law providing the courts with means to utilise its power of discretion appropriately.

[112] *Overton v Banister* (1844) - *A beneficiary failed in their action against the trustees to pay her back the assets of the trust she had already received as a result of a misrepresentation of her age.*
[113] *Supra Note* 85

Through case law[114] and statute,[115] it is well established that the principles for grant of injunction are –

i. *Prima Facie Case*

It translates to on the face of it, or on the face of it or on the first look. Basically means that the evidence and facts must make it seem in the first instance it self to the judge that the applicant has a decent case. Also, it is obvious that the legal rights are being breached or in some cases may be breached. Therefore, from that perspective it is obvious that this right must be protected forever or temporarily to ensure that such harm is not caused that cannot be undone. The Supreme Court held "Prima facie case" to mean that the Court should be satisfied that there is a serious question to be tried at the hearing, and there is a probability of Plaintiff obtaining the relief at the conclusion of the trial on the basis of the material placed before the Court.[116]

To make out a prima facie case the relevant factor is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.[117] It is not necessary to prove the guilt but merely, ensure presentation of evidence that is conclusive. The applicant's claim should be bona fide and it would be unjust of the courts to demand complete analysis of evidence and present a decree, this would defeat a genuine claim.[118] It is necessary that the court must be satisfied that the claim is not frivolous or vexatious; in other words, that trier is a serious question to be tried.[119]

In the *Seema Arshad Zaheer* Case[120], the Hon'ble Supreme Court has indicated the salient features of prima facie case as under:

"*The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:*

a) Existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;
b) When the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and
c) Clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted."

[114] *Supra Note* 55
[115] Specific Relief Act, 1963; Civil Procedure Code, 1908
[116] *Gujarat Electricity Board vs Maheshkumar & Co*. (1995) 5 SCC 545
[117] *Marin Burn Ltd. v. R.N. Banerjee,* AIR (1958) 79
[118] *Supra Note* 115
[119] *American Cyanamid Co. v. Ethicon Ltd*. (1975) 1 All ER 504
[120] *Supra Note* 109

The Supreme Court has held that prima facie case alone would not constitute to be sufficient grounds to grant injunction.[121] It is necessary for the right in question to be an existing one and not one that would arise in the future and primarily it is the responsibility of the plaintiff to present evidence and make the argument for establishing a prima facie case.[122]

ii. *Irreparable Injury*

The role of courts has been to correct any wrong done to an aggrieved party through a decree, after adjudication. The second important factor for consideration is the occurring of such an injury that cannot be corrected through damages and/or such a circumstance wherein there is no alternative remedy in law apart from injunction. Damages and compensation exist with a purpose of restoring the person as far as monetarily possible to his original position before the breach.[123]

The plaintiff must be seeking an injunction against the violation of a legitimate right and it must be made clear to the court that if such is not stopped then it would cause irreparable injury to the plaintiff.[124] Furthermore, when the situation is such that immediate order of injunction is needed dispensing the need for a notice, it is vital that irremediable injury is proved and such injury cannot be adequately undone through any other relief.[125] As it is an equitable and discretionary relief, it is necessary for courts to assess

The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued.[126] Proving irreparable injury along with prima facie case is paramount when obtaining an injunction.[127]

iii. *Balance of convenience*

'Balance of convenience' means the comparative mischief or inconvenience to the parties. The inconvenience to the plaintiff if temporary injunction is refused would be balanced and compared with that to the defendant if it is granted if the scale of inconvenience leans to the side of the plaintiff, then alone interlocutory injunction should

[121] *Supra Note* 74
[122] *Uttara Bank vs. Macneill & Kilburn Ltd*, 33 DLR (1981)
[123] *Orissa State Commercial Transport Corporation Ltd. v. Satyanarayan Singh*, (1974) 40 Cut LT 336,
[124] *Hindustan Petroleum Corporation v. Shrinarayan and Ors*., (2002) 5 SCC 760
[125] *The Municipal Corporation Of Delhi vs Shri Suresh Chandra Jaipuria*, AIR (1976) SC 2621
[126] *Supra Note* 77
[127] *Supra Note* 74

be granted.[128] It entails an assessment by the courts of the likely mischief to be cause if it grants the injunction or denies it. Balanced on a quantum of this analysis a decision is made. It has to consider the possibilities or probabilities of the likelihood of injury that might ensue with the subject matter *sub judice,* that status quo must be maintained. An analysis of balance of convenience arises when there exists uncertainty towards the efficacy of other possible remedies apart from injunction.

The onus is on the plaintiff to actually prove that there is no inconvenience that will befall the defendant if the injunction is granted or that the inconvenience if there is less than what is likely to be caused to the plaintiff.

In other words, the plaintiffs have to show that the comparative mischief from the inconvenience that is may arise from withholding the injunction will be greater than which is likely to arise from granting it.

In *Bikash Chandra Deb v. Vijaya Minerals Pvt. Ltd*.[129]: the Hon'ble Calcutta High Court observed that issue of balance of convenience, it is to be noted that the Court shall lean in favour of introduction of the concept of balance of convenience, but does not mean and imply that the balance would be on one side and not in favour of the other. There must be proper balance between the parties and the balance cannot be a one-sided affair.

In *Antaryami Dalabehera v. Bishnu Charan Dalabehera*[130], as this point, it was held that balance of convenience, which means, comparative mischief for inconvenience to the parties. The inconvenience to the petitioner if temporary Injunction is refused would be balanced and compared with that of the opposite party, if it is granted.

In the case of *Anwar Elahi*[131], the court has clearly explained the meaning of 'balance of convenience'. According to the court:

"*Balance of convenience means that comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it. In applying this principle, the Court has to weigh the amount of substantial mischief that is likely to be done to the applicant if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted*."

<u>Relationship between the 3 factors</u>

All 3 factors must exist together in a particular case for an order of injunction to be granted.[132] The existence of one or two factors is not sufficient for the courts to grant an

[128] *Supra Note* 122
[129] 2005 (1) CHN 582
[130] 2002 I OLR 531
[131] *Anwar Elahi vs Vinod Misra & Anr,* 60 (1995) DLT 752

injunction. In the case of *Dalpat Kumar & Anr Vs. Prahlad Singh & Ors*.[133], the Apex Court explained the scope of aforesaid material circumstances, but observed as under: -

"*The phrases `prima facie case', `balance of convenience' and ` irreparable loss' are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts rest eloquent and speak for themselves. It is well nigh impossible to find from facts prima facie case and balance of convenience*."

When granting an injunction order it is important for the courts to observe the 3 factors and look into the public interest aspect, as well.[134] Public interest has been held to be another primal consideration when granting an order for injunction, specifically when dealing with government contracts and projects.[135]

In one instance, where the suit land is being used as sullage farm for drainage in the city, an application for injunction restraining the Nagar Nigam from interfering with the plaintiff's possession was dismissed.[136]

The Court refused to restrain construction of tube well by the government for distribution of water to cultivators.[137] Where grant of injunction is likely to delay execution of public projects thereby increasing financial burden on the state, the application for injunction was disallowed.[138]

To ensure that judges are not able to exercise their discretion without reason, these 3 factors have been held as paramount in any case, wherein an injunction has been prayed for.[139] Firstly, a basic case must be established by leading evidence; secondly, prove irreparable lose and lastly balance of convenience, is necessary to lie with the plaintiff, wherein the rights of the defendant shall not be subverted. This is all to be kept in the mind of the courts when deciding whether or not to grant an injunction.

Enforcement of decree

This is acheived by attachment of the property of an individual or corporation, civil imprisonment of the individual or detention of the chief officers of the corporation.[140] In the interest of justice and to emphasis the seriousness of the order, strict action should be

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[132] *Supra Note* 61
[133] *Supra Note* 77
[134] *American President Lines Ltd. v. Board of Trustees, Bombay Port,* AIR (2004) Bom 162
[135] *Bichharam* v. *Baldeo,* AIR (1940) All 241
[136] *Nagar Nigam, Aligarh* v. *Udai Singh* AIR (2003) All 34
[137] *Sambhu Chandra* v. *State of West Bengal,* AIR (2004) NOC 146.
[138] *Padhya* v. *State of Orissa,* AIR (2003) NOC 386
[139] *Mt. Aymun Nessa Vs. Md. Obaidul Haque*, 35 (1983) DLR 25
[140] Code of Civil Procedure, 1908, Order 21, Rule 32

threatened by the courts in the event the person against whom the injunction is passed, should not endeavour to transgress the ruling of the court and eventually harming the rights of the applicant.

EX PARTE ORDERS

The law provides for a notice to be sent to the defendants, so as to ensure that they get a chance to present their case. This is in line with the principles of equity and the cardinal rule that a court should grant interim injunction or stay order only after hearing the defendants or the respondents[141] it is necessary for judicial discretion and decisions to be made on sound principles of equity and reasoning of good quality.[142]

The basic consideration is that an *ex parte* order may only be granted after appropriate evaluation of facts and circumstances in the case, with sound discussion, finding and the reason, without it, the *ex parte* order shall not stand.[143]

The Hon'ble Supreme Court in *Morgan Stanley* Case[144], inter alia observed the under mentioned guidelines for grant of ex parte temporary injunction besides others:

- *Where irreparable or extremely serious injury will be caused to the applicant, ex-parte order can be passed;*
- *The court shall examine the time when the plaintiff got notice of the act complained;*
- *If the plaintiff has acquiesced to the conduct of the respondent then ex-parte temporary injunction shall not be passed;*
- *The applicant shall be acting in utmost good faith; and*
- *Such an order shall be for a temporary period.*

Thus, it is important for courts to ensure that they grant such *ex parte* injunctions only in circumstances wherein it is made abundantly clear of the losses that would ensue and such losses must in all probability outweigh the inconvenience likely to be caused to the defendant by the grant of such *ex parte* order.

OTHER TYPES OF INJUNCTIONS

Apart from the injunctions found in the law, there are those that have been developed by courts when dealing with individual cases, coming up with appropriate orders to fit the circumstance.

1. *Freezing Injunctions*

[141] *Ramrameshwari Devi v. Nirmala Devi*, (2011) 8 SCC 249
[142] *State of Uttaranchal v. Sunil Kumar Vaish*, (2011) 8 SCC 670
[143] *Balwant Singh Chauhan v. Mahavidyalaya Sabha Jwalapur Haridwar*, (2019) Utt 360
[144] *Morgan Stanley Mutual Fund Vs. Kartick Das*, (1994) 4 SCC 225

Also known as the Mareva Injunction. This type of injunction was brought after the *Mareva Compania Naviera SA v International Bulkcarriers SA* Case. It was opined by the Judges that, "*if it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, wherein the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets*."[145]

It is consistent with the principle that no remedy for those that don't possess a legal right over the issue.[146] However, it has been held well within the principles of law, especially after the introduction of equity that if there is a legitimate right that needs to be protected, it is the duty of the courts to do so, even if it invites the doing away with certain previous practices.[147]

The standards are prima facie case, balance of convenience and irreparable injury. This injunction basically stops a person from alienating property that they own within a particular area, usually within the Courts jurisdiction. It is different from attachment before judgement[148]. The Bombay High Court opined that a freezing injunction is available only when attachment is not possible or feasible.[149] Stating that freezing injunction merely requires a risk of dissipation of assets while attachment before judgement demands intention to obstruct or delay combined with an attempt/overt act by the defendant to dispose of its property. Nonetheless, both essentially do happen to serve the same motive of ensuring that the amounts of the decree can be realised from the defendant's property.[150]

However, in a Delhi High Court judgment, the learned judge had opined that the standards for granting a Freezing injunction were the same as that for a decree on attachment before judgement.[151] The two conflicting judgements of the High Court creates a sense of uncertainty towards Freezing injunction, however as it is nonetheless an injunction, it would invited the rigours of Order 39 of CPC. Factors like the risk of dissipation of assets; delay on the part of the claimant in applying; and material non-disclosure, need to be considered when dealing with grant or refusal of freezing injunction.[152] Therefore the criteria for passing an order of freezing injunction it is necessary for the following to exist: -

- No delay in applying for it by plaintiff;
- Genuine cause of action;

[145] (1980) 1 All ER 213
[146] *North London Railway Co v The Great Northern Railway Co,* (1883) 11 QBD 30
[147] Lord Halsbury, *Halsbury's Laws of England*, 24 (4th Edn) *para* 918
[148] Civil Procedure Code, 1908, Order 38, Rule 5
[149] *Iridium India Telecom v. Motorola Inc.,* (2003) 6 BomCR 511
[150] *Ganu Singh v. Janji Lal,* (1899) ILR 26 Cal 531, 533; *Amulya Ratan v. Prosad Chandra,* AIR (1936) Cal 143
[151] *Supra Note* 147
[152] *State Bank of India & Others v Dr Vijay Mallya & Others,* [2018] EWHC 1084 (Comm)

- Balance of convenience;
- Real risk of dissipation; and
- Disposable assets within the jurisdiction of the court.

2. *<u>Injunctions against Bank Guarantees</u>*

A Bank Guarantee is a tripartite contract, whereby the bank assures the holder that in the event the customer does not fulfil his obligation under the primary contract, the former bank shall pay the amount specified. This is usually seen in large consignment export or government contracts. They have been a source of numerous disputes and major bone of contention between parties.

A bank guarantee has been held to resemble and be analogous to a letter of credit and the same considerations, which apply to a letter of credit in the matter of interference by a court, have been held to apply to a bank guarantee.[153] If the enforcement of an "on-demand bank guarantee" is in terms of the guarantee, the court will not restrain invocation by looking at the terms of the underlying contract.[154]

There are primarily two types of Bank Guarantees:

i. Conditional: Provides for certain circumstances when the Bank Guarantee can be or cannot be invoked. Its invocation is therefore contingent on those conditions.

ii. Unconditional: The invocation may happen at the discretion of the party, it is not dependent on circumstances or a particular issue. Strictly speaking, they can be invoked irrespective of presence of any formal dispute.

The views that have been held by courts is that they cannot interfere with unconditional Bank Guarantees, as that was not the intention of the parties but can intervene for conditional ones, if the specified conditions are invoked or such circumstance arises.

Certain principles that are considered before the grant of injunction against the invocation of a bank guarantee are:

i. Stipulated period for invocation, whether or not it has expired;[155]

ii. In the case of conditional guarantees, the condition has not been fulfilled;[156]

iii. Apprehension of irretrievable injury;

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[153] *Centax (India) Ltd v Vinmar Impex Inc*, (1986) 4 SCC 136
[154] *National Highways Authority of India v Ganga Enterprises*, (2003) 7 SCC 410
[155] *Makharia Bros v State of Nagaland*, AIR (1999) SC 3466
[156] *Banwari Lal Radhe Mohan v Punjab State Co-op. Supply and Marketing Federation Ltd*, AIR 1982 Del 357; *Banerjee and Banerjee v Hindusthan Steel Works Consm Ltd*, AIR 1986 Cal 374

iv. Purpose of conditional guarantee has been fulfilled;[157]

v. Documents submitted for enforcement are known to be forged or fraudulent;[158]

vi. Fraud committed in the underlying contract and bank has notice of such fraud;[159] and

vii. Whereby the conditions for invoking the bank guarantee have not arisen.[160]

However, if there is (i) egregious fraud and (ii) special equities, then the courts have the jurisdiction to stop the invocation of unconditional Bank Guarantees as well.

i. <u>Fraud</u>

It is paramount that the Bank should have knowledge of such fraud, thereby being able to establish a prima facie case, with evidence.[161] Fraud would need to be proved by the one alleging it; any act or omission to act inducing the other to enter into the contract, would tantamount to fraud.[162] This type of fraud tends to vitiate the underlying transaction and thereby the foundation of the Bank Guarantee[163], hence vague and indefinite allegations cannot be sufficient grounds for injunction.[164]

The Supreme Court has gone a step further from the provisions of Section 17 Contract Act, to stipulate that Fraud need not exist only at the inception of the contract but can come into being during the pendency or duration of the contract, so as long as the fraud is committed and can be established, the court can grant the injunction,[165] so long it vitiates the nature of the contract and its foundation.[166]

ii. <u>Special Equities</u>

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[157] *Larsen & Toubro Ltd v Maharasrhtra State Electricity Board*, AIR (1996) SC 334

[158] *Bolivinter Oil SA v Chase Manhattan Bank*, (1984) 1 All ER 351; *Adani Exports Ltd v Marketing Service Incorporated*, AIR 2005 Guj 257 (letter of credit); *Federal Bank Ltd v VM Jog Engg. Ltd*, AIR 2000 SC 3166

[159] *Bolivinter Oil SA v Chase Manhattan Bank*, (1984) 1 All ER 351, at 352; *Adani Exports Ltd v Marketing Service Incorporated*, AIR2005 Guj 257 (letter of credit)

[160] *Basic Tele Services Ltd v UOI*, AIR2000 Del 1 - *bank guarantee given to cover withdrawal of bid by a bidder during period of validity of bid could not be invoked where the bidder never withdrew the bid*.; *Kirloskar Pneumatic Co Ltd v National Thermal Power Corpn. Ltd*, AIR 1987 Bom 308

[161] *U.P. State Sugar Corporation v. Sumac International Ltd*, (2006) 13 SCC 599

[162] *Ibid*

[163] *General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd*., (1991) 4 SCC 230

[164] *Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.*, (2008) 1 SCC 544

[165] *Mercator Oil & Gas Limited v Oil & Natural Gas Corporation Limited*, (2019) SCC OnLine Bom 1378

[166] *Hindustan Steelworks Construction Ltd. v. Tarapore & Co.*, (1996) 5 SCC 34

Special equities was brought up first in *Texmaco Ltd. v. State Bank of India*[167] irretrievable injury is a part of special equities,[168] but without special equities an injunction cannot be granted.[169] It was also reiterated in *Svenska Handelsbanken v. M/s. Indian Charge Chrome*, where the Court observed that there should be a prima facie case of fraud and of special equities in the form of irretrievable injustice and injury between the parties.[170]

The Supreme Court in *Dwarikesh Sugar Industries Ltd v Prem Heavy Engineering Works (P) Ltd & Anr.*[171], held "*… the second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution*"

Bank Guarantees exist in the daily order of commercial transaction presenting the dynamic environment and the issues surrounding it, hence the ever-evolving equitable remedies pose as a benefit for businesses. Thereby, for injunction against invocation of a Bank Guarantee, it is necessary that the applicant show the egregious fraud and special equities with irretrievable damage.

3. *Injunction to perform negative contract*

Section 42,[172] specifies that wherein a contract provides for both affirmative and negative covenants then the court may order injunction on the negative covenants if it is found that the affirmative ones have been strictly adhered to by the plaintiff. Even if the courts are unable to grant specific performance on the other part of the contracts, it may do so for the negative covenants. Such are predominantly seen in employment contracts.[173]

Illustration: A contracts to sell to B for Rs.1,000 the goodwill of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs.1,000 but A carries on the business in Calcutta. The court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

Lumley V Wagner, A (a singer), agreed that she would sigh for 12 months at B's theatre and that she would not sing elsewhere in the public during that period. Here B cannot

[167] AIR (1979) Cal 44
[168] *Supra Note* 161
[169] *Supra Note* 164
[170] (1994) 1 SCC 502
[171] (1997) 6 SCC 450
[172] Specific Relief Act, 1963
[173] *Swift Initiative Pvt. Ltd. v. Dilip Chhabria Design Pvt. Ltd*., O.M.P. (I) Nos. 454 of 2015;See also *S.K. Gupta v. Hyderabad Allwyn Ltd*., A.I.R. 1988 Del 324.

obtain specific performance of the first part of the contract (i.e. to sing at his theatre), but he is entitled to an injunction, restraining A from singing at other public places during that period. In this case though there is one contract but contain two parts one is positive and other is negative. The two parts are independent contracts. In this case court cannot debar itself to give injunction in case of negative covenant.

The provisions contained in section 42 tantamount to an exception that is contained under section 41 (e), the ingredients are:

i. There is a valid contract;

ii. Such contract contains two covenants, positive and negative;

iii. The negative covenants can be separated from the other parts; and

iv. The applicant must have performed his obligations under the contract.

The rule is that an injunction will be granted to restrain a clear breach of a negative covenant unless there are "special circumstances".[174] The basic requirements of an injunction remain for this, but this remedy was necessitated under the law to ensure that coercion is not unjustly enforced, for example the non compete clause is seen as arbitrary for economic purposes.

Undertakings in damages

As the courts are equipped with the power to grant equitable remedies if the conditions so demand, it is possible for the court to mandate an undertaking in damages by a party, this is preconditioned on the 3 factors of granting an injunction.[175] This usually entails the forfeiture of a certain sum, earnest money or deposit, that acts as the damages.[176] Therefore, instances wherein the parties have agreed to pay a sum of money or to forfeit a sum of money, which he has already paid to the party complaining of a breach of contract, the undertaking can be said to be in the nature of a penalty.[177]

[174] *Araci v Fallon*, (2011) EWCA Civ 668
[175] *Supra Note* 37
[176] Contract Act, 1872
[177] *Kunwar Chiranjit Singh v. Har Swarup.*, A.I.R. (1926) P.C. 1; *Kailash Nath Associates v. Delhi Development Authority & Anr.*, (2015) 4 SCC 136

MODULE III – ENFORCING CONTRACTS: THE REMEDY OF SPECIFIC PERFORMANCE

Introduction

Enforcement of contracts has been a key issue of contention in the current times and the global era, with World Bank basing it as one of the factors for consideration to determine the ease of doing business index. Usually, parties bargain and negotiate complex and high value contracts that cost significantly.

It is necessary for the parties to have some assurance towards the enforcement of such contract if there is a breach. Effective legislative and judicial mechanisms are needed to ensure that this is done. Essentially, the determinant is that the cost of enforcement should not outweigh the gains of the contract.[178]

Enforcement is a complex process, wherein specific performance is one of the remedies made available at the discretion of the court depending on the circumstances of the case. Specific performance like other equitable remedies were adopted into the English courts and thereafter adapted into the Indian judiciary and legislature.

Meaning

Specific performance is an equitable remedy that is provided for under contract law. This remedy when granted by Courts orders a party to a contract must fulfil their obligations under it, when there is a breach or likely to be one. It is mostly granted when there is no other alternative remedy available and the subject matter of the matter in dispute is unique.

For example, in property matters, the subject matter is unique; thereby, if after signing of the contract, seller recants then the court has the power to enforce the obligation of the seller, unless such other circumstances exist that vitiate the contract itself.

Specific performance is equitable relief given by a court in case of breach of contract in the form of a judgment that the defendant is to actually per form the contract according to its terms and stipulations.[179] Jurisdictions of Courts to grant specific performance had come through for the want of equitable remedies, as the lacunae in the common law would in cases do more harm than justice.[180] *Illustration*: A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically

[178] Expert Committee's Report on Specific Relief Act, 1963 submitted on 26th May 2016
[179] Avatar Singh, *Contract & Specific Relief*, 855 (12th ed., 2017)
[180] Pollock And Mulla, *The Indian Contract and Specific Relief Acts* 663 (7th edn., 1944)

to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.[181]

Specific Performance, deal with the performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon.[182] From every contract there immediately and directly results an obligation on each of the contracting parties towards the other to perform such of the terms of the contract as he has undertaken to perform.[183] If a party does not perform such obligation, it creates an inconvenience for the other party; hence, the courts can make an order for specific performance.

Development

The law of specific performance has developed since ages and follows the principles of equity. The remedy developed with the coming into existence of Court of Equity in England that specifically dealt with remedies and matters wherein the law was inadequate to provide a complete remedy. Inherent in the power of contract is the right to have legal sanctions available that are "adequate to protect reliance on the promise, to prevent gain by default and to effectuate expectations where there may be hidden reliance."[184]

Common law initially, did not allow for such remedies to exist and limited the rights of the people to damages, but with matter pertaining to property, it was soon realised that damages do not serve as adequate remedy for its non-performance. Thereby, for property matters specific performance was developed and slowly it went on to apply to various other contracts as well, wherever applicable.[185] The archaic court systems were done away with by the introduction of courts of equity that could compel personal conduct.[186]

In common law the remedy for breach of a contract was damages. The Equity Court innovated the remedy of specific performance because the remedy of damages was found to be an inadequate remedy. Lord Cairn's Act, 1858 conferred jurisdiction upon the Equity Courts to award damages also so that both the reliefs could be administered by one court.

Specific performance was regarded as a secondary remedy[187] due to this institutional separation and continues to be the same in today's times, even when courts have more flexibility to order such equitable remedies.[188]

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[181] Ibid; *Palcke v. Gray* (18S9) 4 Drew. 651, 113 R.R. 493

[182] Blacks Law Dictionary 1296 (4th Edn, 1968)

[183] *Kumari Anandan v T. Balamukunda Rao*, AIR (2002) Mad 472; *Ameer Mohd v Barkat Alt*, AIR (2002) Raj 406,

[184] Ian R. MacNeil, *Power of Contract and Agreed Remedies*, 47 CORNELLL. Q. 495, 497 (1962).

[185] *Supra Note 11*

[186] Sir James O'Connor, *Thoughts about the Common Law,* 3 CAMB. L.J**.** 161, 164 (1928)

[187] E. Allen Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM.L.REV. 1143, 1151-56 (1970)

2018 AMENDMENT

Chapter II of the Specific Relief Act, 1963, deals with the provisions and law relating to specific performance. In 2018 the Act was amended and the critical aspects of the law were altered to suit the current times and fill in the lacunae. One of the major factors in bringing forth the amendment was to improve India's ranking on the ease of doing business index. The necessary provisions were brought forth to provide a succinct law that would allow for speedy disposal of trials.

Table: Changes to Chapter II – pertaining to Specific Performance

	Section	2018 Amendment
1	Section 10 - Specific performance in respect of contracts	"The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16."
2	Section 11 - Cases in which specific performance of contracts connected with trusts enforceable	The words "contract may, in the discretion of the court", shall be substituted with "contract shall".
3	Section 14 - Contracts not specifically enforceable	"The following contracts cannot be specifically enforced, namely: — (a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20; (b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise; (c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and (d) a contract which is in its nature determinable."
4	New section 14A	Power of court to engage experts; pertaining to their costs and the recording of the opinion given by them.

[188] Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction,* 33 U. FLA. L. REV. 345, 347 (1981).

5	Section 15 - Who may obtain specific performance	“(fa) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation.”.
6	Section 16 - Personal bars to relief	(i) for clause (a), the following clause shall be substituted, namely: “(a) who has obtained substituted performance of contract under section 20; or”; (ii) in clause (c), (I) for the words “who fails to aver and prove”, the words “who fails to prove” shall be substituted; (II) in the Explanation, in clause (ii), for the words “must aver”, the words “must prove” shall be substituted.
7	Section 19 - Relief against parties and persons claiming under them by subsequent title	“(ca) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation.”
8	Section 20	The old provision with the exceptions and discretionary relief, was done away with and substituted performance was introduced and specific performance was a made into a statutory relief.
9	New Section 20A - Special provisions for contract relating to infrastructure project.	Addition of provision to ensure that delays in infrastructure projects is curtailed.
10	Section 20B - Special Courts	Constitute specialised courts to deal with the provisions and enforcement of rights under the Specific Relief Act, 1963
11	20C. Expeditious disposal of suits	Set the time limit to being 12 months from date of service of summons to the defendant.

12	Section 21 - Power to award compensation in certain cases	In section 21 of the principal Act, in sub-section (1), for the words ", either in addition to, or in substitution of," the words "in addition to" shall be substituted.

A lot of the development around the law had been that it is a discretionary remedy, however, 2018 amendment converted it into a statutory remedy. The amendment replaced the words "*may, in the discretion of the court*" with "*shall*", but subject to the provisions of section 11 (2), 14 and 16.[189] The discretionary powers created a sense of ambiguity in the principles pertaining to grant of specific performance. Also often resulted in differing jurisprudence being brought forth by the courts. Thereby, by curtailing the discretionary powers and putting forth set principles for the grant or refusal of specific performance. The amendment to section 10 also repealed the standards of exercising discretionary powers by the courts under section 20 of Act before the amendment.[190]

Under the amendment to section 14,[191] the grounds under, which specific performance may not be granted have been significantly reduced in its scope. The generic nature that the previous act existed in has been curtailed, to a much more succinct and definite powers. Section 16, pertaining to personal bars for relief has also been amended in the same manner.[192]

The amendment to Section 20 provides for substituted performance and its precursors. It is an essential remedy brought forth with much more clarity. Allowing an aggrieved party to be able to get substituted performance by another agency or on its own, whilst being able to recover the costs thereafter and damages from the party in breach of its obligations. The prerequisite is that the affected party has to give a written notice of at least 30 days before obtaining such substituted performance. The introduction of this amendment allows for better remedies in the law for parties, thereby allowing for performance it is substituted or specific.

The addition of sections 20A, B and C, show the intentions envisioned by the expert committee, in terms of giving the Act a truly wide scope and ambit by including provisions specifically addressing infrastructure and government contracts. Section 20C specifies that Courts must dispose of the case within 12 months from date of service of summons to the defendant. The object of this particular amendment is in line with ensuring of speedy disposal of cases and not letting it be subject to unnecessary delays, this is in line with the ease of doing business index.

[189] Specific Relief Act, 1963, § 3 of the 2018 Amendment
[190] Specific Relief Act, 1963, § 10 of the 2018 Amendment
[191] Specific Relief Act, 1963, § 5 of the 2018 Amendment
[192] Specific Relief Act, 1963, § 7 of the 2018 Amendment

Another essential amendment was to Section 21 with regards to compensation, wherein the words "*either in addition to, or in substitution of*" with "*in addition to*" specific performance.[193] Thereby, dispensing the aspect of compensation being a substitute to specific performance and both can now be provided in certain cases.

Rationale and Effect: When looking at the provisions amended it can be stated prima facie that they have been enacted with the intent of curbing delays in the litigation process. Thereby improving India's ranking. The introduction of the amendments under sections 10, 14, 15, 16 and 20 was to limit the scope of the courts' discretionary powers and brining specific performance as a statutory remedy with less scope for deviation.

Section 20 provides for substituted performance, which is an important addition. This helps curb out the inordinate delays that come with litigation, after the notice is given, the party can get the work completed and claim it from the party in breach of its obligations. This is crucial when dealing with contracts wherein the time is the essence.

The important aspect was the removal of it being merely a discretionary relief and making it into a statutory relief. This was necessary however, the exceptions that existed under section 20 before the amendment, have not been incorporated into any other section, they have completely been dispensed with, which can be seen to do more harm than good. Cases are yet to be concluded upon after the Amendment, it will be important to see and assess how the judiciary takes it up in terms of ignoring the established principles through precedents or moves to establish new ones. Nonetheless, as the law has developed from equity principles they shall continue to apply, as they define and determine the essence of the remedy.

Furthermore, the addition of compensation being a add on rather than a substitute factor does create a sense of security for parties in terms of being assured that they shall be provided with proper remedies to dispense any grievance caused. Also, the experts being allowed for courts to appoint and the addition of amalgamated LLPs being a party with a viable claim, helps create a wide base for the likely parties that have the *locus standi* to pray for specific performance.

Essentially, the Amendment attempts to provide for a much clearer legislation on specific performance, removing difficulties and provide for means to ensure the expeditious trial and swift disposal of cases that are brought forth, similarly wherein it dispensed the injunction possibility for infrastructure projects.

However, the issue that arises is that these projects usually have an impact on the public, the refusal of injunction blatantly as a matter of law can in the eventuality see to do more injustice than justice with irreparable injury being caused. Therefore, it is necessary for the courts to assess the case and not blatantly deny injunctions as a blanket rule. Furthermore, the introduction of specialized courts tends to infringe on the jurisdiction of

[193] Specific Relief Act, 1963, § 11 of the 2018 Amendment

the commercial courts and overlaps its provisions, thereby creating a certain amount of ambiguity. The conflict exists on the jurisdiction to adjudicate contracts relating to infrastructure projects and general commercial disputes relating to construction and infrastructure contracts.

SPECIFIC PERFORMANCE AS A REMEDY

Specific performance initially developed as an equitable and discretionary remedy that was granted by courts depending on the circumstances of the case. According to Halsbury's Laws of England,[194] the discretion to grant specific performance is not arbitrary or capricious; it is governed by principles developed in precedents. The judge must exercise the discretion in a judicious manner. Circumstances bearing on the conduct of the plaintiff, such as delay, acquiescence and breach or some other circumstances outside the contract, may render it inequitable to enforce it.[195]

Parties entitled to obtain specific performance

Section 15 deals with the parties that may are entitled to bring forth a claim of specific performance and if the conditions are met, would get the order. The Section was recently amended to include amalgamated LLPs, to increase the scope and bring under it more parties, the intent was to curtail the existing ambiguity and make the act more relevant for current times. Section 15 provides for the following: -

a. A party to the contract;

b. The representative in interest or the principal, of any party thereto – however, if the contract is dependent on the learning, skill, solvency or personal trait are key ingredients in the contract, then it cannot be specifically enforced, unless part of their performance is done or accepted by another party;

c. Contract for settlement of marriage – providing the people involved the freedom of choice and disallowing any such arrangement, up until final adjudication;

d. A compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder – the provision of specific performance is to do justice, wherein further investigation is needed, it is not prudent to enforce performance;

e. The contract has been entered into by a tenant for life in due exercise of a power, the remainderman;

[194] Halsbury's Laws of England, Fourth Edition, Volume 44 (1), para 801
[195] *Sushil Kumar Agarwal vs Meenakshi Sadhu*, 2018 (13) SCALE 778

f. A reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

g. A reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

h. Amalgamated LLP, where one of the previous entities was a party[196];

i. Amalgamated Companies;

j. Contracts entered into by promoters of the company and where such acceptance was communicated.

The widest possible scope has been vested upon the possible parties who can obtain an order for specific performance. The Supreme Court opined that there are two tests, which are to be satisfied for determining the question, who is a necessary party.[197] Tests are –

1. *There must be a right to some relief against such party in respect of the controversies involved in the proceedings; and*
2. *No effective decree can be passed in the absence of such party*.[198]

The Supreme Court[199] held that if a plaintiff wants to implead certain parties as defendants in a suit for specific performance on the ground that they may be adversely affected by the outcome of the suit, then interest of justice also requires allowing such a prayer for impleadment so that the persons likely to be affected are aware of the proceedings and may take appropriate defense.

Defendants

Section 19[200] provides for the likely against whom an order of specific performance may be obtained. The importance of setting out the parties that may obtain the relief and against whom helps create a specific list whilst not ousting any possible parties with a bona fide interest, it attempts to envisage a set list. The section was amended in 2018 to bring into its scope amalgamated LLP's as well.[201] The section provides that a specific performance suit may be instituted and granted against –

a. Either party;

[196] Specific Relief Act, 1963, § 15 (*fa*) – added with the 2018 Amendment
[197] *Kasturi v. Iyyamperumal*, 6 (2005) SCC 733
[198] *Ibid*
[199] *Robin Ramjibhai Patel v. Anandibai Rama, Rajaram Pawar & Ors*. (2018) 15 SCC 614
[200] Specific Relief Act, 1963
[201] Specific Relief Act, 1963, § 8 of the 2018 Amendment

b. Any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

c. Any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

d. Amalgamated LLP – where one of the entities was privy to the contract;[202]

e. Amalgamated Company– where one of the entities was privy to the contract;

f. By promoters of a company, wherein such acceptance was communicated.

The principle applied by the courts has been similar to ones applied for the determination of parties to a suit. Furthermore, when determining parties to the suit, it is important to keep in mind the principle of "*all questions involved in the suit*"[203] thereby, making it clear that the intent of the legislature was give the courts a wide scope of powers to go into all aspects of a case pertaining to relief/rights between the parties and/or parties with third parties.[204]

Hence, courts have been vested with the jurisdiction to amend plaints to include parties during the trial if it is necessary in the interest of justice.[205] It is paramount that any party, even if remotely affected by a court order should have the right to be a party to the hearing and present their defense, this also helps curbs multiplicity of cases.

Contracts that cannot be specifically enforced[206]

Initially, the grant of specific performance was conditioned on inability to determine the amount of compensation and wherein it was not an adequate relief. With the 2018 amendment, the scope of it being a discretionary relief was changed to make a statutory relief that must be granted if it is not barred by section 11 (2), 14 or 16. Section 14A allows for the appointment of experts by courts wherein the matter requires it. It is subject to the provisions of the Civil Procedure Code; such expert will act as amicus curiae and give advice or information to the court pertaining to an issue in matter.

Initially, the act provided for contracts which could be specifically enforced and those that could not be, however, the amendment altered it to stipulate the conditions for refusal and the types of contracts that cannot be specifically enforced. The following are contracts that cannot be specifically enforced: -

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[202] Specific Relief Act, 1963, § 19 (*ca*) – added with the 2018 Amendment
[203] Civil Procedure Code, 1908, Order 1, Rule 10 (2)
[204] *Supra Note* 28
[205] *Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay & Ors*., 2 (1992) SCC 524
[206] Specific Relief Act, 1963, § 14

1. Where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20 – if the party gets the work done by another agent or on their own, they cannot claim specific performance, but rather costs and damages;

2. A contract, the performance of which involves the performance of a continuous duty, which the court cannot supervise – as this creates an unnecessary burden on the court and it makes it practically impossible for the courts to monitor each and every step. Thereby in these circumstances, damages are a better option for relief;

3. A contract, which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms – an employee cannot seek the relief of reinstatement and back wages in a Civil Suit as a contract of employment for personal service could not be specifically enforced[207]

   Halsbury lays down "*A judgment for specific performance of a contract for personal work or services is not pronounced, either at the suit of the employer or the employee. The court does not seek to compel persons against their will to maintain continuous personal and confidential relations*."[208]

   Pertaining to contracts for personal services, which entail personal qualifications and abilities of the person, it has been held as a general rule to not be specifically enforceable[209]; and

4. A contract, which is in its nature determinable – these are those contracts, which contain termination clause or means of bringing it to an end upon breach of obligations. The Supreme Court of India in the case of *Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors.,* [210] wherein the Court held that a distributorship agreement which contained a clause that entitled either party to terminate the agreement with 30 days prior notice and without assigning any reason was "determinable" in nature and hence, could not be specifically enforced. The Supreme Court reiterated this in 2001[211], when it observed an agreement for construction unilaterally terminable before delivery of possession to be "determinable" in nature.

[207] *Jitendranath Biswas vs. Empire of India and Ceylone Tea Company,* AIR (1990) SC 255
[208] *Nandganj Sihori Sugar vs. Badi Nath Dixit,* AIR (1991) SC 1525
[209] *Percept D Mark (India) Pvt. Ltd. vs. Zaheer Khan*, AIR (2006) SC 3426; *Infinity Optimal Solutions Pvt Ltd. vs. Vijender Singh,* (CS(OS) 1807/2009)
[210] 1 (1991) SCC 533
[211] *Her Highness Maharani Shantidevi P. Gaikwad v. Savijbhai Haribhai Patel*, AIR (2001) SC 1462

The Delhi High Court of Delhi observed that an agreement that provides for termination by serving 60 days of notice to rectify the default in any event of default falls within the ambit of "determinable contracts".[212]

A Service Agreement that provides for termination of the agreement, on substantial breach or failure to comply in any material respect with any provision of the agreement and such failure continuing for more than the specified period, following written notice thereof to be determinable in nature and hence not capable of specific performance.[213]

In 2018, the Supreme Court in *Sucha Singh Sodhi v. Baldev Raj Walia*[214] held that specific performance and permanent/temporary injunction cannot be claimed in one suit. This was held for the following reasons: -

i. Cause of action of both types of relief arise separately and cannot be included as one; and

ii. Both reliefs are governed by different sections of the Civil Procedure Code and the Limitation Act.

In a suit of specific performance, the plaintiff has to prove: (a) that a valid agreement was entered into by the parties; (b) that the defendant committed breach of the contract; and (c) that the plaintiff was always ready and willing to perform his part of the obligations in terms of the contract.[215]

SPECIFIC PERFORMANCE OF PART OF CONTRACT[216]

The Act provides for various provisions wherein the courts can specifically enforce part of the contract. This section is an exception to the general rule propounded by Lord Romilly M.R wherein he opined that 'the Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all'. The scope of granting performance is limited to the provisions of section 12 only and the court cannot digress from the conditions.[217] The actions that the court can take are:

a. Whereby the part left unperformed is a only a small proportion to the whole in value and admits of compensation in money, the court may, direct the specific

[212] *Ministry of Road Transport and Highway, Government of India v. DSC Ventures Pvt. Ltd*., 2015 (2) ARBLR 142 (Delhi)
[213] *Gujarat Chemical Port Terminal Co. Ltd. v. Indian Oil Corporation of India*, 2016 SCC OnLine Bom 2605
[214] 2018 (5) SCALE 615
[215] *Mankaur v. Hartar Singh*, 10 (2010) SCC 512
[216] Specific Relief Act, 1963, § 12
[217] *Ibid*, § 12 (1)

performance of so much of the contract as can be performed, and award compensation in money for the deficiency.[218]

b. Whereby if a party to the Contract is not able to perform the whole of it and the part which must be left unperformed does not admit of compensation in money then the other party could get Court to direct, in a Suit filed by him, that party to perform provided he: -

    i. Pays or has paid the consideration of the whole of the Contract without any abatement; and

    ii. Relinquishes all claims to performance of the remaining part of the Contract and all rights to compensation, either for deficiency or loss or damage.[219]

c. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed the court may direct specific performance of the former part.[220]

Illustration: A contracts to sell a house to B for a lakh of rupees. The day after the contract is made; the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase-money.

Section 12 of the Specific Relief Act cannot be invoked by the vendee to obtain sale of undivided share of the two co-owners with a right to force partition on the other owners who were not parties to the agreement of sale.[221] However, wherein the property is divisible and a co-owner was not a party, the contract can still be enforced partly.[222] Essentially, section 12 was enacted for the benefit of the purchaser and, thus, cannot operate to his detriment.[223] When dealing with specific performance of a part of a contract, it has been held by the Supreme Court, that there should a valid contract, between the parties and such contract should be enforceable by law.[224]

In *Rachakonda Narayana vs. Ponthala Parvathamma and Anr*,[225] the Apex Court opined that the ingredients, which would attract specific performance of the part of the contract, are:

[218] *Ibid*, § 12 (2)
[219] *Surjit Kaur v. Naurata Singh*, 7 (2000) SCC 379; *Ibid*, § 12 (3)
[220] *Supra Note* 47, § 12 (4); *Balkar Singh v Mohabat Singh*, AIR 2004 P8cH 340
[221] *Shanmughasundaram And Ors vs Diravia Nadar (D) By LRs And Anr*, 2005(1) WLC (SC) Civil 502
[222] *Sardar Singh vs Krishna Devi (Smt.) and Anr*, 4 (1994) SCC 18
[223] *P.C. Varghese Vs. Devaki Amma Balambika Devi*, AIR 2006 SC 145
[224] *Kartar Singh vs. Harjinder Singh*, (1990) 3 SCC 517
[225] 8 (2001) SCC 173

"*(i) If a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent; and*

(ii) The other party to an agreement must, in a suit for such specific performance, either pay or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party."

NON-ENFORCEMENT EXCEPT WITH VARIATION[226]

The Act mandates that if the plaintiff seeks specific performance to which the defendant sets up a variation, the plaintiff can only obtain the performance sought with the variation so specified. The circumstances under which this rule is applicable are:

a. Whereby fraud, mistake of fact or misrepresentation, the contract in its terms or effect is different from what the parties agreed to, or does not contain all the terms agreed to between the parties;
b. Defeating legal object initially intended for; and
c. Parties, subsequent to execution, varied terms of the contract.

When the defendant sets up a variation then the plaintiff may have the contract specifically performed subject to the variation so set up only in cases of fraud, mistake of fact or misrepresentation or where the contract has failed to produce a certain legal result which the contract was intended to do or where the parties have subsequent to the execution of the contract varied its terms.[227]

Cases pertaining to property wherein parts are rendered inalienable subsequently due to acts beyond the control of the vendor, such cannot be enforced as per section 18.[228] When dealing with this section it is necessary to understand the efficacy behind it; primarily not to allow any arbitrary variation that curtails the rights of the parties or wherein such variation is made bona fide, and then the claim must subsist.

SUBSTITUTED PERFORMANCE[229]

When there is a fundamental breach in the contract by one party due to non-performance of their obligation, then the aggrieved party is entitled to substituted performance by a

[226] Specific Relief Act, 1963, § 18
[227] *K. Narendra v Riviera Apartments (P) Ltd*, (1999) 5 SCC 77:
[228] *Supra Note* 2, pg. 889
[229] Specific Relief Act, 1963, § 20

third party or by his own agency. Such costs and expenses can be recovered back from the party committing the breach.

Initially, Section 20 specified the exceptions for granting specific performance and stipulated that the grant was a purely discretionary one. This is was one of the foremost recommendations of the expert committee, wherein they stated that the provisions of section 20 are already provided more or less under section 14. Numerous foreign systems allowed for the performance of the promises by the promisee or by a party appointed by him at the cost of the promisor, in the event of the latter's non-performance.[230] The Indian legislation did not provide for such remedy as a substantive right, it was however present as possible discretionary right under contract law[231] through illustrations, for example:

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

Thereby, if this was envisioned then it was necessary to bring it within the scope of the substantive rights and make it a statutory relief. The rationale was that if the promisee were allowed to get the contract performed by his agency or a third party, it would achieve the same result as specific performance.[232]

The ingredients of section 20 are:

i. Breach of contract due to non-performance of their obligation;

ii. Completion of contract through his own agency or through third party;

iii. Aggrieved party entitled to recover expenses and other costs actually incurred from the breaching party;

iv. Written notice of 30 days given to the defaulting party, mandating performance within a specified time, not less than 30 days[233]; and

v. Thereafter, the breaching party refuses to perform obligation within specified time, expressly or implicitly.

[230] The Spanish Civil Code, arts 1096 and 1098; The Ethiopian Civil Code, art 1778; The Quebec Civil Code, art 1602

[231] Indian Contract Act, 1872, § 73 – compensation for loss or damage caused by breach of contract; illustrations (f), (k) and (l).

[232] Expert Committee's Report on Specific Relief Act, 1963 submitted on 26th May 2016, pg. 57

[233] *Supra Note* 60, § 20 (2)

The concept of substituted performance as specific performance was introduced in UK through the case of *Liberty Merican Ltd. v. Cuddy Civil Engineering Ltd.*[234], wherein in place of defaulting performance bonds, Court directed the defaulting party to deposit a sum of money as substituted performance. The law does provide for "*cost of cure*",[235] however, it was necessary for an explicit right to be created under the Specific Relief Act, 1963.

Under the Indian cases, courts had allowed for parties to claim compensation and costs for completion by another party, if the contract provided for the same.[236] Basically, if a contract contains a 'risk and cost' clause, making it easier for a party to get performance done and then claim the expenses from the promisor or deduct it from the deposit.[237] When the court has granted a decree for specific performance, the party can get performance done and claim the amount from the defendant as a means of enforcing it when it has been disobeyed.[238]

Being made into a right it has instilled a level of confidence, due to the certainty brought forth, by making it a mandate that if substituted performance is done then the dues shall be paid accordingly.[239] It allows for the realization and performance of the contract, earlier, as compared when it would have been obtained after a suit of specific performance.[240]

DEFENSE TO SPECIFIC PERFORMANCE

Defenses that may be invoked by the defendants in contention against a suit for specific performance are per section 14 and 11. Also under sections 9 and 16, which deal with more specific provisions towards bar on suits for specific performance.

Personal Bars to relief[241]

The 2018 Amendment has changed the nature of the remedy, yet there are certain precedent cases that exist and have set principles that are considered when granting specific performance in addition to the provisions of section 14, they are envisaged under section 16. Combining the provisions of sections 16 and 14, bring forth certain key considerations by courts when examining an application of specific performance, these are: -

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[234] (2013) EWHC 4110
[235] *Supra Note* 62
[236] *Indian Oil Corporation Ltd v SPS Engineering Ltd*, AIR 2011 SC 987; *Kamataka Electridty Board v MS Angadi*, AIR 2008 Kant 55
[237] *Krishan Lal v Food Corporation of India*, (2012) 4 SCC 786
[238] Civil Procedure Code, 1908, Order 21, Rule 32
[239] *Supra Note* 63
[240] *Ibid*
[241] Specific Relief Act, 1963, § 16 – *as well as general principles pertaining to grant or refusal, developed by case law over years.*

i. Substituted performance – if this was done following the conditions of section 20 then it is a bar to any suit enforcing specific performance of the same matter. This is to ensure that the applicant cannot enjoy the benefit of two remedies that should not be granted together. Substituted performance allows the performance of the obligations to be done by another party, thereby such should not be specifically enforced upon the defaulting party, and merely costs and compensation should suffice.

ii. Conduct of the Party – specific performance remains an equitable remedy; thereby it shall be bound by basic principles of equity. Principles like "*he who seeks equity must do equity*" and others are paramount in exercise of equitable remedies. It has been held that "*No polluted hand shall touch the pure fountains of justice*." [242] When a plaintiff makes a prayer for specific performance, it is paramount that he must manifest that his actions have been bona fide and done in good faith, throughout entitling him to the specific relief.[243]

    The conduct of a plaintiff is very crucial in a suit for specific performance.[244] If a party expresses their readiness and willingness in a legal notice but only file suit with limited prayer for relief then their conduct cannot be one wherein specific performance could be granted. The conduct of parties is essential when assessing the readiness and willingness of parties.

iii. Readiness and Willingness – the amendment of 2018, the expression "*who fails to aver and prove*" is substituted by the expression "*who fails to prove*" and the expression "*must aver*" stands substituted by the expression "*must prove*". The relief of specific performance shall be denied to any person, who shall fail to prove that they have performed or have been ready and willing to perform their obligations. [245] For the obligations that were waived or prevented by the defendant, the applicant need not prove readiness and willingness.

    Despite the amendment, all the material aspects remains the same that, specific performance of a contract cannot be enforced in favor to the person who fails to prove that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. [246] The essential aspect to determine readiness and

[242] Per Wilmot, C.J., in *Collins v. Blantern*, (1867) 1 Smith LC 369
[243] *Aniglase Yohannan v. Ramlatha,* (2005) 7 SCC 534
[244] *Atma Ram vs. Charanjit Singh*, 2 (2020) MLJ 587 SC
[245] Specific Relief Act, 1963, § 16 (c)
[246] *Mehboob-ur-Rehman v. Ahsanul Ghani,* (2019) SCC OnLine SC 203

willingness is to be assessed by the facts of the case as well as the conduct of the parties.[247]

For an order of specific performance to be granted, it is paramount that the readiness and willingness to perform their part of the contract must be shown. Such readiness and willingness must be shown throughout, from when it is prayed for at the filing of the suit up until the decree by the court.

The party has to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract according to the original plans. If he fails to do so, his claim for specific performance must fail.[248]

The Privy Council in *Ardeshir Mama v. Flora Sassoon,*[249] established this principle:

"*In a suit for specific performance, … he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit.*"

Therefore, for one to obtain a specific performance order it is necessary that they are to establish that they have already performed or were willing and ready to perform their obligations under the contract and such readiness and willingness must persist for throughout.[250]

Also, when establishing willingness and readiness of a party, where a contract involves the payment of money, it is not a prerequisite[251] for the plaintiff to pay the sum or keep it in a separate account[252], unless directed to do so by the Courts.[253]

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[247] *Umabai v. Nilkanth Dhondiba Chavan*, (2005) 6 SCC 243

[248] *Gomathinayagam Pillai v. Palaniswami Nadar*, (1967) 1 SCR 227

[249] AIR (1928) PC 208

[250] *J.P.Builders v. A. Ramadas Rao*, (2011) 1 SCC 429; *Vijay Kumar v. Om Parkash,* AIR 2018 SC 5098

[251] *Bank of India Ltd. v. Jamsetji A.H. Chinoy*, AIR (1949) PC 81 - "*it is not necessary for the plaintiff to produce the money or vouch a concluded scheme for financing the transaction to prove his readiness and willingness.*"

[252] Specific Relief Act, 1963, § 16 (c)(i)

[253] *Azhar Sultana v. B. Rajamani*, 17 (2009) SCC 27 – "*it was not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof.*"; *Boramma v. Krishna Gowda*, 9 (2000) SCC 214

iv. Decree – for the order of specific performance to be appropriate it is necessary that the appropriate form of decree be granted. It was held that when dealing with specific performance for sale of land it is important for the defendant and transferee to join in performance so as to vest a legitimate right to the plaintiff.[254] The need for proper form of decree being an important aspect in determining rights and granting specific performance has also been the view taken by the Calcutta High Court.[255]

The proper form of the decree has been a contention in various cases and the *Durga Prasad* judgment has been held as precedent in determining the appropriate form for a decree pertaining to specific performance of contracts of sale. Such sales can be complex and therefore need proper decrees to be issued.

For example, if the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase-money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case.

In *Vijay A. Mittal v. Kulwant Rai*[256], the principle established in the *Durga Prasad* was reexamined and it was held:

"*The practice of the courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone.*

According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee."

Another crucial consideration is whether or not the court will be able to exercise control over the decree after it has been passed. This is necessary and it is a well-settled position of law[257], for the purpose to ensure complete

[254] *Durga Prasad v. Deep Chand*, AIR (1954) 75
[255] *Kafiladdin And Ors. vs Samiraddin And Ors*., AIR 1931 Cal 67
[256] (2019) 3 SCC 520
[257] *Hungerford Investment Trust Ltd. v. Haridas Mundhra*, (1972) 3 SCC 684

adherence and fulfillment of the relief rendered and avoid it from becoming inadequate.

According to Fry, it may and not infrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as for instance, where a vendor refuses or is unable to execute a proper conveyance of the property or a purchaser to pay the purchase money. [258] There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself:

(i) He may obtain an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase-money and delivery over of the executed conveyance and title deeds, or a period within which the judgment is to be obeyed, and if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects; and

(ii) He may apply to the Court (by motion in the action) for an order rescinding the contract.[259]

It can be stated that even after a decree of specific performance is passed, the suit must still be presumed to be pending for the need to grant additional remedies may arise. [260] The Court which passes a decree for specific performance has the power to extend the time fixed in the decree for the reason that Court retains control over the decree, that the contract between the parties is not extinguished by the passing of a decree for specific performance and that the contract subsists notwithstanding the passing of the decree.[261]

v. Limitation – the prescribed period of limitation for a suit of specific performance is three years from the date fixed for performance or if no such date is fixed, when the plaintiff has notice that performance is refused.[262] Therefore, the date is fixed for performance of the agreement, then non-compliance with the agreement on the date would give a cause of action to file suit for specific performance within three years from the date so fixed.[263]

[258] *Fry on Specific Performance*, (6th Edn. 2012), p. 546
[259] *Ibid*
[260] *Pearisundari Dassee v. Hari Charan Mozumdar Chowdhry*, ILR (1888) 15 Cal 211
[261] *Mahommadalli Sahib v. Abdul Khadir Saheb*, (1930) 59 MLJ 351
[262] Limitation Act, 1963, Article 54
[263] *Rathnavathi v. Kavita Ganashamdas*, (2015) 5 SCC 223

Thereby, it has been held by the courts that examining the limitation period and determining the calculation period is critical before granting an order of specific performance, essentially, if the circumstances provide, condonation of delay can be granted. Essentially, limitation plea is both a question of law and fact.[264]

vi. Necessary Parties – for granting of specific performance, it is crucial to implead the necessary parties, therefore, the provisions of sections 15, 19 of Specific Relief Act, 1963 and Order I Rule 10 of the Civil Procedure Code, 1908, should be examined, in granting an order of specific performance. This is crucial as it is a factor that determines the proper form of the decree as well.[265]

The Supreme Court in the *Kasturi* case has laid down the principles in determining the necessary parties that should be added to a suit of specific performance.[266] The Code gives the Courts to amend the plaint at any stage of the trial for the purpose of adding on a new party to the suit. It is essential, for the purpose of ensuring that the courts adjudicate on all rights of parties involved in a matter completely, hence reducing multiplicity of suits by different parties after passing of decree.

vii. Appropriate relief sought – when praying for specific performance it is necessary for the party to pray that there was wrongful termination of the agreement, failure to pray and establish that would vitiate any prayers made for specific performance.[267]

In a suit for specific performance of contract for sale of immovable property containing a stipulation that on execution of the sale deed the possession of the immovable property will be handed over to the purchaser, it is implied that delivery of possession of the immovable property is part of the decree of specific performance of contract.[268]

Thus it follows that no court can grant the relief of possession of land or other immovable property, subject-matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is specifically prayed for.[269] Paramount for the parties to

[264] *Panchanan Dhara & Ors vs Monmatha Nath Maity (Dead),* (2006) 318 SC
[265] *Supra Note* 74 and 75
[266] *Supra Note* 28
[267] *I.S. Sikandar* v. *K. Subramani,* (2013) 15 SCC 27
[268] *Adcon Electronics (P) Ltd. v. Daulat*, (2001) 7 SCC 698
[269] *Ibid*

include in their prayer the remedies they seek, as the courts look at this and cannot the relief of specific performance cannot later be added in.[270]

BASED ON CONTRACT LAW[271]

Section 9 of the Act stipulates that except as otherwise provided, the defendants may invoke the various defenses available under contract law. Primarily, it would consist of issues relating to:

Validity of Contract: it is trite law that for the remedies of specific performance to be granted to the applicant, it is necessary for them to prove that there exists a valid contract.[272] In *Mayawanti vs. Kaushalya Devi*,[273] the Supreme Court held, in a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract.

In the case of *Prem Singh & Ors vs Birbal & Ors*[274] the Apex Court held that for contracts that are void ab initio there is no scope of specifically enforcing them or any need to cancel them as they are non- existent in the eyes of the law. Thus it is necessary that the contract in question should be valid and enforceable. Aspects of determining validity of contract are:

a. Incapacity of parties – this deals with the mental capabilities determined by age and mental stability, which would adversely affect the validity of the contract if all parties were not majors and/or of sound mental ability. Minors, vulnerable persons and drunken people are all deemed to be incapable of contracting due to lack of sound mental capabilities and understanding.

b. Uncertainty of contract – The Supreme Court refused to grant the relief of specific performance where the contract was in an alternative form and one form had failed to materialize and the other was void, being not enforceable by virtue of uncertainty.[275]

c. Absence of concluded contract – It has been held that a Government contract that is concluded without fulfilling the requirements prescribed by Article 299 of the Constitution of India cannot be specifically enforced.[276]

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[270] *Supra Note* 63
[271] Specific Relief Act, 1963, § 9
[272] *Ambica Prasad vs Naziran Bibi*, AIR 1939 All 64, *Balram v Natku*, AIR 1928 PC 75
[273] (1990) 3 SCC 1
[274] (2006) 5 SCC 353
[275] *Supra Note* 10, pg. 856
[276] *Bishandayal & Sons v State of Orissa*, 1 (2001) SCC 555

d. Fraud – means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent1, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract.[277]

e. Misrepresentation – any positive assertion or statement made without knowledge wherein the party benefits out of such, is misrepresentation as it creates a difference in the understanding of the subject matter.[278]

f. Mistake – this could be of law or of fact, both cases wherein provided for, affect the validity of the contract. Mistake of law is provided for under Section 21 of the Indian Contract Act, 1872, for example A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable. Mistake of fact is provided for under Section 20 & 22 of the Indian Contract Act, 1872, wherein there exists mistake that is committed by both parties with regard to an essential fact of the contract.

g. Illegality – this could occur subsequently, due to alteration of law or introduction of law. This is provided under Section 21 of the Indian Contract Act, 1872, that the object and consideration of the contract should not be barred by law or with intent to commit fraud or defeat any law. For example, A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.

h. Delay – The Supreme Court[279] laid down the aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property:

   (i) Delay running beyond the period, prescribed under the Limitation Act;

   (ii) Delay in cases where, though the suit is within the period of limitation, yet: -

   (a) due to delay the third parties have acquired rights in the subject-matter of the suit;[280]

[277] Indian Contract Act, 1872, § 17
[278] *Ibid*, § 18
[279] *Motilaljain v Ramdasi Devi*, 6 (2000) SCC 420
[280] *Zorawar Singh v Sarwan Singh*, 4 (2002) SCC 460

(b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief.

POWERS OF THE COURT

The Specific Relief Act vests powers on the courts so as to grant certain reliefs in addition to specific performance of the contract. However, the necessary factor is that it should be claimed by the plaintiff in his plaint, if not claimed it cannot be awarded later on, but the court possesses the power to allow the plaintiff to amend his plaint at any stage of the proceedings.

The Amendment in 2018 ensured that compensation could be granted in addition to specific performance and not in substitution of. Importantly, the court must assess whether the relief of specific performance satisfies the need of justice, this is determined by examination of the facts and circumstances of the case. The Delhi High Court, whilst relying on the decision in *Rameshwar Nath vs U.P. Union Bank Ltd*.,[281] wherein a wide ambit was given to the term 'proceeding' for the purposes of Section 22 and was taken to include prescribed course of action for enforcing a legal right.[282]

Compensation

Compensation entails a form of making amends, payment of damages, indemnification for the wrong committed with an intention to restore the injured person as far as monetarily feasible. It is an act which a court orders to be done, or money which a court or other tribunal orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person harmed may receive equal value for his loss, or be made whole in respect of his injury.[283]

This relief is provided for under section 21 of the Specific Relief Act, 1963. The provisions stipulate:

i. That in a suit for specific performance the party may claim compensation in addition to specific performance;[284]

ii. Wherein, the court opines that there is a valid contract but specific performance ought not to be granted[285] or where the award of specific performance on its own would not meet the ends of justice[286], then it may grant compensation;

[281] AIR (1956) All 586
[282] *M/s. Ex-Servicemen Enterprises (P) Ltd. v. Sumey Singh*, AIR (1976) Delhi 181
[283] Blacks Law Dictionary 354 (4th Edn, 1968)
[284] Specific Relief Act, 1963, § 21 (1)
[285] *Ibid*, § 21 (2)
[286] *Ibid*, § 21 (3)

iii. When assessing the amount of compensation to be granted the court keeps in mind the principles provided under section 73 of Contract Act[287]; and

iv. Compensation shall only be awarded if the party in his plaint claims it,[288] the court does have power to allow amendment to the plaint during any stage of the proceedings.

If there is a breach of contract due to non-performance that is valid, and the court is of the opinion that specific performance should not be granted, then it may order for compensation.[289] However, this relief is not made available to a plaintiff who by his own conduct or negligence or option, has made specific performance impossible.[290]

Initially, the courts applied strict standards when amendment was sought to change the plea from specific performance to compensation, as compared to adding compensation in lieu of or in addition to specific performance.[291] This stems from the judgment by the Supreme Court in the case of *Jagdish Singh v Natthu Singh*[292], wherein the judges opined:

"*…Two positions must be kept clearly distinguished. If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the court will allow the amendment at any stage of the proceeding.*

But different and less liberal standards apply if what is sought by the amendment is the Conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked."

The equitable nature of the grant of compensation is retained, whereby the courts have the duty to assess and analyze whether or not to allow the plaint to be amended,[293] and possess the power to grant such amendment during the pendency of the case at any stage of the proceedings. In a case wherein damages were pleaded the court can decree for delivery of goods, it was held that it is necessary to assess whether specific performance would be feasible or not and then pronounce judgment.[294]

[287] *Ibid*, § 21 (4)
[288] *Ibid*, § 21 (5)
[289] *Jai Narain Parasrampuria v Pushpa Devi Saraf*, (2006) 7 SCC 756
[290] *Harjeet Singh v Amrik Singh*, (2005) 12 SCC 270; *Supra Note* 2, pg. 914
[291] *Ibid*
[292] (1992) 1 SCC 647
[293] *Jhandoo v Ramesh Chandra*, AIR (1971) All 189, *Rajendra Kantilal Dalai v Bombay Builders Co (P) Ltd*, AIR 2002 Bom 408
[294] *State Bank of Saurashtra v P.N.B.*, (2001) 5 SCC 751

In the case of *Ardeshir H. Mama v. Flora Sassoon*,[295] the Privy Council *inter alia* held that:

"*In a series of decisions it was consistently held that just as its power to give damages additional was to be exercised in a suit in which the Court had granted specific performance, so the power to give damages as an alternative to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible*."

For sale of land cases, wherein the specific performance becomes impossible subsequently, then the court may move ahead to award compensation accordingly, to the amount it deems just and encompasses the entire costs.[296]

Measure of compensation

The measure of compensation is determined according to the principles of section 73, which grant payment for any loss or injury caused to the party due to breach of contract and such should be foreseeable one, remote and indirect losses are not included. The essence is mitigation of losses, the section cannot be utilized to grant compensation whereby, and losses could have been mitigated.

The duty of mitigating losses and exclusion of indirect and remote losses has tapered the broad ambit of section 73, costs, profits belong to direct losses, and indirect ones would entail the costs incurred after knowledge of breach.[297] When dealing with breach of contract, the courts have been of the view that compensation cannot be granted for the loss of bargain, if it is indirect.[298] Courts should not merely dismiss the claim for compensation for loss of bargain, but must in fact assess and see whether they arose naturally arose in usual course of things from the breach; and in an ordinary case it would be difficult to hold otherwise.

It is important to understand the distinction that exists between damages and compensation; they are not equivalent to each other,[299] however, it is possible for compensation to be measured by the same rule as damages[300] in an action for breach of contract, this was held by the Calcutta High Court.[301]

Bar on suit for compensation

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[295] *Supra Note* 80
[296] *Supra Note* 123; *Mohamad Abdul Jabbar & Others v. Lalmia & Others*, A.I.R (34) 1947 Nagpur 254
[297] *McDermott International Inc. v. Burn Standard Co. Ltd*., (2006) 11 SCC 181.
[298] *Bain v. Fothergill*, (1874) L.R. 7 [House of Lords 15]
[299] *Dixon v. Calcraft*, (1892) 1 Q.B. 458 (463), Lord Esher
[300] *Skinners' Co. v. Knight*, (1891) 2 Q.B. 542, L.J Fry
[301] Mahamed Mozaharal Ahad v. Mahamed Azimaddin Bhuinya, AIR (1923) Cal 507

As per section 24,[302] the dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach. This stems from the principle that for compensation to be granted there is need for the main contract to be valid and for the claim for specific performance to be upheld by the courts.

<u>Possession; Partition</u>

Section 22(1)(a) allows a party in a suit of specific performance for transfer of immovable property, to ask for possession, or partition and separate possession, of the property in addition to such performance of the property, the court can grant such relief, notwithstanding anything contained in the Civil Procedure Code. On a prima facie reading, this decree can be awarded if the plaintiff in his suit specifically claims for its grant by the court,[303] otherwise it cannot be granted, however, this does not curtail the right of the party to amend it into the plaint or claim it subsequently in an execution suit.[304]

When interpreting and applying section 22, the Supreme Court opined that:

"*It may be seen that sub-section (1) is an enabling provision. A plaintiff in a suit of specific performance may ask for further reliefs mentioned in clauses (a) and (b) thereof. Clause (a) contains reliefs of possession and partition and separate possession of the property, in addition to specific performance. The mandate of sub-section (2) of Section 22 is that no relief under clauses (a) and (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed. Thus it follows that no court can grant the relief of possession of land or other immovable property, subject-matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is specifically prayed for*."[305]

Section 22 (2), puts restrictions on the power of the court to grant possession along with specific performance if it is not claimed,[306] this is to ensure complete adjudication of rights pertaining to immovable properties. However, when dealing with a property, where a co-sharer has appropriated it (a small portion in a larger property) and division is not practicable then possession and specific performance can be refused.[307]

Possession or partition can be granted in a suit in addition to main relief specific performance, the intention is to avoid multiplicity of proceedings, and the plaintiff may

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302 Specific Relief Act, 1963
303 *Ibid*, § 22 (2)
304 *Sunita Devi v Dinbandhu Shah*, AIR 2010 Jhar 151; *Krishnamurthy Gounder v Venkatakrishnan*, AIR 2012 Mad 105
305 *Adcon Electronics (P) Ltd v Daulat*, (2001) 7 SCC 698
306 *Babulal v. Raj Kumar*, AIR (1996) SC 2050
307 *Khanderao Subbarao Nadagir v Hulagavva*, AIR (2003) Kant 354

claim a decree for possession and/or partition in a suit for specific performance.[308] Even though strictly speaking, the right to possession accrues only when a suit for specific performance is decreed, indisputably such a decree for possession and/ or partition is prayed for in anticipation of the grant of prayer for specific performance of contract.[309]Section 22 is an enabling provision, and only amendment to be made in the plaint was to add a relief for possession necessitated.[310]

Conflicting views have been held, wherein the court has held grant of specific performance, recognizes the right merely but the right of property passes only with execution of possession,[311] but the predominant view has been that the right of possession and the other rights passes with the grant of specific performance,[312] possession can be claimed later as well in an execution suit as well.[313]

Importantly, a Court has no jurisdiction to entertain and try a suit for specific performance relating to an immovable property situated outside its own jurisdiction, because the relief cannot be entirely obtained through the personal obedience of the defendant under the proviso to Section 16 of the Code of Civil Procedure.[314] The Delhi Court opined this after examining the principles laid down by the Supreme Court in *Babu Lal*[315] and *Harshad Chaman Lal Modi*[316] and three judgments of Division Bench of the Delhi High Court in *Vipul Infrastructure Developers Ltd.,*[317] *Pantaloon Retail India Ltd.*[318] and *Splendor Landbase Limited.*[319]

The primary factor for consideration of the additional reliefs is contingent to a legitimate right for specific performance, existing and the claim of specific performance, succeeding and being granted, nonetheless, compensation can be granted in lieu of specific performance. If there exists a legitimate right the additional relief for delivery of possession is just a formality and even though, no specific prayer is made in the plaint and even the decree is silent about the delivery of possession, the Executing Court is empowered and bound to grant such relief. The Act does provide and vest with the parties

[308] *P.C.Varghese v Devaki Amma Balambika Devi*, (2005) 8 SCC 486
[309] *Babu Lal Vs. M/s. Hazari Lal Kishori Lal and Ors.,* (1982) 1 SCC 525
[310] *Ibid*
[311] *Hakim Enayat Ullah vs Khalil Ullah Khan And Anr.,* AIR 1938 All 432
[312] *Kartik Chandra Pal vs Dibakar Bhattacharjee*, AIR (1952) Cal 362; *Mohammed Ali Abdul Chanimomin vs Bisahemi Kom Abdulla Saheb Momin*, AIR (1973) Kant 131
[313] *Supra Note* 140 - *The word 'proceeding' in section 22 includes execution proceedings also*; *Supra Note* 105
[314] *M.K. Sharma & another v. Shri Sh Tek Chand & others*, 188 (2012) DLT 67
[315] *Supra Note* 140
[316] *Harshad Chiman Lal Modi v. D.L.F. Universal Ltd*., AIR 2006 SC 464
[317] *Vipul Infrastructure Developers Ltd. and Anr. v. Rohit Kochhar*, 2008 (102) DRJ 178 (DB)
[318] *Pantaloon Retail India Ltd. v. DLF Limited*, 2009 (107) DRJ 228 (DB)
[319] *M/s. Splendor Landbase Limited v. M/s. Mirage Infra Limited*, (2010) V AD (Delhi) 19 (DB)

the authority to amend the plaint and relinquish any claim or add any claim during the proceedings.[320]

Refund of earnest money

In the cases wherein the relief of partition or possession become inconvenient and are genuinely complex, then the courts have been vested with the power[321] to provide the plaintiffs relief of refund of the earnest money.[322] In one instance, a property was provided as security for a loan obtained and therefore specific performance, enforcing the sale could not be granted by the courts, the Court allowed for alternative relief of repayment of the loan amount due.[323] In an instance, a plaintiff, sought permission of the court for leave, to amend the plaint, to include a prayer for return of the money paid as advance with interest, such leave was granted as it was sought under section 22(2) and not Order 6, Rule 17, CPC.[324]

If an alternative relief has been prayed for, then there is no legal standard that dispenses his primary relief of specific performance, as the alternatives are prayed in addition to specific performance.[325] The plea of alternative relief of refund of earnest money and damages cannot by itself be a bar to claim the decree of specific performance.[326] In certain cases the contract provides for alternative reliefs like refund of sum with additional, such can be acceptable if it is not too onerous.[327] However, if the specific performance suit is denied due to invalid contract or lack of legal right or for being barred by limitation,[328] then the claim for alternative relief cannot subsist.[329]

It is stipulated that the prayer for possession, partition, refund of earnest money, etc., in a suit of specific performance, is in addition to specific performance and cannot prejudice the power of the court to grant compensation under section 21.[330]

LIQUIDATED DAMAGES AND SPECIFIC PERFORMANCE

Section 23 stipulates that if the parties to the contract have fixed the amount of compensation which would be payable in the event of default, this would not constitute any bar to the relief of specific performance. However, it is important to note that such specific performance should not be granted along with a decree to pay the sum mentioned

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[320] *Kalyanpur Lime Works Ltd. vs. State of Bihar and Anr*., AIR (1954) SC 165; *Girdhar Das Anandji and Anr vs. Jivaraj Madhavji Patel and Ors.,* (1971) PLJR 66
[321] Specific Relief Act, 1963, § 22 (2)
[322] *Sarita Dokania v Krishna Dey*, (2014) 13 SCC 522
[323] *Laxman Haraklal v Ukhaji Zinga Mahajan*, AIR 2011 Bom 159.
[324] *Rajesh Kumar Choudhari v Darshansingh Sardar*, AIR (2011) Chh 179
[325] *Annapoorani Ammal (Died) v Ramaswamy Naicker,* AIR (1990) Mad 361
[326] *Supra Note* 139
[327] *Dadarao v Ramrao*, (1999) 8 SCC 416
[328] *P.Muthusamy vs K.Arumugam*, AIR (2016) Mad
[329] *Supra Note* 156
[330] Specific Relief Act, 1963, § 22 (2)

in the contract.[331] It would be important for the court to assess from the facts of the case that compensation was fixed in order to secure performance and not to allow the defaulting party an option to pay compensation; the court may allow specific performance.

Illustration:

A contracts to grant B an under-lease of property held by A under C, and that he will apply to C for a license necessary to the validity of the under-lease, and that, if the license is not granted, A will pay B Rs10,000. A refuses to apply for the license and offers to pay B the Rs10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the license.

If a plaintiff is ready and willing to perform his part of the obligations in the sale of land, then it is the duty of the court to grant specific performance, even if a penalty clause exists.[332] Hence, upholding the essence that a provision of liquidated damages does not affect the rights of party and the power of the courts to grant specific performance of a contract. Section 23 contains comprehensive statement of the principles to be kept into consideration in construing a contract with a term specifying a sum of money to be paid for breach of the contract when such a breach occurs.[333] The Court in the case further stated that: "*the presence of a term in a contract specifying a sum of money to be paid for a breach of the, contract has to be construed Where payment is an alternative to carrying out the other terms of the contract, it would exclude, by the terms of the contract itself, specific performance of the contract to convey a property*."[334] Hence, it is necessary to examine the nature of the liquidated damages set depending on the facts and circumstances of the case.

Sir Edward Fry pointed out that the distinction between a strict penalty and liquidated damages for a breach of contract was important in common law where liquidated damages were considered sufficient compensation for, breach of contract, but, sums stipulated by way of penalty stood on a different footing. He then said "*But as regards the equitable remedy the distinction is unimportant: for the fact that the sum named is the amount agreed to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the Court from enforcing the contract in specie*."[335]

In the *M.L. Devender Singh* case, the following were held to be important considerations:

"*The question always is: What is the contract? is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of*

[331] Specific Relief Act, 1963, § 23 (2)
[332] *Manzoor Ahmed Magray v Ghulam Hassan Aram*, (1999) 7 SCC 703
[333] *M.L. Devender Singh & Others vs. Syed Khaja*, (1973) (2) SCC 515
[334] *Ibid*
[335] Sir Edward Fry's "*Treatise on the Specific Performance of Contracts*" (Sixth Edn. at p. 65)

this very act? Or, is it that one of the two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the very act, and thus carrying into execution the intention of the parties; if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative."

Hence it can be stated that Liquidated damages cannot be a bar to a suit of specific performance, the rights available under the Specific Relief Act, however, such right shall be subject to the considerations of the case by the Court.

MODULE IV: DAMAGES FOR BREACH OF CONTRACT

Introduction

India following the common law system, gives persuasive value to judgments by foreign courts, for the purpose of seeking guidance, for aspects wherein the Indian laws are silent. The Contract Act, that governs this law, is a colonial era law that is predominantly adopted from English law. The judiciary has made efforts to move away from archaic provisions and establish relevance of the laws with current times.

Breach of contract is one of the ways by which a contract can be discharged. In a very basic sense, breach refers to any action or inaction by a party that is in derivation from the obligations to which they agreed to under the contract, thereby causing loss or injury to the aggrieved party. Wherein, a breach is committed, Contract law allows for the aggrieved party to claim damages for the loss or injury so caused by the breach. The Indian Contract Act, 1872, uses the term compensation vis-à-vis for damages. It is noteworthy, that damages can be awarded to a party when they rightfully rescind a contract.[336]

NATURE OF THE REMEDY

The Oxford Dictionary defines Damages as, ‘financial compensation for loss or injury’. According to McGregor “*Damages are the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum which is awarded unconditionally*.”[337] According to Blacks Law Dictionary[338], “*It is an act which a court orders to be done, or money which a court or other tribunal orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person harmed may receive equal value for his loss, or be made whole in respect of his injury*.”

Thereby, the intent of damages is to restore the plaintiff of the injury or loss or damage so suffered that is a result of the breach of contract.[339] Damages is does neither too wide nor too vague a term to discern, the given context to which it is to apply can be derived easily to determine the loss or injury so sustained by the injured party.[340]

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[336] Indian Contract Act, 1872, § 75

[337] *Common Cause v. Union of India*, (1999) 6 SCC 667; *Broome v. Cassell & Co*., (1971) 2 All ER 187; Halsbury's Laws of England (4th Edition), Volume 12, Para 1102

[338] Blacks Law Dictionary 354 (4th Edn, 1968)

[339] R Yashod Vardhan and Chitra Narayan, *Pollock And Mulla: The Indian Contract and Specific Relief Acts* 1269 (Lexis Nexis, 2nd vol, 15th edn., 2017

[340] *Organo Chemical Industries v. Union of India*, 1980 SCR (1) 61

McGregor in his definition opines that it is the fundamental duty of the court to attempt and restore the defendant, this is important, as it points to what best the court can do and not merely monetary terms. *In Re The Medianna,*[341] Lord Halsbury observed as under:

"*How is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident...But nevertheless the law recognises that as a topic upon which damages may be given.*"

The law and various judicial precedents stipulate that the award of damages should be of just, adequate and reasonable nature,[342] with the intent of placing the aggrieved party in the position he would have been in had the contract not been breached.[343] When a contract is breached, it is discharged, and thereby vests new obligations on the breaching party, to make payment for the damages.

Illustration: A, an assignee of an author, had a publishing agreement with P. P failed to render accounts of royalties, which breach was held to entitle A to treat the contract as at an end. A remedy thereafter lay not in claiming royalty in respect of infringing copies, but in damages, which were the loss of business profits.[344]

It is important to differentiate between 'Damage' from 'Damages'. Damage refers to the injury, which one suffers owing to the default of the other, whereas, "Damages" are the pecuniary compensation given by process of law to a person for the actionable wrong that another has done him.[345] Damages may, on occasion, be awarded where the plaintiff has suffered no ascertainable damage: damage may be presumed.[346] Hereby, there are two main groups which the law divides damages into for purposes of calculation, pecuniary and non-pecuniary loss. Pecuniary loss can be computed (Loss of profits; damage to goods; loss of future earnings), whereas non-pecuniary is that, which cannot easily be ascertained (pain and suffering; and injury to reputation), it is substituted with money as far as possible. It is trite law, that damages should not be one through which the plaintiff is conferred with windfall[347] from what he actually suffered, as that would then defeat the principles upon which damages are based.

[341] (1900) A.C. 1300; *Fletcher v. Autocar and Transporters,* (1968) 2 Q.B. 322; *Parry v. Cleaner,* (1970) A.C. 1
[342] *R.K. Malik v Kiran Pal,* (2009) 14 SCC 1
[343] *Nait Ram v Shib Dat,* (1882) 5 All 238; *Motilal v Seth Jamnadas,* AIR (1936) Ngp 4; *Sorabji Dadabhai v B.N. Rly., Co Ltd,* AIR (1936) Pat. 393; B.*R. Herman v Mohatta v Asiatic Steam Navigation Co Ltd*, AIR (1941) Sind 146
[344] *Mishra Bandhu Karyalaya v Shivratanlal Koshal,* AIR (1970) MP 261
[345] *Supra Note* 12, pg. 1270
[346] Halsbury's Laws of England, Vol 12 (1), 4th Edn Reissue, 31 July, 1998, DAMAGES, para 802
[347] *MSK Projects (I) (JV) Ltd v State of Rajasthan*, (2011) 10 SCC 573

PREREQUISITES

The Supreme Court[348] whilst holding that nature of damages to be awarded in a case is simple to decipher, held that there are the following essentials of damages:

a) "*Detriment to one by the wrongdoing of another;*

b) Reparation awarded to the injured through legal remedies, and

c) *Its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often, not always, a punitive addition as a deterrent-cum-denunciation by the law.*"

When considering the grant of damages or not, Courts have generally considered the following aspects in a case:

1. Existence of a valid contract;

2. Breach of the contract, which amounts to discharge;

3. Actual loss;

4. Arising in usual course of things from the breach; and

5. Mitigation.

FUNCTION OF DAMAGES

The object of an award of damages is to give the plaintiff compensation for damage, loss or injury he has suffered.[349] The concept of restoring the plaintiff to the position he was had the breach not been committed or to put him in a position had the obligations been performed, is trite law and hails from the principle set out in *Robinson v. Harman*.[350] This is done with the intent to put the plaintiff in a position that he would be in had the contract been performed according to the terms of the contract and commensurate them,[351] more often than not.

It is clear that damages exist in a compensatory nature and cannot be punitive or retributory,[352] this is essential for the judiciary to keep in mind whilst determining the amount of the award. This stems from the principle that compensation is based on the loss

[348] *Supra Note 13*
[349] *Supra Note* 10 (*Common Cause v UOI*)
[350] (1848) 1 Ex 850
[351] *Anson's Law of Contract*, (28th Edition 2002) pg. 596
[352] *Rookes v Barnard*, (1964) AC 1129, 1221; *Broome v Cassell & Co Ltd*, (1972) AC 1027; *British Transport Commission v Gourley*, (1956) AC 185

plaintiff due to the breach of the contract and not of the profit gained by the defendant.[353] This view was further reiterated in *Surrey County Council v Bredero Homes Ltd*.[354]

Compensation for physical losses are more often than not seen in torts, but are a subject of contract too, wherein in certain cases, under a contract loss to person and property have been factored in for calculation of damages, for violation of privacy and comfort, even if it does not affect the value.[355] Damages for breach of contract are normally designed to compensate for the damage, loss or injury the plaintiff has suffered through that breach.[356] The essential basis for compensation is to restore the pecuniary loss, which naturally flows from the breach of the contract.[357]

The loss that is actually suffered by the promise is relatively, the one measure of damages in contracts.[358] This is a well-settled principle in law and practice that damages for breach of contract are to compensate the aggrieved party for the wrongful act and for all the natural and direct consequences of the wrongful act.[359]

The Court in *British Westinghouse Electric and Mgf. Co Ltd v. Underground Electric Railways Co of London Ltd*[360] held "*that as far as possible he who has proved a breach of a bargain to supply what he has contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed*." When considering the compensation the important issue is whether a particular loss was within the reasonable contemplation of the parties.[361] The fundamental concept of damages aims to place the aggrieved party in a position, as far as money can, in a position that he ought to have been had the contract been complied with.[362] Damages cannot be used as a means to punish the defendant regardless of how contemptible his action may have been.[363]

In *Addis v Gramophone Co Ltd*[364] the House of Lords held that, "*although the plaintiff might recover a sum representing his salary for the period of notice and the commission he would have earned during that period, his employers were not to be penalized in*

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353 *M Maniappa Pillai v I Anthonisami Mudaliar* (1950) Mad 697; *Tito v Waddell (No, 2*), (1977) 3 All ER 29
354 [1993] 3 All ER 705
355 *Anson's Law of Contract*, (29th Edition 2010) pg. 534
356 *Ibid*
357 Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Reliefs Acts*, Volume II (updated 14th edn, LexisNexis Butterworths), pg. 1158
358 *Ruxley Electronics and Constn. Ltd v Forsyth,* (1996) AC 344
359 *Trojan & Co v RMNN Nagappa Chettiar,* (1953) 4 SCR 789; referring to *McConnel v Wright,* (1903) 1 ChD 546
360 (1912) AC 673
361 *Kanchan Udyog Ltd v. United Spirits Ltd*, (2017) 8 SCC 237
362 *Monarch Steamship Co Ltd v. A/B Karlshamns Oljefabriker,* (1949) AC 196
363 *Supra Note* 28
364 [1909] AC 488 - *A was employed by G as manager of their business in Calcutta at a salary together with a commission on trade done. G wrongfully dismissed A without giving him the required 6 months' notice.*

damages for the humiliating and oppressive manner in which they had dismissed him." Therefore, reaffirming the view that the function of damages is compensatory in nature, with the object to ensure that he is compensated for the loss suffered or the loss, which he is likely to suffer.[365]

DIFFERENCE BETWEEN COMPENSATION AND DAMAGES

Compensation has a wider connotation, which encompasses payments made to a person in respect of some kind of loss or damage suffered due to reasons like acquisition of property by another party, or statutory violations, termination of employments, requiring the aggrieved party to be compensated.[366] However, when referring to damages in a strict sense they stem from actionable wrongs,[367] hence, compensation that is paid for losses arising out of breach of contract are known as damages.

Compensation on various occasions has been used without distinction to damages, enumerating the damages awarded by the Court. The Indian Contract Act uses the word compensation and not damages. Nonetheless, it is essential to point out that they are not the same, although, more often than not, the standards for ascertaining compensation has to be measured by the same rule as damages in an action for breach.

Compensation signifies that which is given in recompense, an equivalent rendered, the image of balancing one thing against another; it primarily signifies equivalence, and secondarily something given or obtained as an equivalent.[368] Whereas damages refer to the sum of money that is claimed or decreed to be paid as compensation for loss or injury sustained, the value estimated in money, for something lost or withheld.[369]

Damages thereby can be defined to mean nothing more than the compensation that the court determines according to the prevalent conditions and terms in a case wherein loss or injury has been endured by the aggrieved party[370] and also encompasses the money due under a contract for breach.[371] On the other hand, compensation means restitution, as this was intended by the legislature when they precluded exemplary and unforeseen damages from being claimed.

DIFFERENCE BETWEEN DAMAGES IN CONTRACT AND TORT

The term Tort is the French equivalent of the English word "*wrong*" and Roman term "*dilect*". Tort is derived from the Latin "*tortum*" meaning twisted or a crooked act i.e. a

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365 *Ghansiram v Municipal Board*, AIR 1956 Bhop. 65
366 *Supra Note* 12, pg. 1270
367 Halsbury's Laws of England, Vol 12(1), 4th Edn Reissue, 31 July, 1998, DAMAGES, para 815
368 *Supra Note* 4, pg. 1270
369 *Mohamed Mozaharal Ahad v Mahommad Azimaddin Bhuinya*, AIR (1923) Cal 507; *Phoolchand v Shesh Gir*, AIR (1956) Hyd 12
370 *S. Milkha Singh v NK Gopala Krishna Mudaliar*, AIR (1956) Punj 174
371 *Dhapai v Dalla*, AIR (1970) All 206 (FB); *Dhulipudi Namayya v UOI*, AIR (1958) AP 533

deviation from straight or right conduct. The law of Torts is not codified in India and still we follow the English common law. Some basic differences that exist between breach of contract rights and commission of a tort are:

Ground	**Contract**	**Tort**
1. Nature of right	Breach is an infringement of a right in person and lie a right available only against some determinate person or body and in which the community at large has no concern.	A Tort is a violation of a right *in rem* i.e., right vested in some determinate person, either personally or as a member of the community and available against the world at large.
2. Motive	Under contract law, the motive is immaterial, even if one did not intend to breach it but has; he becomes liable to pay such damages.	In torts, motive is held as a key ground for assessment of the wrong and the punishment thereof.
3. Duty	Privity of contract ensures that the duty owed is to the contracting parties only.	Anybody whose right has been violated by the action or in action of the wrongdoer, is entitled to claim.
4. Remedy	Under Contract law various remedies like, injunction, specific performance and damages are available to the aggrieved party.	The remedy for the aggrieved parties is mainly damages and the injunction.

The basic difference that exists when dealing with damages in tort versus contract, is that under contract law the damages can be liquidated (already ascertained) or unliquidated (nonetheless, can be ascertained through the data *per se*) whilst under tort law, the damages are always unliquidated, this is due to the nature of torts. Violations in tort are more general to the public, whereby in contract it is of the stipulations set out by the parties themselves.[372]

[372] *Jay Laxmi Salt Works Pvt Ltd v State of Gujarat*, (1994) 4 SCC 1

Damages in the case of torts are usually fixed by law and judicial precedents, whereas, for contracts it is fixed by the parties themselves.[373] An important factor is the nature of the claim made, if it is made arising out of the relationship of the parties independent from the contract, then it lies in tort. On the other hand if it is made and becomes contingent on proof of contract, then action does not lie in tort.[374]

Generally, the function of damages in contract is to put the affected party in a place as though the breach did not occur, whereas in torts it factors in multiple areas and aspects like feelings, or for his mental distress, anguish, annoyance, loss of reputation or social discredit.[375]

BREACH OF CONTRACT

Breach of contract refers to any act by a party or any failure to act by a party that contravenes the obligations set out between them under a valid contract. According to Black Law Dictionary: - Breach of contract means failure to live up to the terms of a contract.

A breach of contract happens when one party discharge his obligations, by his own act and makes it impossible to perform his obligations under it and thereby causes loss or injury due to non-performance or partial performance of key obligations.[376]

A party is liable to pay damages only if there exists a valid contract;[377] and is not liable to pay damages in cases of void[378] or unlawful[379] agreements. To award remedies for breach it is pertinent for the courts to determine the exact terms of the contract, wherein the contract is not concluded, and no relief for damages or breach can lie.[380]

When dealing with breach it is important to stipulate that breach does not instantaneously vest an obligation on the breaching party to pay damages nor does it entitle the aggrieved party to claim from the other. The only right with the party aggrieved by the breach of contract has is the right to sue for damages and that is not an actionable claim.[381] In one instance, where a tenderer did not deposit the earnest money as stipulated for in a contract

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[373] *Ibid*

[374] *Rajkot Municipal Corpn v Manjulben Jayantilal Nakum*, (1997) 9 SCC 552

[375] *Ghaziabad Development Authority v UOI*, (2000) 6 SCC 113

[376] Shepherd and Wellington, *Contracts And Contract Remedies*, (4th ed., 1957) 805; *Chowgule & Co. Ltd. V. Rizvi Estates and Houses (P) Ltd*., (1997) 4 Bom CR 648; *U.P. State Sugar Corp. v. Mahalchand M. Kothari*, AIR (2005) SC 61

[377] *Bibi Durga Devi v Shiv Ram* AIR 1932 Lah 148; *EV Ram & Co v John Bhatt & Co Ltd* AIR 1928 Mad 873; *National Coop Sugar Mills Ltd v Albert & Co* AIR 1981 Mad 172; *BNW Rly v Baij Nath Prasad* AIR 1927 All 837

[378] *Tarsem Singh v Sukhminder Singh*, (1998) 3 SCC 471

[379] *Koteswar Vittal Kamath v K Rangappa Baliga & Co* AIR (1969) SC 504; *Supra Note* 30

[380] *Vedanta Ltd v Emirates Trading Agency LLC*., (2017) SCC OnLine SC 454; *EV Ram & Co v John Bhatt & Co Ltd*, AIR (1928) Mad. 873

[381] *Union of India v. Raman Iron Foundry*, AIR (1974) SC 1265 at pg. 1273

for purchase of goods and therefore he could not blame the defendant for non-delivery of the goods.[382]

A breach must be in relation to an express agreement entered into by and between the parties[383] and it should be such that it discharges the contract in its entirety. Whereby a valid contract (one that is not void or voidable at law or liable to be set aside in equity) is dissolved, at the choice of one of the parties because the other party has not complied with an express obligation or has committed a breach going to essence of the contract,[384] the contract is determined and the party, in default, is liable for damages for its breach.[385]

The court can award no damages without coming to any conclusion about breach, merely on the ground that the defendant has been profited by the contract.[386] The parties to a contract cannot, on their own, determine and assess whether or not there has been a breach, it must be adjudicated,[387] and must be proved.[388] The law is well settled that a claim for damages does not give rise to a right until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority.[389]

The breach must be of an essential condition or warranty or stipulation under a contract, thereby directly affecting its basis. Assessing whether a particular condition or warranty is an essential term to the contract, can be determined from the intention of the parties to the contract. The basis would be whether or not that promise is of such importance that he would enter into the contract only with a complete assurance of its fulfilment by the other party, to whom it ought to have been apparent.[390] Wherein there are no express terms, the matter becomes one of construction[391] but the essential factor persists, that the breach must be of an essential term and not an *ipse dixit* term. In *A.S. Motors Pvt Ltd v UOI*,[392] it was held by the Supreme Court whereby in a contract it was expressly stipulated and provided that contractor shall not charge fee in excess of the prescribed rate, was held as an essential condition. Also, whereby it was provided for in a contract that the parties would personally inspect the samples of the ore through their respective agents, the seller could not forgo this stipulation and have it analysed by his agents only.[393]

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[382] *M. Paramasivam v Food Corp. of India*, AIR (1984) AP 124 at 127
[383] *Managing Director, Army Welfare Housing Organisation v Sumangal Services Pvt Ltd*, (2004) 9 SCC 619
[384] Indian Contract Act, 1872, § 39
[385] *Madhya Pradesh Industries Ltd v Rai Bahadur Shriram Durga Parshad Ltd*, AIR (1971) SC 1983
[386] *Pulavarti Sitaramamurty v Bangaru Sobhanadri*, (1950) 2 Mad LJ 505
[387] *J G Engineers Pvt Ltd v UOI*, AIR (2011) SC 2477
[388] *P Radhakrishna Murthy v NBCC Ltd*, (2013) 3 SCC 747; *Draupadi Devi v UOI*, (2004) 11 SCC 425
[389] S.C. Mitra, "*Law Relating to Damages, Claims and Compensation*", ed. 2nd (2013), at.p.25
[390] *Tramways Advertising Ply. Ltd v Luna Park* (*NSW) Ltd*, (1938) SR (NSW) 632 at 641
[391] *Bentsen v Taylor Sons & Co.*, (1893) 2 QB 274 at 280–281
[392] (2013) 10 SCC 114
[393] *Supra Note* 58

Breach of contract entails two types of breach mainly[394], actual and anticipatory. An anticipatory breach occurs where a party clearly shows its intention to break a contract.[395] However, oral or written proof is not required, and failure to perform an obligation in time can result in a breach. Therefore, an anticipatory breach occurs either when there is renunciation of a party of his liabilities under the contract or the party by his own act makes the performance of the contract impossible.[396] On the other hand actual breach occurs, whereby a condition, which is so important, that when one party breaches it, it allows the other party to declare that the contract is at an end and sue for damages.[397]

EFFECT OF TERMINATION

In many instances, contracts contain express provisions that provide for termination and the method for effecting such termination. It is important to note that the termination if done within the terms agreed shall not give rise to a breach, however it is important to assess this on a case-to-case basis. For example, if a contract provides for termination, which can be invoked by either party through the issue of notice, the only relief that is available to the aggrieved party would be damages for the notice period.[398]

The important aspect is that the termination must be done through the agreed terms and stipulations of the parties; otherwise, this limitation shall not apply when assessing the damages. As it is held that whereby a party has terminated whilst complying with the express terms providing for such termination, the other party shall only be entitled to damages up to date of termination but not for the benefit gained by the defendant.[399] However, when the contract, stipulates for means to terminate the contract (like notice), such must be complied with, otherwise it would make the party terminating the contract liable for breach and obligate them to pay damages.[400]

EXCLUDING RIGHT TO DAMAGES

A contract may contain, within itself, the elements of its own discharge, in the form of provisions, express or implied, for its determination in certain circumstances, e.g. a contract may be made by the parties, subject to a condition subsequent. They may agree that, in the event of the fulfilment or non-fulfilment of a certain condition or upon the occurrence of a certain event, they are to be mutually discharged from their obligations.[401]

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[394] Avatar Singh, *Contract Act & Specific Relief Act*, 948 (12th ed., 2017)
[395] *Supra Note* 57
[396] *HFCL BEZEQ Telecom Ltd v UOI*, (1997) 69 DLT 317
[397] *Poussard v Spiers & Pond*, (1876) 1 QBD 410
[398] *Indian Oil Corp Ltd v Amritsar Gas Services*, (1991) (1) SCC 533
[399] *Financings Ltd v Baldock*, (1963) 2 QB 104; *Charterhouse Credit Co Ltd v Tolly*, (1963) 2 QD 683
[400] *Bombay Housing Board v Karbhase Nath & Co,* AIR (1975) SC 763; *M.S. Kailasananda Sarma v President of District Board*, AIR (1928) Mad. 211
[401] *Supra Note* 12, pg. 1263

Parties to a contract can, and usually do, exclude liability for certain types of losses, which may be suffered by each or either party, or limit the amount of their liability pursuant to such loss.[402] As per the contract law of the country, parties have freedom in terms of stipulating and creating special rights, obligations and the measure for damages in the event of a breach.[403]

There is no express statutory bar on contracts that provide for limiting or exclusion of damages, however based on section 23 (Indian Contract Act, 1872) and the Supreme Courts decision,[404] it was held that wherein it is certain that there was unequal bargaining power, it will not enforce any unreasonable or unconscionable clauses in a contract. Wherein, the fundamental duty of a party in the contract is to carefully transport a parcel and it charges for that service, it cannot be entitled to exclude or limit damages by virtue of a clause.[405]

The Delhi High Court[406], when dealing with the issue of excluded damages, which otherwise were entitled to the party by virtue of section 73, opined that:

1. *Clauses which bar and disentitle a contractor from claiming damages, which it is entitled to claim by virtue of Sections 55 and 73 of the Contract Act, are void by virtue of Section 23 of the Contract Act.*
2. *A law, which is made for individual benefit, can be waived, but when such law includes a public interest/public policy element, such rights arising from the law cannot be waived because the same becomes a matter of public policy/public interest.*
3. *According precedence to the sanctity and binding nature of contracts over the entitlement of a party to breach the contract by virtue of clauses with no remedy to the aggrieved party, is a matter of public policy.*
4. *To permit a clause that has the object of defeating the contract itself is a matter of grave public interest and defeats the very basis of existence of the contract.*
5. *Clauses such as the one in the present case would be void under Section 23 of the Contract Act, as they are violative of public interest and public policy.*

Furthermore, if there is an exception to limitation, e.g. misconduct, then if the party claiming such limitation is guilty of misconduct then he is not entitled to such exclusion.[407] The Madras High Court also refused to enforce a clause limiting the liability

402 *Bharathi Knitting Co. v DHL Worldwide Express Courier*, (1996) 4 SCC 704; *State of Jammu & Kashmir v Dev Dutt Pandit*, AIR (1999) SC 3196
403 *Maharashtra State Electricity Board v Sterilite Industries*, (India), AIR (2001) SC 2933
404 *Central Inland Water Transport Corporation. v. Brojo Nath Ganguly Brojo Nath Ganguly,* (1986) 3 SCC 15
405 *Supra Note* 74
406 *Simplex Concrete Piles (India) Limited v. Union of India,* ILR (2010) II Delhi 699
407 *Simplex Infrastructure v. Siemens Limited*, (2015) 5 Mh.L.J. 135

of a dry cleaner, which was printed on the reverse of the bill handed over to the customer, to 50% of the market price or value of the articles in case of loss.[408]

KINDS OF DAMAGES

The Courts to determine the losses of the party and based on that grant the kind of damages most feasible to circumstances of the case. The Indian Contract Law, provides for the following kinds of damages:

1. *General*

   General damages refer to those losses that naturally arise out of usual course of things following the breach of contract.[409] Also known as direct damages, as they result directly from the breach. This is the most basic type of damages that are awarded by courts, when dealing with loss or injury arising out of a contract. The duty of mitigation is placed on the plaintiff as well, to ensure and assess whether the applicant has been equitable in his conduct. This hails from the concept and principle of equity.

   General damages usually encompass those losses or injuries, which are incapable of being quantified. For example, damages for harm to reputation in actions for defamation and damages for pain and suffering in actions relating to personal injury. When pleading general damages, the plaintiff, need not have to extensively prove the loss, it should merely be arising from the natural and probable consequences of the wrong done and it should merely be proved that the loss was sustained and attempt to quantify it.[410]

2. *Special*

   Special damages are those, which do not arise naturally out of the defendant's breach, and are recoverable only where they were in the reasonable contemplation of the parties at the time they made the contract.[411] Also known as indirect damages, as they are connected but do not directly arise out of the breach.

   When dealing with special damages it is pertinent to understand that these are those losses, which ought to have been within the contemplation of the parties when contracting.[412] For example, if they had been notified by one party to the other, that there exist special circumstances that are contingent upon the contract between the parties. It is pertinent for special damages to be proofed and backed

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[408] *Lily White v. R. Munuswami*, AIR (1966) Mad 13

[409] Indian Contract Act, 1872, § 73

[410] *The Forward Foundation, A Charitable Trust & Ors., vs. State of Karnataka & Ors.*, MANU/GT/0075/2016 at para 51

[411] *India General Navigation and Rly Co Ltd v Eastern Assam Co Ltd,* AIR (1921) Cal 315

[412] Avatar Singh, *Contract Act & Specific Relief Act*, 467 (12th ed., 2017)

by evidence, before the court may award them.[413] The defendant could derive the knowledge of the special circumstances through the plaintiff or any other source[414] and even where it could be foreseen by a reasonable man with the requisite knowledge he possesses, such would entitle the plaintiff to special damages.[415]

Illustration: Whereby A fails to supply certain machinery at a specified date for a specified price to B and B has to buy the machinery at a higher price and is also unable to perform a contract he had entered into with another person and is required to compensate such person, B is entitled to receive as compensation the higher amount he had to pay for the machinery but not the compensation he had to pay to the other person as he had not informed A that he had entered into that contract.[416] Examples of special damages could be loss of business opportunities, profits or harm to business reputation or loss to operating revenues or harm to product and properties.

As the essence of special damages hails from the prevalence of a special circumstance, it is held that damages cannot be recovered wherein the defendant was not aware of the special circumstance.[417] Furthermore, a logistics company lost the consignment that he was supposed to deliver in Vancouver the, plaintiff claimed damages and loss of profits that could be gained from the mill, the court awarded damages merely for the loss of goods.[418]

However, when the parties know the special circumstances to a contract, then there is no need to communicate them and if they do breach, shall be liable for the subsequent losses that are so incurred.[419] It was held by CJ Cockburn that – "*the principle is now well-settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or the circumstances are known to the carrier, from which the object ought in reason to be inferred, so that the object may be taken to have been in the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object*."[420]

The prerequisites to a claim of special damages are –

- Foreseeability;
- Arises out of the breach of the contract, albeit indirectly; and
- Quantifiable.

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[413] *VIACOM 18 Media Pvt. Ltd. vs MSM Discovery Pvt. Ltd*, 2010 VII AD (Delhi) 45
[414] *Supra Note* 84
[415] *State of Kerala v K Bhaskaran* AIR 1985 Ker 49
[416] *Supra Note* 82, Illustration (k)
[417] *Home v Midland Railway Co.*, (1873) LR 8 CP 131
[418] (1868) LR 3 CP 499
[419] *Simpson v London & North Western Railway Co.*, (1876) LR 1 QBD 274
[420] *Ibid*

Only such loss is recoverable that is reasonably foreseeable by the parties to a contract, due to the knowledge being with the defendant.[421] In a claim of special damages it is pertinent to explicitly claim it[422] and mere acceptance of guilt by the defendant is not sufficient, it is upon the plaintiff to prove that the loss has so occurred and quantify such loss.[423]

Difference between special and general damages[424]

- Definition – general damages are those, which arise naturally and in the normal course of events, whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they were not beyond the reasonable contemplation of the parties;

- Liability – for general damages it relates to those that are arose out of things ordinarily following the breach, whereas, for special damages it arose of special circumstances due to the breach, within reasonable contemplation of parties;

- Evidentiary – general damages when dealing with merely within the course of things after the breach, however it is difficult to quantify it. The courts quantify it based on the case. Whereas, special damages are those losses which can be calculated in financial terms; and

- Claim – Special damage refers to those losses which must be specifically pleaded and proved by evidence, and particulars of the special damage claimed must be specified in the plaint, whereas general damage is that which will be presumed to be the natural or probable consequences of the wrong complained.

3. *Nominal*

In the event that there has been a violation of a right or breach of a valid contract but have not caused any real and significant damage then the court may award nominal damages in the case, by virtue of its verdict that legal rights were violated.[425] When the defendant is found liable for breach of contract, the plaintiff would be entitled to nominal damages even if no actual damage were proved.[426]

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[421] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*, (1949) 2 KB 528 (CA)
[422] *Chief Secy, State of Gujarat v Kothari & Associates,* (2003) 1 GCD 372 (Guj)
[423] *Shipping Corp. of India Ltd v Bharat Earth Movers Ltd*, (2010) 2 MWN (Civ) 1
[424] Halsbury Laws of India Volume 9 Page 16, cited by *Supra Note* 83
[425] *Arjunsa Raghusa v Mohanlal Harakchand,* AIR 1937 Nag 345 (difference between contract price and market price not proved); *W Jayaraghavan v Leo Films,* AIR 1948 Mad 442; *Pravudayal Agarwala v Ram Kumar Agarwala,* AIR 1956 Cal 41
[426] *Supra Note* 12, pg. 1279

There is no particular section, however, the requisite conditions for granting nominal damages are:

i. There is a breach of contract;

ii. No loss actually caused but a right is violated;[427]

iii. Proof of loss or means of ascertaining the loss are not possible;[428]

iv. The wrongful act has been committed by the defendant however due to no fault of the plaintiff[429] or any external event;[430] and

v. There is a prima facie case towards infringement of his legal right,[431] even very small amounts can be awarded[432] and not be of a significant sum.[433] Nominal damages have been defined as a sum of money that may be spoken of, but that has no existence in point of quantity, or "a mere peg on which to hang costs.[434]

However, the fact that the buyer sustains no actual loss from the seller's failure to deliver the goods is no ground for awarding merely nominal damages to the buyer.[435] Thereby nominal damages are awarded when there is an infraction of a legal right, and though it gives no right to any real damages, yet gives the right to a verdict because of the infringement.[436]

4. *Substantial*

There are many authorities, which establish that substantial damages can be claimed where a breach is proved even though the calculation of damages is "*not only difficult but incapable of being carried out with certainty or precision*."[437]

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[427] *Clifton v Hooper*, (1844) 6 QB 468; *Columbus Co Ltd v Clowes*, (1903) 1 KB 244

[428] *Erie County Natural Gas and Fuel Co Ltd v Samuel S Carroll*, (1911) AC 105 (PC); *Tai Hing Cotton Mill v Kamsing Knitting Factory*, (1979) AC 91 at 106

[429] *Hiort v London and North Western Rly. Co*, (1879) 4 Ex D 188 (CA); *Sanders v Stuart*, (1876) 1 CPD 326

[430] *Grant Smith and Co and McDonnell Ltd v Settle Constn and Dry Dock Co*, AIR 1919 PC 85

[431] *Surrey County Council v Bredero Homes Ltd*, [1991] 3 All ER 705

[432] Halsbury's Laws of England, Vol 12(1), 4th Edn Reissue, 31 July 1998, DAMAGES, para 813

[433] *Gambhirmull Mahabirprasad v Indian Bank Ltd*, AIR 1963 Cal 163; *Municipal Committee v Harda Electricity Supply Co Pvt Ltd*, AIR 1964 MP 101

[434] *Beaumont v Greathead*, (1846) 2 CB 494 at 499 per Maule J

[435] *Ismail Sait & Sons v Wilson & Co*., (1918) 41 Mad 709

[436] *Mediana (Owners) v Comet (Owners)*, (1900) AC 113

[437] *Supra Note* 12, pg. 1280

For award of substantial damages it is necessary for the extent of breach to be stated and a failure to perform the contract on one side.[438]

Illustration: Whereby B refuses to accept goods sold to him and then A thereafter sells it to a third party on the same terms, thereby making the same profit. Then A would be entitled to nominal damages if the demand doesn't exceeds the supply of similar goods; but if the supply doesn't exceed the demand then only will A be entitled to recover his loss of profits on the defendants contract.[439]

When there is partial breach and the extent is uncertain, it is upon the plaintiff to prove that his financial condition has deteriorated due to the actions of the defendant, and then only nominal damages can be awarded.[440]

It has been seen that the courts in India more frequently adopt the principle of granting substantial damages even in cases of aggravated wrongs, and in case of failure to prove damage that can be measured in money, award nominal damages.[441] Besides where a person has suffered injury in respect of his social position and estimation, substantial damages are awarded notwithstanding that he may not have sustained a pecuniary loss or physical injury by the act complained of.[442]

5. *Aggravated & Exemplary*

Courts have awarded these in the instance whereby there is gross misconduct by the defendant; it does not merely take into the extent of damages but factors in the defendants conduct in the breach and/or performance of the contract. These are:[443]

i. Aggravated damages – are compensatory in that they compensate the victim of a wrong for mental distress, or injury to feelings, in circumstances in, which that injury has been caused or increased by the manner in which the defendant committed the wrong, or the defendant's conduct subsequent to the wrong; and
ii. Exemplary damages – are intended to make an example of the defendant; they are punitive and not intended to compensate the plaintiff for any loss, but rather to punish the defendant.[444]

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[438] *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd,* (1938) 61 CLR 286 at 301; referring to *Chaplin v Hicks*, (1911) 2 KB 786 at 791
[439] *Charter v Sullivan*, (1957) 2 QB 117; *WL Thompson Ltd v R Robinson (Gum Makers) Ltd,* (1955) ChD 177
[440] Halsbury's Laws of England, Vol 12(1), 4th Edn Reissue, 31 July 1998, DAMAGES, para 980
[441] *Keshob Lai Nag v. Jhanendra Nath*, (1914) 24 Ind Cas 538
[442] *Bhyran Prasad v. Isharre*, 3 NW 313
[443] Halsbury's Laws of England, Vol 12(1), 4th Edn Reissue, 31 July 1998, DAMAGES, para 811

However, predominantly these types of damages are awarded more often than not, in torts, wherein the intent takes precedence,[445] but if there is elements of fraud, malice then the punitive damages may be awarded.[446] This is because the intent of contractual remedies is to put back into place and recompense whereas in torts it is with the intent to punish.[447]

The English[448] and Indian Courts have been very strict towards award of such damages as the principal view is that damages should not be of a punitive or in the nature of a reward.[449] The English courts in the case of *Rookes v. Barnard*,[450] laid down the considerations and situations wherein exemplary damages may be awarded by the courts:

i. Oppressive, arbitrary or unconstitutional actions by the servants of government;

ii. Where the defendant's conduct was 'calculated' to make a profit for himself; and

iii. Where a statute expressly authorises the same.

Despite the nature of aggravated damages being more or less compensatory and exemplary damages being punitive, they cannot be awarded the Indian contract law, as there is no relevance of intention u/s 73 of Indian Contract Act.

According to Halsbury’s Laws of India:[451]

“*The Indian courts have been reluctant to award punitive damages and the view taken is that if the offender has to be punished then recourse must be had to the penal law. However, courts in cases have awarded exemplary damages wherein there is -*

- *Breach of duty by public functionaries, to protect the fundamental rights of the citizen; or*

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444 Nilima Bhadbhade (ed.), Pollock & Mulla, The Indian Contract Act and Specific Relief Acts, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1173; See also, *Organo Chemical Industries and Another. v. Union of India and Others*, (1979) 4 SCC 573

445 *Addis v. Gramaphone Co. Ltd*. (1909) AC 488; *Ghaziabad Development Authority v. Union of India & Another* (2000) 6 SCC 113

446 *Sheikh Jaru Bepari v. AG Peters*, AIR (1942) Cal 493; *Gayatri Balaswamy v. IGS Nocasoft Technologies Ltd*., 2015(1) ArbLR 352(Mad)

447 *Sikka Papers Ltd. v. National Insurance Corporation Ltd*., (2009) 7 SCC 777

448 *IBM United Kingdom Holdings Ltd & Another v. Dalgleish & Ors*., (Rev 1) [2015] EWHC 389(Ch)

449 *Kerala State Road Transport Corporation Rep. by the Managing Director v. Feethambaran*, 1994 (2) KLJ 646 (para8); *Bharat Sanchar Nigam Limited v. Reliance Communication Ltd*., (2011) 1 SCC 394

450 [1964] AC 1129; *Supra Note* 113

451 Volume 9 page 23; *Supra Note* 83 at para 53

- *For misfeasance in public office because it is an accepted principle and oppressive, arbitrary or un-constitutional action by the government or its servants calls for exemplary damages.*

Awards of exemplary damages must, however, be made sparingly. If official power has been exercised in a bona fide manner, exemplary damages should not be awarded despite the fact that unintended injury is caused to someone. Exemplary damages may also be awarded in cases where the defendant has calculated to make a profit for himself, which may exceed the compensation payable to the plaintiff, and this extends to cases where the defendant is seeking to gain some object at the plaintiff's expense."

6. *Liquidated and Unliquidated*

Section 73 deals with unliquidated damages, which are those, that the court quantifies or assesses the damages or loss. On the hand, Section 74 provides for liquidated damages, these are those types of damages that have been agreed to and fixed by the parties to the contract in question. It is possible that the parties have fixed an amount as liquidated damages for a specific type of breach only; then the party suffering from other type breach may sue for the unliquidated damages arising from such breach.[452]

If a sum of money is previously agreed upon by the parties to a contract, will be paid, to either party, in case of breach of such contract, whether or not actual damages is proved to have been caused thereby, it is called liquidated or stipulated damages which the party complaining of the breach is entitled to recover.[453]

Granting unliquidated damages is to compensate for the breach of a valid contract. The court does so with the intent to recompense the plaintiff for the loss suffered and put him in a position as though the breach had not been committed and aim to compensate the plaintiff as far as possible and not penalise the defendant.

MEASURE OF DAMAGES

The "measure of damage" or "measure of damages" is concerned with the legal principles governing recoverability, based on considerations and contemplations of the law.[454] The assessment or quantum of damages is distinct from measure of damages. Measure of damages presents the principles upon which the quantification of damages rests.[455] The general rule that damages are compensatory in nature is nevertheless only a starting

[452] *Steel Authority of India Ltd v Gupta Brother Steel Tubes Ltd*, (2009) 10 SCC 63; *Aktieselskabet Reidar v Arcos*, (1927) 1 KB 352

[453] Arnold on Damages, (2nd Ed.) pg. 4

[454] *Supra Note* 12, pg. 1282

[455] L.L. Fuller and Willian R. Perdue Jr., '*The Reliance Interest in Contract Damages*' (1936) 46 Yale Law Journal 52

point[456] and to ensure that this is kept intact, it is necessary for measurement to be done using precise principles.

The Supreme Court when dealing with the question concerning measurement opined:

> "*Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation, which is the pivotal consideration.*"[457]

According to Fuller & Perdue,[458] there are three key principles when considering the measurement of damages, these are: *firstly,* the expectation principle, which holds that damages following breach of contract should make the plaintiff as well off as he would have been had the defendant performed her promise; *secondly,* the reliance principle, which holds that damages for breach should make the plaintiff as well off as he would have been had the promisor never made her promise; and *thirdly,* the restitution principle, which holds that damages for breach should require the defendant to return any benefit conferred on her by the plaintiff as a result of the promise. Under a contract for the sale of goods the measure of damages upon a breach by the buyer is the difference between the contract price, and the market price at the date of the breach.[459]

It is well established that the intent of expectation damages for breach of contract is based on the principle of *restitution in integrum,* basically to put the party in the place they would be had the contract been performed.[460] For the purposes of quantification, there are two aspects that must be considered value (advantage that is expected) and cost (price to be paid in achieving the value).[461]

Expectation Measure

It is not a far-fetched principle for the profits lost to be an important aspect when measuring the damages that are to be incurred, that the damages will be assessed by reference to the claimant's 'performance' or 'expectation' loss, consisting of what would have been received had the contract been duly performed.[462] The rationale of this measure is that the plaintiff had entered into a contract with an expectation that would be accrued in the event the breach had not occurred. The step further that contract law goes is it allows aggrieved parties to be able to claim for the loss of the benefits that they would be

[456] *Anson's Law of Contract*, (29th Edition 2010) pg. 539
[457] *R.K.Malik v Kiran Pal,* (2009) 14 SCC 1
[458] *Supra Note* 128
[459] *The Andhra Pradesh Mineral Development Corp Ltd v Pottem Brothers*, (2016) 4 Andh LD 354
[460] *Robinson v Harman*, (1848) 1 Exch 850, 855
[461] "*The Valuation of Property",* (1937) 19, cited in Farnsworth, "*Legal Remedies for Breach of Contract*", (1970) 70 Colum L Rev 1145
[462] *Supra Note* 128

able to get had the performance happened. This goes beyond the claim of loss of profits, which is more or less established.

The protection interest basically stems from the principle of being able to monetarily restore the plaintiff as far as possible. Hence, there are two aspects that flow from the interest of expectation[463]:

i. Fulfillment of promise – have the terms agreed to, abided by.

ii. Usage – these are applicable in contracts of sale, or wherein it was to receive a particular good or service; in those case the expectation of the profits or benefits from the usage of that particular article must also be factored in.

The expectation principle basically holds these two aspects in consideration in the measurement for award of damages to an aggrieved party so as to ensure that the expectations are protected and restored monetarily in the event of a breach. The protection of the expectation interest must be subject to the rules of remoteness and causation. For example in a contract that pertains to supply of machinery or a works contract, it is necessary that the loss of expected profit be compensated as the party contemplated that before entering to the contract.[464]

Speaking strictly in commercial terms, parties predominantly enter into contracts between the parties for a specific economic gain, even if it is the buying of equipment or construction of new office, there is an underlying gain that is expected to accrue if the promise is fulfilled and performance happens according to the terms. In the current volatile yet dynamic economic environment, the expectancy of fulfilling an obligation should be regarded as a kind of property and breach of such obligation, injury to property.[465] If a building contractor has finished half the structure when the property owner puts an end to the contract the contractor's declaration may list two items of damage: (1) expenditures actually made in performing or preparing to perform, and (2) the profit which he would have made on the whole contract.

Parties commonly use this to increase the quantum of sum that was receivable but due to the fact that it finds its basis in a principle of equity, courts accept it without regarding it or letting it tantamount to a penalty. It rests the protection accorded the expectancy on (1) the need for curing and preventing the harms occasioned by reliance, and (2) on the need for facilitating reliance on business agreements.[466] The party, in breach, cannot avoid

[463] Treitel, *The Law of Contract*, 10th Edn p 875
[464] *A.T. Brij Paul Singh & Bros v State of Gujarat*, AIR 1984 SC 1703; *MSK Projects (I) (JV) Ltd v State of Rajasthan*, (2011) 10 SCC 573
[465] *Supra Note* 128
[466] *Ibid*

liability simply because a true valuation of the innocent party's expectation interest is rendered impossible by the breach.[467]

Reliance Measure

When assessing the optimal method to assess and measure the appropriate quantum of damages whilst taking into account the considerations of law, the next feasible method seems to be factoring the costs that the aggrieved party has suffered in preparing to perform its part of the contract, which have been rendered futile due to the breach. In various contracts, predominantly reciprocating promises exist, there are certain costs and expenses that each party incurs from their end in hope of the contract being performed, and it is in the form of a negative interest.[468]

The protection of this interest becomes paramount for the sole reason that the law aims to compensate the party for the loss or injury undergone on reliance of this contract, those that are now rendered futile due to the breach.[469] The losses that have been factored in are those that a party incurs to ensure its performance. For example, in a contract of sale of goods, before delivery, a party may arrange for transport and storage, thereby incurring certain costs pending delivery; hereby, courts tend to factor in such costs as well to ensure parity and measure damages accordingly.

In some cases, the courts have looked into the cost that a party incurs to get into a contract and costs incurred after the breach. In a high value contract it is more often than seen that various legal, administrative and logistical investments are made, merely to ensure that the contract is signed. There is a significant cost that is undertaken to enter into such contracts; thereby it is within the interests of justice to ensure that such costs are factored in when measuring the total amount of damages.

The loss may include expenses incurred in preparation by the innocent party’s own performance, expenses incurred after the breach or even pre-contract expenditure but subject to remoteness.[470] When praying for costs, even if they are regarded to be exorbitant or unreasonable, it is merely necessary for the plaintiff to aver and prove that it was towards performance or entering into the contract.[471] If a party partly executes a contract in good faith based on documentation from the other party, he shall be entitled to certain costs that he incurred.[472]

Although traditionally the reliance measure has been seen as an alternative basis to the expectation measure, the ‘no escape from a bad bargain’ and the recovery of pre-

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467 *McRae v Commonwealth Disposals Commission*, (1951) 84 CLR 377
468 *Surrey County Council v Bredero Homes Ltd*, [1993] 3 All ER 705
469 *Supra Note* 140
470 *Kanchan Udyog v. United Spirits Limited*, (2017) 8 SCC 237
471 *Chitty on Contracts*, 28th Edn, paras 27–002, p 1270
472 *Food Corp of India v Babulal Agrawal*, AIR (2004) SC 2926

contractual expenses suggests that the reliance measure is better viewed as merely a method of assessing the claimant's expectation measure.[473] Reliance interests are retrospective in nature and much more easier to prove when compared to expectation interests. The purpose of protection of reliance interest is to put the plaintiff in the position in which he would have been if the contract had never been made.[474]

Need to choose

Although the rules as to damages seek to protect both the expectation and the reliance interests, the innocent party cannot ordinarily recover both and he must choose,[475] between expectation loss (loss of profit) and reliance loss, (expenses incurred in reliance of the promise), that would involve double counting. However, exception would be in situations wherein huge capital expenditure was incurred and the loss of profits exist, herein on a case basis courts may award damages.

Thus damages for expenses rendered futile by the breach cannot be sought at the same time as damages for loss of profit, since such expenses would have had to be laid out in order to earn the profit claimed. However, if the defendant can prove that the plaintiff would not gain the benefits he alleges had the contract been performed, then the plaintiff would be entitled to expectancy interests only.

Restitution Measure

Wherein the interest of a contracting party in reversing an unjust enrichment made by the other party at his expense is termed the "restitution interest". The understanding is that the law cannot allow for such unjust enrichment and furthermore, it would be a gross miscarriage of justice if it found that such was condoned by the courts. Hence making it important for the courts to factor in this in measuring damages, when and if prayed for by the plaintiff. Important for the court to consider it on case-to-case basis and ensure that there is proof, as this cannot be based on assumptions.

Restitution obligation may arise from breach of contract where a party to a contract makes a profit from its breach; in which case he may be obliged to surrender his profits.[476] Restitution may also follow the cause of the total failure of consideration.[477] This measure is basically in the reversal of an unjust enrichment by the defendant, through compelling the defendant to surrender the value of the benefits or economies gained.

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[473] *Supra Note* 129
[474] *Supra Note* 143
[475] *Kanchan Udyog Ltd v United Spirits Ltd,* (2017) 8 SCCC 237; *Gee v Lancashire and Yorkshire Rly., Co,* (1860) 6 H&N 211
[476] *Rowland v Divall*, (1923) 2 KB 500
[477] *Attorney General v Blake*, (1998) ChD 439; **affirmed in** *Attorney General v Blake*, (2000) 4 All ER 385 (HL)

In *Wrotham Park Estate Co v Parkside Homes Ltd*, the developer of land acquired land which was subject to a restrictive covenant for the benefit of an adjoining estate that the land shall not be developed "*except in strict accordance with a layout plan to be first submitted to and approved in writing by the vendor or his surveyors, such plan to indicate thereon the roads, sewers and drains to be constructed*".[478] Despite this covenant, the developer built houses on the land. This did not diminish its value. The owners were held entitled to damages calculated at 5% of the profits earned by the developer on the sale of the houses, which amount was stated to represent such "*sum of money as might reasonably have been demanded by the plaintiffs from (the defendant) as a quid pro quo for releasing the covenant*".[479]

Whilst, examples do insinuate that there is a similarity between the reliance interest and restitution interest, as if it were compensation for detrimental reliance.[480] Particularly when the concept from, which restitution hails, primarily looks to put the aggrieved party in a place as though the contract was performed.

In the case of *Attornery General v Blake*,[481] Court held that:

"*When a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring the defendant to account to the plaintiff, of the benefits he has received from the breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for a court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.*"

ASSESSMENT OF DAMAGES

The question of ascertaining the quantum of damages does not involve any question of legal recoverability, but merely of the assessment or calculation in terms of money or the non-pecuniary (viz., injury to reputation, mental pain and suffering) or pecuniary damage (loss of profit, cost of replacement etc.). Usually, the extent of actual damage sustained must be established with reasonable certainty, however, there is no absolute need to present direct evidence as to amount.[482]

<u>Costs</u>

Costs present a significant portion for the purposes of assessing the quantum of damages in a contract. Costs pertaining to expenditure for the entering into the contract, losses, fines, or in certain cases the expenditure on legal proceedings, so as long as there is a

[478] *Wrotham Park Estate Co v Parkside Homes Ltd*, (1974) 2 All ER 321 at 342
[479] *Ibid*
[480] *Supra Note* 129
[481] (2000) 4 All ER 385 (HL) at 397 per Lord Nicholls
[482] *Frederick Thomas Kingsley v Secretary of State for India*, AIR (1923) Cal 49

affirmative judgment to the applicants rights. That is because damages for legal proceedings are not beyond the contemplation of the parties, as that is the legal remedy available and an aggrieved party would pursue the avenue.[483] However, these are specific to civil trials only and cannot be claimed through a criminal prosecution as the injury and conviction is personal to the offender.[484]

Pre-contract Expenditure

The rule of thumb is, whether the damages foreseeable and within the contemplation of the parties to the contract. If they are, then damages may be awarded for the injury. Execution of contracts is cumbersome and tedious, often involves significant costs before they are finally entered into. The Court of Appeal in *Angua Television Ltd v Reed,* [485] laid down the principle and recognized the expenses incurred can be claimed, however, it cannot be claimed with loss of profit, one must be chosen. It has been held, that expenses prior to contract are recoverable if they were within the contemplation of parties.[486]

The rules are slightly different for competitive tender bids, where it is often seen that there is significant costs that are undertaken for winning the tender, but to be able to claim damages there must be more work done on possibility of winning the bid, however, if a tender states 'subject to contract' then there is no possibility to claim for pre-contract expenditure.[487] Such expense must have been incurred in reliance on the due performance of the contract.

Two conflicting view exist pertaining to award of pre-contract expenditure; the costs were contemplated as parties were aware that they would recover the expenses through the benefits accruing from the contract. On the other hand, they can recover the expenses by contracting with another party.[488] However, the second view holds less strength in cases where the contract was specific to an industry or project, it is a standard rule that there can be boilerplate terms but contracts are altered for the specific party/project etc.

Since the true intent of compensation is to bring the party to a position he would have been in if the contract was not breached, the factoring in of costs has been seen to be paramount in the assessment of damages. Nonetheless, the case existing is that both cannot be claimed, it is either loss of profits or pre-contract expenditure and in most cases the loss of profits present a more desirable amount for damages as compared to the expenses. As no contract would be executed if the party did not think they would be able to gain a substantial profit out of it.

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[483] *Supra Note* 12, pg. 1293
[484] *Askey v Golden Wine Co Ltd,* (1948) 2 All ER 35 per Denning J at 38
[485] *Anglia Television v Reed*, 91972) 1 QB 60
[486] *Ibid*
[487] *Regalian Properties pic v London Dockland Devp Corp,* (1995) 1 WLR 212
[488] Burrows, *Remedies for Torts and Breach of Contracts,* (2nd Edn, 1994) pg. 254–256

Cost of Cure

Also known as the difference in value, value between the performance received and that promised in the contract.[489] With the duty of mitigation placed on the plaintiffs, there is a need for them to do all within their means to minimize the incurring of further losses; this maybe in terms of taking means to cure the breach. Thus, being entitled to claim for that difference in value, as that was within reasonable contemplation of the parties.

In the case of *Ruxley Electronics and Constn. Ltd v Forsyth*,[490] involved a contract to perform services and for work and materials. R constructed a swimming pool for F at a contract price of GBP 17, 797. The required depth of the diving area under the contract was 7 ft. 6 inches, but was constructed with a depth of six feet, which was sufficiently deep for diving according to the standards, nor did it adversely affect the market value of the pool. F claimed the cost of rebuilding the pool according to the contract specifications. It was held that the F was entitled neither to the cost of cure (the pool being safe and usable), nor to the "difference in value", there being no difference. Holding that it was unreasonable for F to claim cost of reconstruction, the House of Lords approved an award for damages for loss of amenity or of consumer surplus, as F had lost his personal preference for a deeper pool. Factors, which would determine reasonableness would include[491]:

i. Whether the claimant has actually had the work done; or

ii. Whether he undertakes to have the work done (though mere undertaking may not make it reasonable for him to have the work done); or

iii. Whether he sufficiently intends to have the work done if he receives the damages, for which purpose his subjective intention would be relevant.

When dealing with works contract and the contractor breaches his obligation the plaintiff gets the work done by another, the measure of compensation is the increased cost of work on account of the work so done.[492] Certain contracts, wherein there is a "risk and cost" or "risk purchase" clause then the aggrieved party is entitled to get the work done through another agency upon breach and claim the costs from the breaching party.[493]

Cost of Substitute

Compensation is assessed as the difference between the actual value or market value when it is assessed and the contracted price. In a contract for sale of goods where the seller has failed to deliver goods, the compensation will be the amount by which the

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489 *Supra Note* 129, pg. 540

490 (1996) AC 344

491 *Supra Note* 12, pg. 1298

492 *Dhulipudi Namayya v UOI,* AIR (1958) AP 533

493 *Krishan Lal v Food Corp of India*, (2012) 4 SCC 786

market price exceeds the contract price at the time specified for delivery.[494] Damages are assessed by reference to actual value or market value when it is assessed on the basis of difference in value or cost of substitute. The rise or fall in the market price since the date of the contract is irrelevant.[495]

If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises.[496] If the seller in case of a breach of contract, delays the sale of goods, then he must bear the loss due to fall in price, or deterioration in quality.[497] If the breach is by the seller, as the seller has the right to deliver at any time on the date of delivery, it is physically impossible for the buyer to purchase elsewhere on the date of the breach. In such a case, therefore, the market price on the day following the breach is the yardstick by which the buyer's claim to damages is evaluated.[498] However, this is not an absolute rule; it is only a presumptive rule.[499]

The factors that are put into consideration when looking into:

1. Market – when goods are sold and supplied at a fixed depending on the equilibrium of supply and demand, it is said to have a market. In one instance, “black market” or “surreptitious market” had also been taken into account.[500] For the assessment of damages, it is necessary to be able to determine the exact market that is going to be accounted for. When analyzing which market shall be applicable it is necessary to look into the facts of the case, if there was an agreement[501] or it can be based on the destination or origin market.[502] Contractual terms are important as they present the intent of the parties, in an FOB contract it would the place at which they were loaded[503] and in a contract of re-sale it would the market wherein it was sold.[504]

2. Market Price – in a suit for damages, it is necessary to prove the market price. The market price is the buying price at which the buyer can obtain equivalent goods of like quantity at the time and place where they should have been delivered.[505] The normal rule for computation of damages for non-acceptance of goods would be the difference between contract price and the market price of such goods when the

[494] *PSNS Ambalavana Chettiar & Co Ltd v Express Newspapers Ltd* AIR 1968 SC 741
[495] *Supra Note* 82, Illustration (a)
[496] *AKAS Jamal v Molla Dawood Sons & Go,* AIR (1915) PC 48
[497] *Ibid*
[498] *Shaw v Holland,* (1846) 15 M&W 136; *Sohanlal Pachisia & Co v Bilasray Khemani,* AIR 1954 Cal 179
[499] *Fateh Chand Murlidhar v Juggilal Kamlapat*, AIR 1955 Cal 465
[500] *Mouat v Betts Motors Ltd*, (1959) AC 71
[501] *Madhusudan Koer v Badridas*, AIR (1920) Cal 426
[502] *Naihati Jute Mills Ltd v Khyaliram Jagannath*, AIR (1968) SC 522
[503] *Thyssen Krupp Materials AG v Steel Authority of India*, (2017) SCC OnLine Del 7997
[504] *Ibid*
[505] *Ismail Sait and Sons v Wilson and Co*, (1918) 41 Mad 709

contract is broken.[506] If the market price determination is getting difficult then it could probably be based of estimates or merely by holding the party committing the breach to be liable to pay the difference between the contract rate and the sub-sale rate. The buyer does not need to prove that he actually bought the goods after the seller had failed to deliver. All that has to be proved is the buying price at which he can obtain substitute goods.[507]

Loss of profit

It has been held by Apex Court[508] on multiple instances that the damages for loss of profit shall be based on the principles of remoteness and Section 73 (Contract Act), as it does not arise naturally out of the breach thus it should be within the reasonable contemplation of the parties. Unlike damages itself, the loss of profit is not awarded on account of principles of equity, therefore the necessity of presenting proof is there.[509] On the base of the principle of restitution the duty befalls upon the court to assess whether the pre-estimate of damages is reasonable and in case of no pre-estimate then the reasonable amount for the loss of foreseeable business shall be awarded.[510]

Illustration: a carrier agrees to carry a machine-part for repairs, and the consignor informs the carrier that work on the machine is at a standstill without that part, and the carrier unreasonably delays carrying the machine resulting in A losing a valuable government contract, the consignor is entitled to receive as compensation the loss of profits for the period of the delay, but not the loss suffered through the loss of the contract.[511]

In a contract for sale of land, special circumstances are necessary to impute to the vendor the knowledge that the purchaser wants to use it in a particular manner so as to justify the recovery of profits lost as a result of the default of the defendant.[512] In a works contract, where a party entrusting works commits breach of the contract, contractor's claim for damages under the head of loss of expected profit is certainly admissible.

The Supreme Court importantly, differentiated between the issues of measure of profits and whether or not compensation can be awarded. Deeming them two separate issues, it opined that the former is a matter of contract, whereas the latter is a matter of remoteness. Damages for loss of profits can be calculated[513] as a percentage on the contract price;[514] and the percent figure of profits contemplated in preparing the estimates in a works

[506] *Bungo Steel Furniture Pvt Ltd v UOI*, AIR (1967) SC 378
[507] *UOI v Commercial Metal Corp*, AIR (1982) Del 267
[508] *AT Brij Paul Singh & Bros v State of Gujarat*, AIR (1984) SC 1703; *Murlidhar Chiranjilal v Harishchandra Dwarkadas*, AIR 1962 SC 366
[509] *UOI v United Timber Works*, AIR (1960) Pun 478
[510] *State of Kerala v K Bhaskaran*, AIR (1985) Ker 49
[511] *Supra Note* 82, Illustration (i)
[512] *Ghaziabad Development Authority v Union of India*, (2000) 6 SCC 113
[513] *Supra Note* 12, pg. 1292
[514] *Samuel Fitz & Co Ltd v Standard Cotton and Silk Weaving Co*, (1946) Mad 192

contract may be evidence of the loss of profits;[515] as also percentage value of balance of works granted as damages in another suit on a similar works contract in the vicinity.[516] A key principle still persists, that windfall profits cannot be granted thereby, loss of profits for part no performed is not within assessment range, as the intent remains restitution.[517]

Onward profits

Sometimes, there are contracts that are contingent upon the performance of an initial contract. Therefore, if the onward contract were notified to the party earlier on then it would entitle him to claim damages for onward profits lost as well, otherwise it would be too remote. This principle "*rests on the sound ground that it is immaterial (to the seller) what the buyer is intending to do with the purchased goods*".[518] Thus, a seller of defective goods cannot invoke the buyer's onward resale contract for the purpose of showing that the buyer resold the goods at a price greater than their market value.[519]

Illustration: A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price, B, afterwards, before the first of January, contracts to sell saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit, which would have arisen to B from the sale to C, is to be taken into account.[520]

A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a specified time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, informing C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.[521] If C only knew generally that A wanted the iron for resale, he would not be entitled to damages beyond the difference between the contract price, and the market price at the date of the breach.[522] In a case wherein a party opposes the application of the other for a stage carriage permit in contravention of the terms of the contract, the measure of damages is the net profits lost on that route.[523] Profit actually made on a sub-sale which is outside the contemplation of parties, cannot be used to reduce the damages by a notional loss in market rate.[524]

[515] *State of Kerala v K Bhaskaran*, AIR (1985) Ker 49
[516] *AT Brij Paul Singh & Bros v State of Gujarat*, AIR (1984) SC 1703
[517] *MSK Projects (I) (JV) Ltd v State of Rajasthan*, (2011) 10 SCC 573
[518] *Williams Bros v Ed T Agius Ltd,* (1914) AC 510
[519] *Slater & Co v Hoyle and Smith Ltd,* (1920) 2 KB 11
[520] *Supra Note* 82, Illustration (o)
[521] *Supra Note* 82, Illustration (j)
[522] *Karsandas H Thacker v Saran Engg Co Ltd*, AIR (1965) SC 1981
[523] *K S R Chakrapani Chettiar v S Guruswami Reddiar*, AIR (1984) Mad 194
[524] *Biggin & Co Ltd v Permanite Ltd*, (1951) 1 KB 422

Non-pecuniary losses

The established rule of law had been that you couldn't claim for loss of reputation,[525] however, the change was brought about under *Malik v Bank of Credit & Commerce International SA*.[526] The difference was held to be that at the time the *Addis* case was decided prior to the development of the implied obligation of mutual trust and confidence so that the loss of reputation there had not been caused by a relevant breach of contract.

Assessed once and for all

When a plaintiff brings forth a suit for damages it is necessary that he does include within his claim all losses that he has incurred, that arose from the cause of action.[527] The cause of action is particularly significant, as it is a determinant, for accumulating the damages incurred in one suit,[528] past, present and future, certain and contingent. Nonetheless, separate cases may be maintained for different breaches of different obligations under the same contract, e.g. multiple breaches of various parts of a contract or installment contracts.

A second suit cannot be brought forth for the same matter, as that would be barred by the principle of *res judiciata* - a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties. In the case of *State of Gujarat v Kothari & Associates*[529] the Supreme Court when analyzing the facts with the concept of *res judiciata*, opined:

> "*The factual matrix presents a situation of successive or multiple breaches, rather than of a continuous breach, as each delay in handing over the canal/site by the Appellant State constituted to a breach that was distinct and complete in itself and gave rise to a separate cause of action for which the Respondent could have rescinded the contract or possibly claimed compensation due to prolongation of time and resultant escalation of costs*."

For the purposes of assessing once and for all, it is important to distinguish that the breaches that occurred where distinguishable from the others and were not related. For example, when a party agrees to deliver certain goods every month for a duration spanning certain years, the cause of action for breach for failure to deliver in a particular month arises at the end of that month and not at the end of the period of the contract.[530] Damages that arise out of a continuing cause of action usually pertaining to repeated breaches of obligations under a contract, which are of the same kind – these types must be

[525] *Addis v Gramophone Co Ltd*, (1909) AC 488
[526] (1998) 1 AC 20
[527] Code of Civil Procedure, 1908, Order 2, Rule 2
[528] *Supra Note* 12, pg. 1278
[529] (2016) 14 SCC 761
[530] *Rohtas Industries Ltd vs. Maharaja of Kasimbazar China Clay Mines*, ILR (1951) 1 Cal 420

assessed as a cumulative. Further making it important to distinguish between breaches of recurring or continuing obligations under continuing breach of contract.[531]

Difficulty not a bar to assessment

More often than not assessing the appropriate amount of damages that must be awarded in a court is difficult to determine and arriving at that needs a judicious examination of the facts and circumstances in the case. Even whilst doing the assessment the Courts need to keep it in mind that they cannot be punitive and must be compensatory. However, wherein it is deemed overtly complicated to compute the amount of damages due to the applicant for breach of contract by the defendant, that does not constitute a valid defense against grant of damages,[532] it cannot be pleaded to disentitle the aggrieved party from claiming damages.[533] Even in the case of contracts providing Liquidated Damages, courts do rely on them only if they present a reasonable compensatory amount, however, the court may still go ahead and compute the sum if the need arises.[534] In certain cases wherein a genuine pre-estimate is provided by the parties, in the form of liquidated damages, that amount shall take precedence and be utilized, if assessment proves to be difficult.[535]

The basic proof of legal injury is not dispensed, once that is shown, and then the compensation may be computed using various formulas utilized by courts, keeping in mind that they be reasonable to the injury complained of. Sometimes computation can become difficult due to the lack of concrete evidence towards the breaches sustained due to its dependency on various contingencies and speculative circumstances. In such cases the party would still be entitled to claim compensation for any and all loss to speculative presumptions of possible benefits.[536]

One can always allege and argue that speculative profits[537] may be too remote for that to be included in the computation of damages, however, that is for the defendant to aver. The factual consideration is placed on the type of project and sometimes on the motive of the contract with the stipulated obligations. Wherein the project is for a construction that would curtail negative impacts on the environment and the defendant breaches the timeline requirements in the contract, in such cases the applicant can claim for losses for environmental degradation and loss of interest on capital and reasonable compensation can be allowed.[538]

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[531] *National Coal Board v Galley*, (1958) 1 All ER 91
[532] *Chaplin v. Hicks*, (1911) 2 KB 786
[533] *K Narendra v Riviera Apartments Pvt Ltd*, (1999) 5 SCC 77
[534] *Indian Oil Corporation vs Lloyds Steel Industries Ltd*., 2007 (4) ARBLR 84 Delhi
[535] *Kailash Nath Associates v. Delhi Development Authority & Anr*, (2015) 4 SCC 136
[536] *Andard Mount (London) Ltd v Curewel (India) Ltd*, AIR (1985) Del 45 at 66
[537] *M Maniappa Pillai v I Anthonisami Mudaliar*, (1950) ILR Mad 697
[538] *Construction & Design Services v DDA*, (2015) 14 SCC 263

Usually, when assessing damages becomes very difficult the method adopted is '*best judgment*',[539] for the reason that in numerous cases laying down exact number for loss is difficult and evidencing that is an equally herculean task. When dealing with consumer forum cases, it is not always feasible to assess the loss, e.g. deficiency of service by medical professional or an architect but that is not grounds to disentitle a plaintiff from his claim of damages.

Date of assessment

For appropriate assessment of damages, the date from which they must be assessed is important. The rationale adopted is that since the loss, suffered after the breach, is due to the plaintiffs' failure to mitigate his losses. Nonetheless, exceptions can be made whereby there is proof and/or an agreement to that effect. For the purposes of determination the rate, it is necessary to see the date when the breach occurred or when the performance was due. In the event, the contract does not stipulate timelines then it is probable to use the most reasonable date for the purposes of assessment. Usually, they are deemed to become due from the date of breach,[540] and the method used for deriving that date would be as per the applicable law, unless there is an agreement to the contrary.[541]

Importantly, if there was an extension granted or agreed upon, then the date of breach shall be the extended date and not the original one. If the buyer, after giving the seller time at his request, finally has to go into the market and buy at an advanced price, he may recover the whole difference between the contract price, and the price he actually paid.[542] In the case that the seller delays the delivery of goods to the buyer, without seeking approval for extension appropriately, the plaintiff renounces the delivery, the date of assessment shall the date previously agreed upon by the parties.[543]

As stated in Pollock & Mulla,[544] if a party asks to have the performance of the contract postponed, he does so at his own risk; because he will have to suffer if, consequent upon the postponement, the measure of damages increases;[545] but where no such request has proceeded from the seller, the buyer is not entitled to anything more than the difference between the contract rate and the market rate at the date of the breach, though he may not have pressed for delivery on the due date.[546]

In the case *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha, The Golden Victory*,[547] the question that arose was whether damages should be assessed as at the date

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[539] *Jaidev Prasad Singh v. Auto Tractor Ltd*., I (1991) CPJ 34 (36) NC
[540] *Surjan Mal-Kishen Chand v Gian Chand-Chinraji Lal*, AIR (1921) Lah 39
[541] *Padma Srinivasan v Premier Insurance Co Ltd*., (1982) 1 SCC 613
[542] *Ogle v Earl Vane*, (1868) LR 3 QB 272
[543] *Anandram Mangturam v Bholaram Tanumal*, (1946) ILR Bom 218
[544] *Supra Note* 12, pg. 1305 - 1306
[545] *Levey & Co v Goldberg*, (1922) 1 KB 688
[546] *Muthayamanigaran v Lakku Reddiar*, (1912) 22 Mad LJ 413
[547] (2007) UKHL 12

of breach on the basis of the value of a four-year remaining charterparty ignoring the outbreak of war, or as at the date of trial taking into account the known outbreak of war and hence on the basis of only a fifteen-month remaining charterparty. By a 3–2 majority (Lord Bingham and Lord Walker dissenting) it was held that damages should be assessed on the second basis. This is justified as more precisely measuring the claimant's known loss in a situation where the mitigation principle was essentially irrelevant because the claimant had not attempted to mitigate its loss by concluding a substitute charterparty for the four-year period. The minority preferred to adhere to the date of breach rule as promoting commercial certainty.[548]

Damages has its origin in equity, therefore, courts may in cases whereby required exercise some amount of discretion in determining the date of assessment,[549] but keeping in mind the principle of reasonableness. This discretion may be exercised by court wherein the aggrieved party was not able to come to know about the breach[550] or was unable to immediately take steps to mitigate and minimize their losses.[551] In cases of specific performance of a contract for sale of shares and in the alternative for damages, the plaintiff abandoned the claim of specific performance;[552] damages were fixed as the difference between the market price on the date of agreement and on the date of filing the plaint, and not the date on which the plaintiff abandoned the claim.[553]

Limitation

The period of limitation for compensation for breach of contract, express or implied, not specifically provided for under the Act, is three years from the time when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.[554] In instances of numerous breaches giving occasion to different causes of action, it can be brought under one suit, but the contemplation of the period of limitation shall be calculated from the last date of the cumulative breach.[555]

Damages in particular contracts

To be able to garner a judicial analysis on assessment of damages, it is important to try and analyze the different damages in various contracts.

Carriage Contracts

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548 *Supra Note* 129, pg. 536

549 *Johnson v Agnew*, (1980) AC 367

550 *Van den Hurck v R Martens & Co Ltd*, (1920) 1 KB 850

551 *Ogle v Earl Vane*, (1868) LR 3 QB 272

552 *Supra Note* 12, pg. 1305 - 1304

553 *United Brokers v Alagappa Corp*, AIR 1948 Mad. 391

554 The Limitation Act, 1963, Schedule, Article 55

555 *State of Gujarat v Kothari & Associates*, (2016) 14 SCC 761

Carriers of goods are bailees. Wherein an applicant proves loss of goods,[556] the measure of damages is the value of the goods at the place and time they ought to have been delivered,[557] less the cost of transportation,[558] but not costs incurred in its further disposal.[559] For cases where carriage happens through rail and the goods are lost then the assessment of damages shall be the difference in the price at which they were bought and the price at the intended destination *less* transportation costs.[560] However, if it is deemed that there is a price drop at the destination versus at the origin then the price at the origin shall be considered.[561]

Illustration:[562] A contracts with B to provide a ship on a certain day to receive a cargo of coal to be carried to Havre. A fails to provide the ship in time, and B has to charter vessels at an advanced freight and also buy coal at a higher price. B can recover from A the increase of price as well as the increase of freight, unless A can show that, due to a corresponding increase in the market price at the port of delivery or otherwise, the loss is compensated wholly or in part.

If the delivery is delayed then the computation shall be the difference in value between the date when they ought to have been delivered, and the date when they are actually delivered.[563] However, if they deteriorate due to the delay then the measure of damages is the difference between value of the goods as delivered, and their value if they had been delivered in good condition.[564]

Breach of Confidence

Confidential agreements or non-disclosure agreements are most prominent amongst commercial contracts. Many business corporations tend to enter into preliminary talks before finalizing the terms of a deal and taken the step forward. During the period of negotiations, it is necessary and more often than not, seen that business insert confidentiality clauses to avoid, leakage of key strategies or pricing list or other such vital strategic information. In the event such breach occurs, the most plausible step would be an injunction, following that a suit for damages. However, it is critical to avoid breach situations, for once they occur it is difficult to be fully compensated and avoid further significant damage.

The assessment of the loss is the computation of losses that arose naturally out of the breach and were within the contemplation of the parties, when entering into the contract.

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[556] *Savani Transport (Pvt) Ltd v Gangadhar Ghosh*, AIR (1986) Cal 330
[557] *Union of lndia v A Venkatiah,* AIR (1975) Mad 119
[558] *Union of India v Baijnath Madan Lall,* AIR (1951) Pat 219
[559] *Union of India v Hari Mohan Ghosh,* AIR (1990) Gau 14
[560] *UOI v Baijnath Madan Lall*, AIR (1951) Pat 219
[561] *Union of India v Bikaner Textiles,* AIR (1961) Raj 211
[562] *Featherston v Wilkinson*, (1873) LR 8 Ex 122
[563] *Union of India v Panipat Woollen and General Mills Co Ltd.,* AIR (1967) P & H 497
[564] *Lalchand Chowdhury v Union of India,* AIR (1960) Cal 270

However, computation of losses for breach of confidentiality is most difficult and mostly is based on non-pecuniary loss or liquidated damages, as evidence for injury may not easily be obtainable. Therefore, it is most desirable to avoid these situations as far as possible, as the damages are hardly ever adequate for the loss incurred.

Construction Contracts

In the case of breach of a contract for specific work, the ordinary measure of compensation is the cost of reinstatement or cure,[565] viz., the increased cost of the work got done by another contract.[566] In a Government building contract that was allotted through tenders. The contractor had done only a part of the work when the Government unjustifiably repudiated the contract. The contractor sued for loss of profits. It was not disputed before the Supreme Court that where in a works contract the party entrusting the work commits breach, the contractor would be entitled to claim damages for loss of profit which he expected from the project.[567] The time at which the cost of repairs should be assessed is when it was reasonable for the plaintiff to begin repairs.[568]

The normal measure of damages in a case of a wrongful refusal to give a sub-contract carried by a contractor in his own tender, is the contract price less the cost of executing or completing the work, i.e., the loss of profit.[569] Where a contractor builds a defective building, the measure of damages is the cost of building it according to the contract specifications.[570] All in all, the measure of damages has been dependent on the facts of the case and the overall value of the contract.[571]

Employment Contracts

An employee is entitled, on his wrongful dismissal,[572] to damages for loss of earning and other benefits he would be entitled to, had his employment been terminated according to contract,[573] and if no period is fixed for termination, he is entitled to reasonable notice, and for loss of earnings for such period.[574] There exists a disparity in the law pertaining to suits that can be brought forth by public sector employees and private sector ones. For private sector employees, who are governed by a contract and an employee, can be

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[565] *Mertens v Home Freeholds Co Ltd,* (1921) 2 KB 526
[566] *Dhulipudi Namayya v UOI,* AIR (1958) AP 533
[567] *A.T. Brij Paul Singh & Bros v State of Gujarat*, AIR (1984) SC 1703
[568] *Tito v Waddell (No, 2),* (1977) ChD 106
[569] *Naylor Group Inc v Ellis-Don Construction Ltd*, (2001) 2 SCR 943
[570] *Rajaram Konduram Nikhera v Mahadaorao Gangadharrao Chitnavis* AIR 1941 Nag 11
[571] *Dwarka Das v State of Madhya Pradesh,* AIR (1999) SC 1031
[572] *SS Shetty v Bharat Nidhi Ltd*, (1958) SCR 442
[573] *Beckham v Drake*, (1849) 2 HL Cas 579 per Erle J
[574] *Harisingh Vijaysingh v Fatehsingh Narayan*, AIR (1957) MP 46

dismissed if he is not performing per standards,[575] whereas, in the public sector it is a different method.

If the services of an employee are wrongfully terminated, damages are calculated on the basis of his salary for the period of the notice specified in the contract of employment, and for the term of the employment, after taking into consideration the opportunity the employee had to get another job,[576] compensation calculated by considering the usual rate of wages contracted for and what time would be lost before a similar employment could be obtained.[577]

Contracts for professional services

A few examples for contracts for professional services include contracts with:

i. Legal advisers;
ii. Accountants;
iii. Barristers;
iv. Solicitors;
v. Consulting engineers;
vi. Architects;
vii. Surveyors.

It is widely accepted that perfection in these services is not possible, therefore the standard to adjudge is whether reasonable care and skill was afforded by the professional or not. However, if the professional does give a personal undertaking to achieve a particular result or accomplish a particular task, the law would hold him by that standard and confer a much wider duty than the mere reasonable care. Torts and contracts are not the only standard but in certain cases the Consumer Protection Act, 1986, also applies.[578]

In Hedley Byrne & Co Ltd v Heller & Partners Ltd,[579] it was held that a person seeking information or advice from another who is not under contractual or fiduciary obligations to give the advice, in circumstances in which a reasonable man so asked, would know that he was being trusted, or his skill or judgment was being relied on, and that person chooses to give the information or advice without clearly specifying that he does not accept responsibility, than the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply. A duty to exercise proper care may also arise out of special relationship of a general character, e.g. the relationship of a solicitor and client, or of banker and customer, or out of a particular relationship created ad hoc.[580]

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[575] *Satya Narain Garg v DCM Ltd.*, (2012) 127 DRJ 216
[576] *Kayastha Pathshala Allahabad v Rajendra Prasad,* AIR (1990) SC 415
[577] *Sree Minakshi Mills Ltd v TC Anantarma Ayyar* AIR 1930 Mad 654
[578] *Indian Medical Assn v VP Shanta,* AIR (1996) SC 550
[579] (1963) 2 All ER 575
[580] *Supra Note* 12, pg. 1319

Sale of goods Contracts[581]

It is trite law[582] that in contracts for sale of goods, if the terms are breach then the main measure for damages is the difference between the contract price and the market price of the goods, which he retained,[583] and not a certain percentage on the value of the goods.[584] The computation of damages by taking the difference between the contract price and the lowest market price on the date of the breach is not unreasonable.[585] Where the property in the goods has passed to the buyer, and the buyer refuses or neglects to pay the price, the seller may sue him for the price. The following are examples of breaches that could occur in a contract for sale of goods:

i. Non-delivery;
ii. Non acceptance;
iii. Delay in delivery;
iv. Defective delivery; and
v. Breach of warranty.

Works Contracts

A works contract is a mixture of service and transfer of goods. Therefore, if a party is unable to execute their work by the stipulated time or within reasonable time in case there is no time, then the aggrieved party shall be entitled to claim damages. In case, the contractor or defendant is aware that the service or goods are necessary for an expected profit, then the damages shall be computed on the expectation of the earning that would have been obtained in the ordinary course of employment of the goods in time,[586] or hiring charges, where substitute is hired.[587] However, wherein the special circumstance or expected benefit is not intimated then the contractor shall not be entitled to such benefit. In a works contract wherein the materials and are supplied by the contractor, different standards apply.[588]

Precedent judgments on assessing damages

Damages can always be assessed according to the industry standards[589] and/or by formulas that have been previously accepted by courts or quasi-judicial bodies.[590]

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[581] The Sale of Goods Act, 1930
[582] *Supra Note* 12, pg. 1305 - 1304
[583] *Union of India v Jolly Steel Industries* (*P*) *Ltd.*, AIR (1980) SC 1346; *P S N S Ambalavana Chettiar & Co Ltd v Express Newspapers Ltd. Bombay,* AIR (1968) SC 741
[584] *Manager of Hardware and Tools Ltd v Saru Smelting Pvt Ltd*., AIR (1983) All 329
[585] *M.N. Gangappa v A.N. Setty & Co*, AIR (1972) SC 696 at 699–700
[586] *Re Trent and Humber Co, ex p. Cambrian Steam Packet Co*, (1868) 4 Ch App 112 at 117 per Lord Cairns LC
[587] *Supra Note* 82, Illustration (g)
[588] *GH Myers & Co v Brent Cross Service Co*, [1934] 1 KB 46
[589] *Mcdermott International Inc v Burn Standard Co Ltd,* (2006) 11 SCC 181

Supreme Court Cases –

1. *McDermott International Inc. v. Burn Standard Co. Ltd.*[591]

- **Facts**: With a view to achieve exploration of production programme, ONGC appointed contractors to fulfil substantial portions of its offshore construction requirements. Burn Standard Company Limited (for short "BSCL") was interested in the second stage of platform construction of ONGC, i.e., structural and progress fabrication and material procurement. BSCL and Mcdermott International Inc. (for short "MII") entered into Technical Collaboration Agreement on 25th September 1984 in terms whereof the latter agreed to transfer technology to the former with regard to design, construction and operation of a fabrication yard. Disputes' having arisen the arbitration clause was invoked by MII.

- The three formulas discussed were:

i. <u>Hudson Formula</u>: In Hudson's Building and Engineering Contracts, Hudson formula is stated in the following terms:

(Contract Head Office overheads profit %) x (contract sum ÷ period in weeks) x delay in weeks;

a. Where Contract Head Office (head office overheads) and profits percentage submitted in tender. Dividing the total overhead cost and profit of the organisation as a whole by the total turnover of the organisation normally arrives at the head office percentage.

b. In the Hudson formula, the head office overhead percentage is taken from the contract. Although the Hudson formula has received judicial support in many cases, it has been criticized principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.

ii. <u>Emden Formula</u>: In Emden's Building Contracts and Practice, the Emden formula is stated in the following terms:

(Head Office Overhead & Profit ÷ 100) x (Contract Sum ÷ Contract Period) x Delay Period

a. The formula divides the total overhead cost of the contractor's organisation by the total turnover. This results in a percentage based on

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[590] *Associate Builders v Delhi Development Authority*, AIR (2015) SC 620
[591] (2006) 11 SCC 181

the contractor's actual head office overhead, instead of one contained in an isolated contract.

b. Using the Emden formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organization as a whole by the total turnover. This formula has the advantage of using the contractors' actual head office and profit percentage rather than those contained in the contract.

c. This formula has been widely applied and has received judicial support in a number of cases including *Norwest Holst Construction Ltd. v. Cooperative Wholesale Society Ltd*., *Beechwood Development Company (Scotland) Ltd. v. Mitchell,* and *Harvey Shoplifters Ltd. v. Adi Ltd*.

iii. Eichleay Formula: The Eichleay formula was evolved in America and derives its name from a case heard by Armed Services Board of Contract Appeals, Eichleay Corp. It is applied in the following manner:

- Step 1: Overhead Allocable to the Contract. This is a calculation to determine the portion of the Office Overhead that should be allocated to this project. This is a way of calculating that amount.

(Contract Billings ÷ Total Billings for contract Period) x Total Overhead for Contract Period

- Step 2: Daily Allocable Overheads/ Daily Overhead Rates. This is a calculation to determine the daily rate for the allocation of Office Overhead.

(Allocable Overheads ÷ Total Days of Contract)

- Step 3: Daily Overhead Rate/ Amount of Unabsorbed Overhead. This is simply a matter of multiplying the number of compensable delay days by the daily allocable overhead rate.

Daily Allocable Overheads/ Daily Overhead Rates x No. of days of delay

- This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overheads during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed.

- Finally, the judges opined "*We do not intend to delve deep into the matter as it is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the Arbitrator*."[592]

- There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

- Overhead costs, decreased profits come within the ambit of direct losses; while incidental losses refer to the costs incurred after gaining knowledge of the breach of the contract, which could be in the form of the transportation costs involved in shifting the goods on default of the purchaser to purchase the goods or costs incurred in looking for an alternative buyer.

- The Supreme Court of India has held that- "*We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law*"[593]

2. *Fortune Infrastructure and Anr v. Trevor D'Lima & Ors*[594]

- **Facts**: the respondents had booked property in the year 2011 in a redevelopment project undertaken by the appellants. In 2015, the appellants, being aggrieved by the fact that the appellants were unwilling to deliver the property, approached the NCDRC with prayers to declare the appellants to be deficient in service & unfair trade practices; for directions that the property is delivered and for compensation for inconvenience, mental agony and legal costs. The NCDRC ruled in favour of the respondents.

- **Held**: the Appellants opted for an appeal to the Supreme Court. The Supreme Court held that it is settled that damages have to be considered at the time of the breach, this rule allows flexibility and needs to be assessed in the facts and circumstances of each case.

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[592] *Ibid*
[593] *Ibid,* para 70
[594] (2018) 5 SCC 442

3. *Maharashtra State Electricity Distribution Company Limited v. Datar Switchgear Limited & Ors.*[595]

- **Facts**: the applicant which is a Public Limited Company entered into a contract of lease with the respondents for supply, including erection, commissioning, maintenance, testing and transportation at specified locations, The applicant installed 17,294 LTLMS. However, in the year 1998, some disputes arose between the parties, which were referred to the Arbitral Tribunal and the Tribunal made an Award on 18th June 2004. It was appealed to the Bombay High Court and then the Supreme Court.

- The Apex Court held that also that the Arbitral Tribunal, while awarding the damages, has relied upon the judgment of this Court in *Union of India & Ors. v. Sugauli Sugar Works (P) Ltd.*[596] wherein a cardinal principle of damages had been laid down to the effect that the injured party should be placed in as good a position as money could do as if the contract had been performed. Therefore, application of the market rate principle is good per the principle of law.

- **Held**: in the instant case, the Arbitral Tribunal, considered a 30% reduction in lease rent to compute damages for installed objects, 50% reduction in lease rent to compute damages for manufactured but uninstalled objects and the bare cost of raw materials for the objects not manufactured. Thus, the Arbitral Tribunal awarded almost the same amount as was invested by respondent No.2 for the project. Interest was awarded only @ 10% per annum from the date of the award as opposed to the prevailing bank rate of about 21%. The aforesaid being a reasonable and plausible measure adopted by the Arbitral Tribunal for awarding the damages, there is no question of interdicting with the same.

4. *Associate Builders v. Delhi Development Authority*[597]

- **Facts**: the appellant herein was awarded a certain construction work contract by the DDA. DDA was building a colony consisting of 7,000 houses in Trilok Puri in the trans-Yamuna area. 168 Middle Income Group houses and 56 Lower Income Group houses, Grade-A Pocket- B (balance work). The contract was to be completed in 9 months. Admittedly, it was ultimately completed only in 34 months, the contractor completing 166 Middle Income Group houses and 36 Lower Income Group houses. As many as 15 claims were made by the contractor and the High Court of Delhi appointed one Shri K.D. Bali to arbitrate the dispute. Thereafter, it was finally put before the SC for final determination.

[595] (2018) 3 SCC 133
[596] (1976) 3 SCC 32
[597] (2015) 3 SCC 49

- **Held**: Justice R Nariman, upheld the McDermott judgment and held that as computation is specifically highlighted, the widely accepted formulae can be accepted as long as they do not contravene any set position of Indian Law.

5. *Kailash Nath Associates v. Delhi Development Authority and Anr*[598]

- **Facts**: The present appeal arises out of a public auction conducted by the Delhi Development Authority ("DDA") wherein the appellant made the highest bid for Plot No.2-A, Bhikaji Cama Place, District Centre, New Delhi for 3.12 Crores (Rupees Three Crores Twelve Lakhs). As per the terms and conditions of the auction, the appellant, being the highest bidder, deposited a sum of Rs.78,00,000/- (Rupees Seventy Eight Lakhs), being 25% of the bid amount, with the DDA, this being earnest money under the terms of the conditions of auction.

- **Held**: observed that the party complaining of the breach can receive the entire amount stipulated in the liquidated damages clause only if it is a genuine pre-estimate of damages suffered. While assessing the quantum of damages suffered, the Court has jurisdiction to award amounts, as it deems reasonable but not exceeding the limit stipulated in the contract.

6. *Kanchan Udyog Ltd v United Spirits Ltd*[599]

- The Supreme Court, in the context of a suit for damages and wrongful termination of a bottling contract, held that since it had concluded that the appellant was entitled to no expectation loss for anticipated profits on facts, any grant of reliance costs (intended to put the plaintiff back in the position in which it would have been had the contract never been made) would be tantamount to giving a benefit to the plaintiff for what were essentially its own lapses.

- If the law of contract were to move from compensating for the consequences of the breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce.

- In view of the above discussion, therefore, quantification of unliquidated damages has to account for the various principles as explained in Section 73 as well as the expectation and reliance interests. A cumulative analysis of these various principles and doctrines trickles down to the following general guiding formula, which can be followed as a basic conceptual framework for quantifying unliquidated damages.

High Court Cases –

[598] (2015) 4 SCC 136
[599] (2017) 8 SCC 237

1. *Koninlijke Philips NV v. Amazestore*[600]

- **Facts**: The plaintiff sought a permanent injunction restraining violation of multiple statutory and common-law rights. They also sought a decree in damages from the defendants for infringement of copyright and passing off. The plaintiff claimed actual damages and additionally aggravated damages on account of the extreme bad faith actions and the wrongful conduct of the defendants.

- **Held**: The injunction was granted and compensatory damages as well. While considering the claim for aggravated (exemplary) damages, the High Court of Delhi referred to the principles set out in *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*,[601] which in turn relied on decisions of the House of Lords in *Rookes v. Barnard* and *Cassell & Co Ltd v. Broome*.

- The High Court of Delhi also noted the three conditions set out in *Re Rookes v. Barnard*, which are to be satisfied before an award for aggravated or exemplary damages is granted. First, that the plaintiff cannot recover exemplary damages unless he or she is the victim of the punishable behaviour. Second, the cautionary restraint that the award of damages ought not to 'amount to a greater punishment than would be likely incurred if the conduct were criminal'. And thirdly, that although the means of the parties are irrelevant in the assessment of compensation, they are nevertheless material in the assessment of exemplary damages.

2. *Daiichi Sankyo Company Limited vs Malvinder Mohan Singh And Ors*[602]

- **Facts**: The arbitration arose out of a Share Purchase and Share Subscription Agreement dated June 11, 2008 ("SPSSA") whereby Daiichi agreed to purchase from the Respondents their total stake in the Company named Ranbaxy Laboratories Limited. According to this agreement, the place of arbitration was to be Singapore while ICC rules were to be followed.

- **Held**: the loss awarded must be a natural and direct consequence of the illegal acts done by the defendant. Remote damages suffered cannot be awarded. The plaintiff would have a duty to mitigate the damages. No general principles can be laid down for quantifying damages and every case must to some extent depend, on its own circumstances. In the instance case, the Delhi High Court accepted the tribunals’ computation method and upheld the view taken in *McDermott*.

3. *Esar Procurement Services Ltd vs Paramount Constructions*[603]

[600] (2019) 260 DLT 135
[601] (2014) 57 PTC 495
[602] Delhi High Court, Decided in 2018, O.M.P. (EFA)(COMM.) No. 6 of 2016

- **Facts**: On 30th April 1998, the petitioner invited tender for erection, testing and commissioning of chemical soar water treatment facility for Issar Oil Limited at Vadinar. The respondent submitted their bid pursuant to the said offer issued by the petitioner on 11 th May 1998. The respondent deposited the security deposit amount @ 5% p.a. of the contract amount in the form of a bank guarantee dated 2 nd June 1998 as per the terms of the contract with the petitioner. It was the case of the respondent that due to financial problem faced by the petitioner, work was required to be suspended. By the letters dated 26th March 1999 and 3rd April 1999, the petitioner intimated through their official communication that they were facing financial crunch and admitted the request of the respondent for time extension in order to facilitate the execution of the said work.

- **Held**: that the different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the Court.

REMOTENESS OF DAMAGES

A contract is an agreement enforceable by law. It contains a promise to do or to abstain from an act for a certain consideration. Remoteness of damages is distinguished from measure or assessment of damages that deals with the computation and principles for computation of damages not deemed to be remote. When a breach of contract occurs, it entitles the aggrieved party to claim damages for the loss incurred. However, this rule is not absolute and is subject to limitations, wherein the loss prayed for is too remote then the courts cannot award it. The term "remoteness of damages" refers to the legal tests used for determination of which type of loss may be compensated by an award of damages due to do the breach of contract.[604]

The most basic aspect relating to remoteness is whether they were or in a normal and prudent circumstance should have been aware of the possibility of the losses when they entered into the contract. The courts have held that it is within their purview to assess and decide what were within the reasonable contemplation capabilities of the parties to the contract. Even the mere possibility of it happening has been deemed to be sufficient. In the case of T*he Andhra Pradesh Mineral Development Corp Ltd v Pottem Brothers*,[605] the court held:

> "*Damages are not to be regarded as too remote merely because, on the knowledge available to the defendant when the contract was made, the chance of the occurrence of the event which caused the damage would have appeared to him to be rather less than an even chance; it is generally sufficient that that event would*

[603] 2016 Bom 9697
[604] Chitty on Contracts, (28th Edn) Vol II, pg. 1289
[605] (2016) 4 Andh LD 354

> *have appeared to the defendant as not unlikely to occur; it is hardly ever possible to assess probabilities with any degree of mathematical accuracy; there is no warrant for regarding, as within the contemplation of the parties, any event which would not have appeared to the defendant, had he thought about it, to have a very substantial degree of probability; and the loss need not be such that the contract-breaker could see that it was certain to result*."

The facts of the case and the terms of the contract are key for understanding what was within the reasonable consideration of the parties when entering in, wherein the risk and title had passed to the buyer upon the delivery of goods, overhead expenses incurred by the buyer in procuring the sale would not be awarded as compensation.[606] Remoteness of damage is a question of fact, and the only guidance the law can give is to lay down general principles.[607] There is no absolute rule that losses resulting from re- valuation of currencies are always too remote in law to be recovered and hence loss on account of foreign exchange rate fluctuation can be claimed under section 73.[608]

<u>*Casual Connection*</u>

To be able to establish that the damage suffered was not remote, it is necessary to establish the casual connection. The breach of contract must be the 'effective' cause of the loss, as opposed to an event which merely gives the opportunity for the claimant to sustain the loss.[609] It is not sufficient for the breach merely to provide the opportunity or occasion for the plaintiff to injure himself.[610] Causation does not depend on remoteness or contemplation of the parties.[611]

The important factor being to assess whether or not the breach was the effective cause for the loss sustained, as in some contracts, there may be many breaches. Therefore, it is necessary to analyze facts and ascertain the real cause and differentiate that from one that is distant from being the direct cause for the loss. As highlighted by Pollock and Mulla,[612] the traditional "*but for*" test has been:

- "*Would the damage have accrued but for the defendant's action*".[613] However, this test fails where there is more than one cause or intervening causes.[614]

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[606] *Thyssen Krupp Materials AG v Steel Authority of India*, 2017 SCC OnLine Del 7997
[607] *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker*, (1949) AC 196 at 223 per Lord Wright
[608] *ONGC v Soconord OCTG., SA*, 2014 SCC OnLine Bom 1277
[609] *Galoo Ltd v Bright Grahame Murray*, (1994) 1 WLR 1360
[610] *Quinn v Burch Bros (Builders) Ltd*, (1966) 2 QB 370
[611] *County Ltd v Girozentrale Securities*, (1996) 3 All ER 834 (CA)
[612] *Supra Note* 12, pg. 1282
[613] (1995) 1 All ER 16
[614] *Bennett v Minister of Community Welfare*, (1992) 176 CLR 408

- One test is: whether the damage would not have happened, if the breach had not occurred, rather than the damage would not have occurred without an extraneous event.[615]

Nonetheless, in the event a breach is caused due to the actions of an independent third party or there is no resulting loss from the breach or it occurs due to factors outside the defendants' control, then damages cannot be claimed.

In *Pannalal Jankidas v Mohanlal,*[616] where the agent had failed to insure the goods despite contractually required to do so and the goods were destroyed in an explosion, and the Government paid only 50% of the compensation under an ordinance since the goods were uninsured. In the agent's suit for indemnity being price of goods, the agent was ready to pay over to the principal the compensation received by him. The principal counterclaimed for credit for the entire value of the goods. It was held that the non-recovery of half of the price of the goods arose directly from the neglect of the agent in not impacting a fire-insurance for the goods and hence the agent was liable.

In *Firm Kishanlal Shrilal Patwa v UOI,*[617] where the railways delayed a consignment, and the value of the goods depreciated on account of fall in the market price in the meantime resulting from price control by the Government, the depreciation in, value was not a direct consequence of the delay caused, nor could it be in the contemplation of the parties, and the plaintiff was not entitled to recover for the depreciation in value.

Hadley v Baxendale[618] rule in Indian Law

In the *Hadley v Baxendale* case, H's mill was stopped by the breakage of a crankshaft, and it was necessary to send the crankshaft to the makers as a pattern for a new one. The defendants, who were carriers, undertook to deliver the shaft to the makers, but the only information given to them was 'that the article to be carried was the broken shaft of a mill, and that H was the owner of the mill'. By some neglect on their part the delivery of the shaft was delayed, and in consequence the mill could not be restarted until some time after it could otherwise have been. H lost profits, which he would otherwise have made.

The question that arose was the loss of profit too remote or it could have been awarded, to which the judgement of Alderson B in the Court of Exchequer held:

> "*In the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and H never communicated these special circumstances to the defendants.*"

[615] *Smith Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd,* (1940) AC 997
[616] (1950) SCR 979
[617] AIR (1960) MP 289
[618] (1854) 9 Exch 341

"*If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury, which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them*."

This judgment therefore, brought forth two branches of a rule that is held as good law till date. As per Section 73 of the Indian Contract Act, Compensation for loss or damage caused by breach of contract:

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract – when an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation – in estimating the loss or damage arising from a breach of contract, the means, which existed of remedying the inconvenience caused by the non-performance of the contract, must be taken into account.

It has been held that section 73 embodies the rule of *Hadley v Baxendale*. The section also provides that the same principles will apply where there has been a breach of a quasi-contractual obligation.[619] The first rule is "objective" as it makes the liability to depend upon a reasonable man's foresight of the loss that will naturally result from the breach of the contract. The second rule is "subjective" as, according to it, the extent of liability

[619] *State of Karnataka v Shree Rameshwara Rice Mills*, (1987) 2SCC 160

depends upon the knowledge of the parties at the time of the contract about the probable result of the breach.[620]

The principles laid down in *Hadley v Baxendale*, as involving two branches of the rule *firstly* that the party breaking a contract is liable for damages arising "according to the usual course of things"; *secondly* that he is liable, or also liable, for "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it" were restated in Victoria Laundry case[621] by the Court of Appeal as a single rule.

Section 73, entitles the party who has suffered on account of breach compensation for loss or damages: -

1. Those that naturally arose in the usual course of things from such breach:

This is the first branch of the two-branch rule laid down in *Hadley v Baxendale*. Wherein it deals with such damage as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from the breach of contract, as the probable result of the breach.[622] It depends, as we have seen, on the knowledge that the parties are presumed to possess. Therefore, the first part consists of being able to affix liability on the person who has committed breach for those matters as may fairly and reasonably be considered as arising naturally (i.e., within the ordinary course of things) from the breach; Such matters would include the normal circumstances prevailing within the type of trade or transaction in question.

It is assumed, for the purpose that reasonable businessmen must be taken to understand the ordinary business practices and exigencies of the other's trade or business without the need for any special discussion or communication. An important question that arises is whether liability can exist for the direct consequences of a breach of contract, even though the extent of the damage was not foreseeable. The solution depends upon the construction to be placed upon the words "naturally in the usual course of things".

For this purpose it is important to analyse the decision of the Supreme Court in *Pannalal Jankidas v Mohanlal*, wherein it held that the Supreme Court, by majority, held an agent liable to his principal for "the direct consequences of his neglect" relying on section 212 (without mentioning Section 73), and referred with approval the distinction between direct and remote damage drawn in *Re Polemis*,[623] on the other hand, the dissenting view was hat the rules laid down by section 73 and section 212 as to the measure of damages were the same, but that in the circumstances the damage arose neither "directly", nor "naturally in the usual course of things".

[620] *Heron II, The Koufos VC. Czarnikow Ltd*, (1969) 1 AC 350
[621] (1949) 2 KB 528
[622] *Supra Note* 28, pg. 551
[623] (1921) 3 KB 560

For damages arising in the usual course of things, loss of normal business position of parties or late delivery are not too remote, and the fact that the breach was not contemplated is irrelevant. However, exceptional losses are not covered – which is the exception but if the exceptional circumstance is informed then such can be recovered.[624]

2. Those that the parties knew to be likely to result from the breach:

The application of this second branch of the rule depends upon the knowledge, which the contract-breaker possesses at the time of the contract, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those circumstances will cause more loss. The second aspect is the where the effect of the breach exceeds the effects which would occur in the "normal" or "basic" circumstances stated in the first branch. The plaintiff would be allowed to claim if the defendant through the plaintiff or other source came to know of the special circumstances to the contract. However, if it wasn't within his knowledge then such cannot be claimed.

For the second part of first paragraph to apply, it is necessary to prove that not only the plaintiff, but also the defendant knew when the contract was made about the special loss likely to result from the breach.[625] As to what was within the contemplation of "reasonable men" depends on the relevant degree of likelihood that particular kind of loss may occur.[626] In a suit for damages, whilst a plaintiff is entitled to damages that naturally arise in the usual course of business, but not for remote or indirect losses. For example, if a passenger misses his engagement due to defective management in the reservation of seats, he is not entitled to damages as the punctuality of trains is not guaranteed, and there is no contract to carry a passenger for a particular reason. In this case, the passenger missed his connection at a changing of trains' station due to his seats not being booked.[627]

<u>*Duty of Mitigation*</u>

In *Dunkirk Colliery Co v Lever*:[628]

> "*The person who has broken the contract is not to be exposed to the additional burden by reason of the plaintiffs not having done what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business*."

In *Murlidhar Chiranjilal v Harishchandra Dwarkadas*,[629] the Supreme Court held that there are two principles on which damages are calculated in the case of breach of contract of sale of goods. In his judgment Wanchoo J said:

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[624] *Supra Note* 28, pg. 551 - 553
[625] *Adam Haji Peera Mahommad v Sakavath Hussain Akbari,* AIR 1923 Mad
[626] *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* (1969) 1 AC 350
[627] *Monindra Lall Sen v UO*I, AIR (1960) Pat 411
[628] (1878) 9 ChD 20 at 25

"*The first is that he who has proved a breach of a bargain to supply what he has contracted to get, is to be placed so far as money can do it in as good a situation as if the contract has been performed; but the principle is qualified by a second which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps*."[630]

There are three rules predominantly followed by courts for the purpose of the doctrine of mitigation.[631] First, the plaintiff cannot recover the loss consequent upon the default of the defendant if the plaintiff could have avoided the loss by taking reasonable steps. Second, if the plaintiff avoids or mitigates the loss, he cannot recover for such avoided loss even if he takes steps, which are more than what was reasonably required of him. Thirdly, where the plaintiff suffers loss or incurs expense by taking reasonable steps to avoid or mitigate the loss resulting from the defendant's default, he may recover the further loss or expense from the defendant.

A court while assessing damages arising from a breach of contract must take into consideration the steps the plaintiff could have taken to mitigate the loss or the means, which existed of remedying the inconvenience caused by the non-performance of the contract.[632] This is not a right of the defaulting party; it is only a rule for the court to bear in mind.[633] It is often said that the law imposes 'a duty' on claimants to mitigate their loss, but this expression is misleading.[634] The claimant cannot be sued for failure to comply with its duty; rather the consequence is simply that no damages are given for the avoidable loss.

The plaintiff is required only to take reasonable steps.[635] If he fails to do so, he cannot claim damages for any loss, which he ought reasonably to have avoided.[636] Thus, where the successful bidder at an auction commits a breach, and the second highest bid is still alive, the party holding the auction must accept it to mitigate the damage.[637] An employee whose services have been terminated must take reasonable steps to obtain new employment.[638] The plaintiff is entitled to claim the expenses incurred for taking reasonable steps to mitigate his loss.[639]

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629 *Murlidhar Chiranjilal v Harishchandra Dwarkadas*, (1962) 1 SCR 653

630 *British Westinghouse Electric and Mfg. Co Ltd v Underground Electric Rlys Co., of London Ltd*, (1912) AC 673

631 *Chitty on Contracts*, (28th Edn) pg. 1316–17, paras 27–085

632 Indian Contract Act, 1872, § 73 explanation

633 *M Lachia Setty & Sons Ltd v Coffee Board, Bangalore*, AIR (1981) SC 162

634 *Supra Note* 28, pg. 555

635 *R J Mohammed Jacub Sahib (decd) v Indian Bank Ltd, Madras* AIR (1975) Mad 220

636 *AKAS Jamal v Moolla Dawood Sons & Co*, AIR (1915) PC 48

637 *A R Krishnamurthy v Arni Municipality*, (1955) 1 Mad LJ 437

638 *Firm Bhagwandas Shobhalal Jain v State of Madhya Pradesh*, AIR (1966) MP 95

639 *RJ Mahommad Jacub Sahib v Indian Bank Ltd*, AIR (1975) Mad 220

Illustration: Ahab hires SevenSeas, Inc., a world-famous boat builder, to build him a yacht. Ahab agrees to pay $2,000,000 for the yacht. After SevenSeas incurs $100,000 in expenses buying materials and drawing up blueprints for the boat's construction, Ahab breaches, telling SevenSeas that he will not be buying the yacht. SevenSeas continues to work on the yacht, incurring $400,000 in expenses before suing Ahab. In a suit against Ahab for $500,000, SevenSeas will only be awarded $100,000 because they had a duty to mitigate damages specifically not continuing to work once Ahab breached.[640]

A Plaintiff who has taken unreasonable steps cannot hold the defendant liable for loss, which has thus been suffered. For example, it has been held reasonable to incur hire-purchase charges to replace a damaged rotor, legal expenses in proceedings with a third party, advertising to safeguard one's commercial reputation, and voluntary expenses to meet the claimant's commercial (but legally unenforceable) obligations to the public.[641] Mitigation is the duty of the plaintiff, that he must duly undertake after the breach to ensure minimal damage and thereby be entitled to claim the same from the defendant.

Rule of Contributory Negligence

According to Winfield and Jolowicz[642] – negligence is the breach of a legal duty to take care, which results in damage, undesired by the defendant to the plaintiff. When a person by his own want of care contributes to the damage caused by the negligence or the wrongful conduct of the defendant, he is considered to be guilty of Contributory Negligence. "Contributory Negligence" does not mean breach of any duty, merely insinuates to the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong". It exists a legal defence against any suit initiated against one self. In contract claims the duty to keep one's loss to the minimum is capable of taking care of the matter where the loss is either caused or increased by the plaintiff's contributory negligence.

As a general rule, where the claimant's loss has been caused partly by the defendant's breach of contract and partly by the claimant's own blameworthy conduct, the damages are not reduced unless the claimant's conduct breaks the chain of causation[643] or constitutes a failure in the claimant's duty to mitigate its loss or itself amounts to a breach of contract.[644]

In the case of *Barclays Bank Pic v Fairclough Building Ltd*,[645] the court held that the defence of contributory negligence is not available as against a claim for damages, which is founded on a strictly contractual obligation. A contractor was engaged for cleaning of

[640] *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929)
[641] *Supra Note* 28, pg. 555
[642] Winfield and Jolowicz on Tort, (9th Edition, 1971) pg. 45
[643] *Quinn v Burch Bros (Builders) Ltd.*, (1966) 2 QB 370
[644] *Tennant Radiant Heat Ltd v Warrington Development Corp.*, (1988) 1 EGLR 41
[645] (1995) QB 214

roofs made of corrugated asbestos sheets. He did not properly control the asbestos discharge. The refuse contaminated the premises necessitating extensive remedial works. As against the owners' action for damages, the contractor contended that the owners were also negligent because their architectural department did not provide proper supervision of the work. The court found that the owners' claim was only in contract being based on a breach of two contractual terms.

LIQUIDATED DAMAGES

As the concept of liquidated damages has its origin in the English Laws, it is necessary to analyse the provisions and cases to get a better understanding. In the case of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*.,[646] wherein a manufacturer of tyres supplied a quantity of tyres to a dealer on the condition that they would not be sold below the list prices and that liquidated damages, not penalty of £5 would be payable for every tyre sold in breach of the agreement. The dealer committed breach. The question was whether the above sum was intended as a genuine compensation for the loss suffered. The Lords held:

1. The expression used by the parties is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

3. The question whether a sum stipulated is penalty or liquidated dam ages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract.

4. To assist this task, various tests have been suggested:

    a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

    b) It will be a penalty if the breach consists only in not paying a sum of money and the sum stipulated is a sum greater than the sum, which ought to have been paid.

    c) There is a presumption (but no more) that it is penalty, when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion a serious and others but trifling damage".

[646] 1915 AC 79 (HL)

Section 74 provides that parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other, or may agree that in the event of breach by one party any amount paid by him to the other shall be forfeited. If this sum is a genuine pre-estimate of damages likely to flow from the breach, it is called "liquidated damages". The fact that parties have provided for liquidated damages does not take away the choice of a plaintiff to seek specific performance.[647] If it is not a genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, it may be a penalty. Under the common law, a genuine pre-estimate of damages by mutual agreement is binding upon parties but the Court will refuse to enforce a penalty which is a stipulation in a contract *in terrorem*, awarding instead only reasonable compensation.

Section 74 provides for the measure of damages in two classes:

i. Where the contract names a sum to be paid in case of breach; and

ii. Where the contract contains any other stipulation by way of penalty.

In both the cases the measure of damages is by section 74, reasonable compensation not exceeding the amount or penalty stipulated for.[648] In *Kailash Nath Associates v DDA*, the Supreme Court has set out the law under section 74 as follows:

> "*Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*"

Since section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in section 73 of the Contract Act.

Advantages

[647] *P DSouza v Shondrilo Naidu* AIR 2004 SC 4472, (2004) 6 SCC 649
[648] *Fateh Chand v Balkishan Das*, (1964) 1 SCR 515

In commercial contracts, the provisions for Liquidated Damages are most definitely provided and that is because of the multiple benefits and assurances that are presented to the parties in the event of a breach. The following are the benefits:

i. Genuine estimates of risks. Usually, helps the court as a means of guiding them towards calculating unliquidated damages, as they can assess what all to factor in;

ii. Eliminates tedious process of proving and evidencing loss, as well as computing them. This is conditioned on it being a genuine pre-estimate and not in the form of a penalty;[649]

iii. Somewhat of a guarantee that he may rely on for fulfilment of obligations;[650]

iv. Saves time from making estimations for assessment. The contemplations and calculations are done prior hand;

v. Compensation, where the party may otherwise not be able to recover indirect, consequential loss by the rule of remoteness;

vi. The parties are able to choose and stipulate different damages for different breaches, depending on the issues surrounding that particular aspect.[651] Parties tend to ensure that they provide liquidated damages for material breaches or breaches of timelines etc.; and

vii. Parties are therefore allowed and able to claim different sums for different breaches by the other party.[652]

Rule against Penalties

The rule against penalties originated in equity which would relieve against penalties, cutting them down to the actual damage suffered, but was taken up and applied by the common law, and reinforced by statute. The Court will accept as liquidated damages the sum fixed by the parties if it is a genuine pre-estimate of the damage which seems likely to be caused if the breach provided for should occur. Section 74 clearly specifies the payment of sums agree upon that do not amount to being penalties but are merely a pre-genuine reasonable estimate of the damages. The Courts are thereby vested with the powers to examine such clauses and determine the difference as being a penalty or liquidated damages. The difference[653] between penalties and liquidated damages are:

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[649] *Oil and Natural Gas Corp Ltd v SAW Pipes Ltd*, AIR (2003) SC 2629
[650] *Chitty on Contracts*, (28th Edn) para 27–102, pg. 1326
[651] *Steel Authority of India Ltd v Gupta Brother Steel Tubes Ltd,* AIR 2009 SCW 7191
[652] *Indian Drugs and Pharmaceuticals Ltd v Industrial Oxygen Co Ltd,* AIR 1985 Bom 186
[653] *Supra Note* 12, pg. 1398

a) An exaggerated and outrageous sum will be deemed to be a penalty;[654]

b) If the difference between the stipulated sum and the damages suffered is exorbitantly high then such amount is a penalty;[655]

c) If the contract specifies payment of one lump sum then such amount would be a penalty, as it would be conscionable to claim damages for each breach separately;

d) Wherein there is a stipulated sum but ascertaining a definite pre-estimate of damage is difficult, the sum stipulated the true bargain;[656] and

e) Sometimes, parties fix the sum prior hand to avoid hassles of assessment later on, wherein there is meeting of minds and it is the intention of parties, for example in a key project, then such sums are accepted.[657]

For the purpose of differentiating a sum provided as penalties or liquidated damages, it is necessary to examine the facts of the case and decipher from the construction of the clause.[658] Usually, penalties are stipulated as *in terrorem* and liquidated damages are a pre-genuine estimate. In the event that a party feels that they were pressured into accepting the terms and thereby the stipulated sum is not reasonable, the burden would be on them to aver such. The Courts may shift the burden on the plaintiff if it is found that the sum is not reasonable, affording them an instance to prove that such sum is genuine and reasonable.

Generally, it is open to the court under this section to award as compensation a sum equal to the agreed penalty, provided that it does not appear to the court to exceed what is reasonable. In *Surjit Kaur v Naurata Singh*,[659] the Supreme Court has observed that a term in an contract fixing an amount of compensation must be given effect to, and any award less than that amount must be accompanied with reasons. The courts are burdened with the task of analysing and looking into multiple aspects before being able to determine whether the clause is a penalty or liquidated damages. If the court is unable to assess compensation, the sum named by the parties may be taken into consideration as the measure of reasonable compensation, if it be regarded as genuine pre-estimate of the loss; but not where it is in the nature of a penalty.

Certain things that could be looked into are such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in

[654] *Clyde Bank Engineering and Shipbuilding Co v Castaneda*, (1905) AC 6 at 17
[655] *Kemble v Farren*, (1829) 6 Bing 141
[656] *Clyde Bank Engineering and Shipbuilding Co v Castaneda*, (1905) AC 6
[657] *Diestal v Stevenson*, (1906) 2 KB 345
[658] *Public Works Commissioner v HilIs*, (1906) AC 368
[659] *Surjit Kaur v Naurata Singh*, AIR (2000) SC 2927

incorporating in the contract the particular stipulation which is contended to be penal in nature.[660] Courts have treated the stipulated amount, if in the form of a penalty, as the upper most limit, if it is difficult to aver and evidence the loss or prove otherwise then such sum shall be the maximum that can be paid as damages.[661]

<u>Examples of Penalty clauses</u>[662]

1 A stipulation in a contract with an employee that he must pay as damages double the daily wage if he absented himself.

2 Wherein it is provided that if there were a default in payment, the defaulter would be liable to pay double the amount.

3 A clause in a building contract providing for forfeiture of the security deposit if the work was not completed in time.

4 A clause in a contract, under which a film was leased with the lease amount payable in instalments, that the instalments paid would be forfeited if there was a default.

5 A clause in a maintenance agreement that the amount of Rs 80 per month would be increased to Rs 100 a month if there was a default.

6 A security bond under which attached articles, were to be sold for three times their value.

7 A clause in a purchase agreement that a part of the purchase price paid would be forfeited if vacant possession was not given.

8 A clause in a chit fund agreement that the whole amount would be payable if there was a default.

9 A clause in a hire purchase contract providing for seizure of the article if instalments are not paid may be penal.

[660] *K P Subbarama Sastri v K S Raghavan* AIR (1987) SC 1257

[661] *Fateh Chand v Balkishan Das*, AIR (1963) SC 1405; *Construction & Design Services v DDA,* (2015) 14 SCC 263

[662] Halsbury's Laws of India, Contract - CONSEQUENCES OF BREACH/Penalty, (2nd Edn, 2015) pg. 304 Volume 9

Examples of clauses that are not penalties[663]

1 A clause in an electricity supply contract, stipulated that if the bill is not paid by the due date, interest would be charged.

2 A two-part tariff in an electricity supply contract requiring the consumer to pay a minimum amount regardless of the quantity of power drawn by him.

3 A clause in a contract to deliver paddy providing for a payment of Rs 3 per maund if it was not delivered.

4 A clause in a pledge that it would be irredeemable if the amount advanced was not paid on the due date, if the amount advanced is not much higher than the value of the article pledged.

5 A clause in an employment contract providing for forfeiture of salary where an employee leaves without giving 15 days notice.

6 Foreclosure premium charged by a financer to foreclose the loan before the stipulated time.

7 A seizure clause in a hire purchase agreement.

8 Bonds imposing liability on employees to serve in employment after education or training was completed.

Requirement of Actual Loss

Rule of thumb is, a person cannot be compensated when he has suffered not loss or injury. The necessity of proving and evidencing the injury has increased and recognised widely under law. In actuality the ability to adduce actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. The Section 74 exempts him from such responsibility and enables him to claim compensation despite of his failure to prove the actual extent of the loss or damage.[664] A plaintiff, who has not, in fact, suffered any loss by reason of the breach, is nevertheless entitled to a verdict, but the damages recoverable will be purely nominal.[665] In *Kanchan Udyog Ltd v. United Spirits Ltd*, the Supreme Court of India in

[663] *Ibid*, pg. 305
[664] *Supra Note* 12, pg. 1402
[665] *Supra Note* 28, pg. 534

consideration of the question of the casual connection between the breach and the loss sustained relied on Chitty on Contracts within *Kanchan Udyog* to find that the '*important issue is whether a particular loss was within the reasonable contemplation of the parties*'.

In *Fateh Chand v Balkishan Das*, it has been observed:

> "*There is no warrant for the assumption made by some of the High Courts in India that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract, and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression 'the contract contains any other stipulation by way of penalty' comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of the right to money or other property already delivered...In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture... The application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff...The jurisdiction of the Court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit...The expression 'to receive from the party who has broken the contract' does not predicate that the jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract.*"

Similar to the requirements under section 73, there is need to make a prima facie case that there was an infringement of obligations and due to such breach the plaintiff has suffered loss. Section 74 does not dispense this standard requirement. Proof of legal injury is paramount for a claim to succeed; therefore, parties tend to rely on liquidated damages and provide these as necessary clauses as breach causes legal injury then they can simply bring forth a claim enforcing it without going into the quagmire of assessment.

In the case of *M/s. Herbicides (India) Ltd. v. M/s. Shashank Pesticides P. Ltd*,[666] the Delhi High Court held in case of liquidated damages that "*... even if it does not prove the actual loss/damage suffered by it, is entitled to reasonable damages unless it is proved that no loss or damage was caused on account of breach of the contract.*" The provisions relating to liquidated damages are required to be drafted with clarity and one has to prove that the amount is a genuine pre-estimate of loss or injury suffered. This is advisable for the benefit of the parties themselves in the event of a breach.

[666] 180 (2011) DLT 243

In section 74, "*Whether or not actual damage or loss is proved to have been caused thereby*", this has been stipulated to emphasise the change specifically made by Indian Legislature that departs from the complicated principles of English Common Law, and to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved.[667] These words allow for an aggrieved party to be reasonably compensated, even if the damages suffered due to the breach are lesser than the stipulated amount[668] or even when the breach has not resulted in serious damages. [669] This is because, when drafting the contract, the parties had contemplated and agreed upon the terms as is, however, there is always scope for courts to side-line onerous contracts.

It is specified that the plaintiff must show legal injury, however, when claiming for a loss of a monetary sum, the proof must be adduced,[670] otherwise, it will not be entitled to the claim any damages thereof. The courts cannot rely only on the stipulated amount without, going into the clauses of the contract and the nature of the contract. The courts must for themselves establish and assess whether or not the assessment of damages in the particular contract is difficult or not.[671] Thereafter, it can arrive at a conclusion whether to rely on the sums stipulated or not. The Supreme Court and various High Courts have held that wherein assessment is difficult then the stipulated amount should be taken as a genuine pre-estimate.

The Supreme Court in *Oil and Natural Gas Corp Ltd v SAW Pipes Ltd*[672] laid down certain considerations to be followed when dealing with contracts and liquidated damages:

1. "*Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.*

2. *If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.*

3. *Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is*

[667] *Supra Note* 12, pg. 1403
[668] *Bhai Panna Singh v Bhai Arjun Singh,* AIR (1929) PC 179
[669] *Wallis v Smith*, (1882) 21 ChD 243
[670] *Nagpur Nagarik Sahakari Bank Ltd v UOI,* AIR (1981) AP 153
[671] *Maula Bux v UOI,* (1970) 1 SCR 928
[672] AIR (2003) SC 2629

competent to award reasonable compensation in case of breach even if no actual damage is proved to have been in consequences of the breach of a contract.

4. *In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation*."

Wherein a sum is named as damages for breaches however varying in importance, but of such an uncertain nature that they cannot be accurately ascertained or the sum stipulated is taken as an average or mean figure of losses probably incurred in different events, it may be recoverable as liquidated damages.[673]

Stipulations for Liquidated Damages

There is no mandate that parties must make a provision for liquidated damages for all breaches, it is left upon the parties to decide for which breach the damages will be specified and for which it will be left as unliquidated. One of the examples for a stipulation of liquidated damages is forfeiture of earnest money and/or security deposit, as a means of compensation for breach of certain obligations.

Forfeiture of Earnest Money

Earnest money was regarded as to confirm interest in a project as well as a part-payment to the entire sums that accrue out of a contract. The Court has to construe the words of the contract as well as the intention of the parties in the scenario[674] and the question for consideration is whether the money is earnest money or advance deposit as part-payment. In *Fateh Chand* the court held that for the forfeiture of money to be allowed there was a need for an express clause[675] to be there in the contract stipulating the same. A sum of money may be paid as advance and as a part of the consideration money, it cannot be forfeited in absence of a provision for forfeiture even if the defaulting party is liable for damages for breach.[676]

Furthermore, in *Maula Bux* the court held that the term earnest money was applicable to cases of sale of property movable and immovable. It was held:

"*Forfeiture of earnest money under a contract for sale of property-movable or immovable if the amount is reasonable does not fall within Section 74. That has been decided in several cases. These cases are easily explained, for forfeiture of reasonable amount paid, as earnest money does not amount to imposing a penalty.*

[673] *Chitty on Contracts*, (28th Edn) para 27–103
[674] *Videocon Properties Ltd v Bhalchandra Laboratories,* AIR (2004) SC 1787
[675] *Satish Batra v Sudhir Rawal*, (2013) 1 SCC 345
[676] *Mahommad Sultan Rowther v Naina Mahommad,* AIR (1973) Mad

> *But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money, which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty*."

It is always the intention of the Courts to interpret clauses in line with the intention of the parties. Therefore, there is need to carefully analyse and opine on provisions, the following guidelines[677] were laid down by the Supreme Court with regard to the earnest money:

i. *It must be given at the moment at which the contract is concluded;*

ii. *It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract;*

iii. *It is part of the purchase price when the transaction is carried out;*

iv. *It is forfeited when the transaction falls through by reason of the default or failure of the purchaser; and*

v. *Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest money.*

Security Deposit

In many cases, certain sums of money are deposited as security to ensure that the party does not infringe their obligations and actually performs it. It has been held[678] that the expression "contract contains any other stipulation by way of penalty" is not limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach but also includes covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.[679]

In *Fateh Chand v Balkishan Das*, two sums of money were paid by the vendee to the vendor of land, a sum of Rs 1,000/- as earnest money and Rs 24,000/- "*out of sale price*" at the time the possession was given. There was a stipulation that the whole amount will be forfeited in case of default of the vendee to complete the contract. It was held that the sum could not bear the character of a deposit for the due performance of the contract. The Court observed:

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[677] *Shree Hanuman Cotton MilIs v Tata Air Craft Ltd*, (1970) 3 SCR 127
[678] *Fateh Chand v Balkishan Das*, (1964) 1 SCR 515
[679] *Supra Note* 12, pg. 1419

"*The words 'to be paid' which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression 'if the contract contains any other stipulation by way of penalty' widens the operation of the section so as to make it applicable to all stipulations by way of penalty whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression, which implies that the stipulation must be done for rendering something after the contract is broken.*"

In *Maula Bux v UOI*, the Supreme Court held that the deposit, being security for guaranteeing due performance of contract for supply of goods, was not one to be applied towards the part payment of price, nor was it earnest money, but it was a sum stipulated in the nature of a penalty, and section 74 applied to it. The general principle is that such deposits are not ipso facto liable to forfeiture on a breach of contract, but party complaining must prove the loss suffered, which he may be entitled to recover. The party to a contract taking security deposit from the other party to ensure due performance is not entitled to forfeit the deposit on the ground of default when no loss is caused to him in consequence of such default.[680]

Stipulation on Interest

Interest can only be awarded if it is payable.[681] If the contractual obligation were one of debt, the rule against penalty would not apply to the sum payable. This is because the section applies where the sum is payable on breach, and not on some other event. The explanation, therefore, would apply as it states, where higher rate of interest is payable "from the date of default". Ordinarily, interest is not allowed on the amount of damages arising out of breach of contract.[682] The general perception is that without their being an express stipulation, awarding interest as damages can be seen to be a punitive remedy. The following are the considerations for granting interest:

a. Under an agreement, express or implied,[683] to pay interest,
b. By custom[684] – in the particular industry or due to the nature of the contract; or
c. Under statutory provisions.[685]

The burden of proving that interest is receivable under contract or custom is on the party who alleges it.[686] It cannot be awarded where the parties have agreed that no interest is payable. Interest may be awarded when the security deposit or earnest is being returned if

680 *State of Tamil Nadu v K.R. Selvamoorthy,* AIR (1987) Mad 171
681 *Thawardas Pherumal v Union of India* (1955) 2 SCR 48
682 *Aditya Prasad v Chhote Lal,* AIR (1924) Oudh 319; *Grasim Industries Ltd v Union of India,* AIR (2011) P&H 32
683 *Ananda Namdeo Kharde v Pundalik Tukaram Chaudhary,* AIR (1936) Nag 225
684 *Allied Motors v Sanderson Agencies,* AIR (1992) Del 324 (custom must be proved).
685 Sale of Goods Act 1930 § 61; Interest Act 1978; Negotiable Instruments Act 1881 § 78-81.
686 *Union of India v Krafters Engineering and Leasing (P) Ltd,* AIR (2011) SC 2620

there is a written notice demanding interest.[687] If a defendant is required to refund an amount to the plaintiff, interest is generally awarded.[688] Thus, interest can be awarded to a buyer of goods if he claims a refund of the price.[689] As per Interest Act 1978, a Court may allow interest to the person entitled to the debt or damages or to the person making such claim, at the current rate of interest *(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings; (b) in case of other debts, from the date mentioned in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed*.

The largest number of cases decided under the original paragraph related to stipulations providing for interest. Those stipulations may be divided into the following five classes[690]:

1. Stipulations for payment on interest at a higher rate on default on the part of the debtor to pay the principal of part thereof or interest on the due date, and these may again be sub-divided into:

    a) Stipulations for payment of enhanced interest from the date of the bond; and

    b) Those for payment of such interest from the date of default.

2. Stipulations for payment on default of compound interest, which may be divided into:

    a) Stipulations for payment of compound interest at the same rate as simple interest; and

    b) Those for payment of compound interest at a rate higher than simple interest, or for payment of an increased rate of interest, and compound interest at that rate.

3. Stipulations for payment of interest at a specified rate if the principal or a part thereof is not paid on the due date.

4. Stipulations for payment of interest at a lower rate if interest paid on due dates.

5. Stipulations for payment of interest from the date of the bond, but at an exorbitant rate.

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687 *Jaggo Bai v Hari Har Prasad Singh*, AIR (1947) PC 173

688 *Official Receiver, Calcutta High Court v Baneshwar Prasad Singh*, AIR (1962) Pat 155

689 Sale of Goods Act, 1930, § 61(2)(b)

690 *Supra Note* 12, pg. 1406 -1407

MODULE V – REMEDIES ARISING OUT OF VOID/VOIDABLE CONTRACTS

Introduction

The Indian Contract Act attempts to contemplate and envisage within its ambit almost all and every scenario that there could be whilst entering into a contract or executing it. However, it is practically impossible to include the entirety of laws pertaining to contracts, there is still room for courts discretion and customs, traditions practices, etc. At the outset, it is necessary to understand which contracts are deemed to be void and which are voidable, as the remedies available for each differ. The difference that exists between Void and Voidable Contracts are clearly outlined under the provisions of the Indian Contract Act, 1872.

VOID CONTRACTS

As per Section 2(g) an agreement not enforceable by law is said to be void. The law that determines the validity of the contract is the statutes that are in force, for example the Contract Act or any such substantive law of the nation. Procedural defects do not pertain to the essence of the contract, but merely deal with the enforceability of the rights arising out of the contract. However, if the contract is contrary to the operation or provisions of a substantive law, then it is said to be unenforceable by law.[691]

The understanding is that when either party cannot enforce a contract and the rights within it have lapsed, such contract is said to be void. As per 2(g), which specifies it as an agreement, however in common commercial terms and customary practice, void contract is the norm for usage. According to 2(h), an agreement that is enforceable by law is a contract. Therefore, void contract is a contradiction, nonetheless a nascent one.

Although a void agreement is described as one not enforceable, yet reliefs can be granted under it. For example, if goods are delivered under a void agreement, the goods are recoverable by an action of conversion in tort. If the contract is discovered to be void, the obligation of restitution arises under section 65. A party to an agreement which is void for unlawful consideration or object may be entitled to recover, if he can establish his claim otherwise under that agreement; so would a party to such an agreement be entitled to recover if he is not a participant in the illegality.

An agreement that is unenforceable from its inception is *void ab initio*. Void ab initio is Latin for "void from the beginning." This means that legally, a contract was void as soon as it was created and the rights and obligations arising out it are not enforceable and such contract is not recognised. For example, wherein a contract/agreement contains an obligation to do an illegal act, such is void ab initio.

[691] *Sadhusingh Fatehsingh v Jhamandas Valiram*, AIR (1937) Sind 211 at 212

The other instance is whereby an agreement/contract becomes void subsequently. When the parties entered it into it was valid, however, has become void due to certain factors or operation of law. As per section 2(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. In *Mahant Singh v U Ba Yi*,[692] the Privy Council observed that clause (j) did not declare every unenforceable contract void, but only those unenforceable by law, and these meant not unenforceable by reason of some procedural regulation, e.g., the law relating to limitation, but unenforceable by substantive law. A contract may become void due to the impossibility of performance.

Void agreements arise due to a legal defect or non-compliance with certain stipulations under the law, the following are situations[693] that lead to rendering of a contract void:

i. Free consent of the parties;

ii. Competent parties to a contract;

iii. A lawful consideration;

iv. A lawful object;

v. Not expressly declared void by Sections 27, 28, 29, 30, 56; and

vi. Procedural compliances – if any e.g. for contracts relating to property or companies have other substantive laws as well.

The following are the instances when a contract/agreement is void:

1. Mistake of Fact[694] - meeting of mind is a cornerstone under law of contract. When parties to a contract enter into if without completing agreeing on all aspects as one mind, then such contract is void. The essential thing is that such fact should be one that is essential to the contract between the parties. An erroneous opinion as to the value of the thing, which forms the subject matter of the agreement, is not to be deemed a mistake as to a matter of fact.

   Illustration: A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

[692] AIR (1939) PC 110
[693] Indian Contract Act, 1872, §10
[694] *Ibid*, §20

2. Mistake of Law[695] - it is essential that the contract be entered into for a lawful object, not forbidden by any law or with the intent to defeat any law or defraud somebody. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

   Illustration: A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A, salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B"s promise, being in part unlawful. This applies to contracts, which the court may deem as immoral or opposed to public policy, such as fraudulent agreements, which may cause financial loss to a person. However, if the legal part of the contract is severable from the illegal part, then the former can be enforced in the court of law.

3. Agreements without consideration[696] - unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law. Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made. An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the Court in determining the question whether the consent of the promisor was freely given may take the inadequacy of the consideration into account.

4. Agreements in restraint of marriage[697] - any agreement in restraint of the marriage of any person, other than a minor is void. It is the policy of the law to discourage agreements, which restrains freedom of marriage. The restraint may be general or partial, that is to say, the party may be restrained from marrying at all, or from marrying for a fixed time or from marrying a particular person or class of persons, the agreement is void.

5. Agreements in restraint of trade[698] - every agreement, by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. Saving of agreement not to carry on business of which good will is sold. Certain provisions of the Partnership Act also allow for certain agreements in restraint of trade to be held as valid. As well as certain exclusive dealing agreements and employment agreements have been held to be valid despite of having an agreement in restraint of trade.

[695] *Ibid*, §23 & 24
[696] *Ibid*, §25
[697] *Ibid*, §26
[698] *Ibid*, §27

6. Agreements in restraint of legal proceedings[699] - an agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. However, arbitration agreements have been held to exempt from this provision.

7. Uncertain agreements[700] - agreements, the meaning of which is not certain, or capable of being made certain, are void.

8. Wagering agreements[701] - agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made. Exception is made for horseracing bets.

9. Contingent on impossible events[702] - contingent agreements to do or not to do anything, if an impossible event happen, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

10. Impossibility of performance[703] - agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non- performance of the promise.

VOIDABLE CONTRACTS

Section 2(i) describes a voidable contract as one, which is enforceable by law at the option of one of the parties, but not at the option of the others. An agreement, which is enforceable at the option of one or more of the parties only and not at the others, is a voidable contract. Since the contract is voidable, it gives the person a right of choice or election. Such a right, once exercised, is exhausted. If such a person, by express notice or by conduct, elects to affirm, he cannot later seek to avoid the contract; and if he has

[699] *Ibid*, §28
[700] *Ibid*, §29
[701] *Ibid*, §30
[702] *Ibid*, 1872, §31
[703] *Ibid*, 1872, §56

elected to avoid, he cannot later be allowed to affirm.[704] There is no *locus poe nitentiaeor* drawing back from the bargain in either case.[705] If the party having the option, affirms the contract, or fails to exercise the right to rescind within a reasonable time, so that the position of the parties has been altered, he loses the right to rescind.

The option, which characterises a voidable contract, is an option either to say, "*it shall not be enforceable at all*", or to leave it as a good contract enforceable by any party on usual conditions.[706] Hence, the words "*may put an end to the contract*"[707] also render the contract voidable. A contract may be voidable, not only under the Act, but also under other laws.[708] A transfer by a guardian of minor's property in violation of section 29 of the Guardians and Wards Act, 1890 or under sections 8(2) or (3) of the Hindu Minority and Guardianship Act, 1956 are voidable at the option of the minor. This definition was not intended to alter and does not alter the substantive law. It has been held that when a "voidable contract" is avoided, it "becomes void", and hence attracts application of section 65 to it for restoration of advantage received by the parties.

The following are the instances when a contract/agreement is voidable:

1. Lack of free consent[709] – when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

2. Refusal of party to perform promise wholly[710] – When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

3. Prevention of performance[711] – when a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he

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[704] R Yashod Vardhan and Chitra Narayan, *Pollock And Mulla: The Indian Contract and Specific Relief Acts* 94 (Lexis Nexis, 2nd vol, 15th edn., 2017)
[705] *Kunja Lal Bhuiya v Hara Lal Bhuiya,* AIR (1943) Cal 162
[706] *Muralidhar Chatterjee v International Film Co Ltd,* AIR (1943) PC 34
[707] Indian Contract Act, 1872, §39
[708] *Supra Note* 22
[709] Indian Contract Act, 1872, §19 & 19A
[710] *Supra Note* 25
[711] Indian Contract Act, 1872, §53

is entitled to compensation 1from the other party for any loss which he may sustain in consequence of the non- performance of the contract.

4. Failure to perform within fixed time[712] – when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

The differences between void and voidable contracts are:

1. Whilst void contracts are invalid from its inception, whereas voidable contracts become void subsequently or at the choice of the party;

2. Under void contracts, the party has no choice and cannot perform or enforce performance of it, however, in a voidable contract, the party has an option to declare the contract and may if he wishes enforce performance;

3. In a voidable contract, the performance is contingent on the choice of the affected party, whereas, in a void contract it cannot be done by either party;

4. The void agreement does not exist in the eyes of the law, but there are remedies for it, and for voidable contracts, they do exist and have legal ground but are dependent on the treatment of the party.

Contracts that need not be performed

Section 64: Consequences of rescission of voidable contract – it specifies when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding avoidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Section 65: Obligation of person who has received advantage under void agreement, or contract that becomes void – it is stipulated when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Section 66: Mode of communicating or revoking rescission of voidable contract – the rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal

[712] *Ibid*, §55

Section 67: Effect of neglect of promisee to afford promisor reasonable facilities for performance – if any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Certain relations resembling those created by contract

Section 68: Effect of neglect of promisee to afford promisor reasonable facilities for performance – it specifies that if any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Section 69: Reimbursement of person paying money due by another, in payment of which he is interested – when a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Section 70: Obligation of person enjoying benefit of non-gratuitous act – whereby a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Section 71: Responsibility of finder of goods – a person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.

Section 72: Liability of person to whom money is paid, or thing delivered, by mistake or under coercion – a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

REMEDIES

Understanding the numerous possibilities of difficult situations that are created due to the complex nature of contracts and their law. The Contract Act attempts to keep the principle of protecting the innocent party, at the heart of the legislature. It provides for remedies to parties wherein they have entered into contracts that are void or voidable.

Rescission

The word "rescission" is derived from the Latin term *rescindere*, which means to cut or tear open. The abrogation of a contract, effective from its inception, thereby restoring the parties to the positions they would have occupied if no contract had ever been formed. This right is available with the parties to the contract; it can be done expressly or impliedly, thereby not binding on the parties. The aspect for examination is the intent[713], which can be construed from their actions and the terms of the Contract. There is an implied rescission of the contract when some new and independent terms, inconsistent with the first contract, are agreed upon regarding the same subject matter between the parties.[714]

Before making an order for rescission of the contract, the court must order restoration of benefit; the defendant cannot be made to bring another suit; the defendants' claim for restoration is a defence and separate court fees are not payable for it.[715] *Illustration*: A sells a field to B. There is right of passage over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded. As per Section 27 of Specific Relief Act, 1964, for courts to be able to grant an order rescinding the contract between the parties, it is necessary for the following to be present:

a) Where the contract is voidable or terminable by the plaintiff;

b) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

The option of avoiding a contract procured in any of the ways mentioned in sections 19, 19A, is exercisable by the party's representatives,[716] unless at the date of his death, he had lost it by acquiescence or otherwise.[717] Once affirmed by the person entitled to avoid the contract, a third party cannot question it.[718] If we are to construe the provisions of Section 27(2)(d) of Specific Relief Act, 1964, it is implied that courts can grant rescission of part of a contract, if it is possible to remove that portion alone.

Modes:

1. By Notice – it is sufficient under section 66 that the rescission is communicated in the same manner and subject to the same rules as if it were a proposal. As per Section 66, for rescission to be valid and final, it is necessary that it be communicated to the other party. For the purposes of communicating the notice, it would be governed by the same principles and rules as those applicable for acceptance or refusal of an offer. Communication of notice to rescind is enough, and it is not necessary to file a suit for rescission. In *Car and Universal Finance Co Ltd v Caldwell*,[719] the owner of a car sold it to a rogue against a cheque. The purchaser absconded. The cheque was dishonoured. The owner informed the police and the Automobile Association. After thus avoiding the sale, the

[713] *Morris v Baron & Co.*, (1918) AC 1
[714] *Raghumull v Luchmondas*, AIR (1917) Cal 52
[715] *Pramada Prasad Mukherji v Sagarmal Agarwalla*, AIR (1954) Pat 439
[716] *Shravan Goba Mahajan v Kashiram Devji*, AIR (1927) Bom 384
[717] *Govind Ramaji Ganjale v Savitri Rama Thosar*, AIR (1918) Bom 93
[718] *Rangnath Sakharam v Govind Narasinv*, (1904) 28 Bom 639
[719] *Car and Universal Finance Co Ltd v Caldwell*, (1964) 1 All ER 290

subsequent purchaser from the rogue had acquired no title to the car. Thus, an innocent party to a contract of sale of a car was held to have effectively exercised his right of rescission otherwise than by communication or repossession, although the other party to the contract by deliberately absconding, put it out of the power of the innocent party to communicate his intention to rescind. The party rescinding or terminating the contract must prove that notice to that effect has been sent and received by the other party.[720]

2. Setting aside by Court – the Specific Relief Act, 1963 (Specific Relief Act) provides sections 27–30 for rescission by the court. A heavy duty lies upon the party who seeks to avoid a contract on grounds of fraud, misrepresentation or coercion to prove such allegations.[721] In the absence of details, a fluent use of expressions cannot help avoidance of the contract. The process of rescission is essentially the act of the party rescinding, and not of the court, although, it is common to speak of a Court "setting aside" or rescinding a contract.[722] A decree of rescission may become essential where property has been transferred on execution of a deed.[723]

3. Rescission as a Defence – if a suit is brought by a party to enforce a contract, the defrauded party can pray for avoiding the contract in his written statement being well within the period of limitation, and it is not necessary for him to bring a suit to avoid the contract. The innocent party may raise the defences entitling him to rescission in a suit for specific performance, which is enabled by section 9 of the Specific Relief Act. Therefore, such right is available throughout and is not defeated by lapse of time.

When:

1. Lack of free consent – as per Section 19 of The Contract Act, consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. Non-disclosure of some immaterial facts would not per se give a right to rescission, unless the consent has been secured by practicing some deception.[724]

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720 *Madhumita Sarkar v Oriental Insurance Co Ltd*, AIR (2007) Cal 234
721 *Supra Note* 22, pg. 497 - 498
722 *Ibid*
723 *Appanna v Jami Venkatappadu*, AIR (1953) Mad. 611
724 *Bhagwani Bai v Life Insurance Corpn of India*, AIR (1984) MP 126

The innocent party whose consent is not free can elect to rescind the contract or affirm it. If he elects to rescind it, he must give notice of rescission.[725]

2. Undue Influence – under section 19A of The Contract Act, consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just. Where the contract is voidable on the ground of undue influence, the Court has discretion to set aside the transaction absolutely, or subject to terms and conditions. The Court can pass such a decree in favor of the plaintiff as may be consistent with the equities of the case, and it is not necessary to the passing of such a decree that the plaintiff should agree to the contract being modified.[726]

3. Mistake of fact – under section 20, where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. A mistake described in this section operates to invalidate a contract, because the true intention of the parties to make their agreement conditional on the existence of some state of facts turns out not to have existed at the date of the agreement.[727] The rule of mistake, as invalidating a contract, is therefore confined within very narrow limits, where the extreme injustice of holding one party to the contract, outweighs the general principle that apparent contracts should be enforced.[728] It is for this reason that where one party's misunderstanding was caused by the words or conduct of the other party the mistaken party will normally challenge the validity of the contract not by asserting that he made a mistake but by founding his claim on the other party's misrepresentation where a wider range of remedies is available.[729]

4. Refusal to perform – under section 39, when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

   Rescission of contract for a refusal to perform has been upheld in several instances[730]:

   a. Promoting a collusive suit that would block the performance of obligations under the contract[731];

[725] Indian Contract Act, 1872, §66
[726] *Supra Note* 22, pg. 516
[727] *Landmark Developers v Govt of Andhra Pradesh*, (2013) 1 Andh LD 338
[728] GH Treitel, *The Law of Contract*, (10th Edn) pg. 262
[729] Anson's Law of Contract, (30th Edn) pg. 269
[730] Halsbury's Laws of India, Contract - CONTRACTS WHICH MUST BE PERFORMED/Refusal to perform contract, (2nd Edn, 2015) pg. 193 Volume 9

b. Disposal of wagons that would be used to carry supply of timber to the station for further transport[732];
c. Getting that son married who was to be given in adoption[733];
d. Refusing to furnish an indemnity to an agent which the principal was under an implied obligation to provide[734];
e. Failure by a successful bidder to comply with the conditions of an auction[735];
f. Failure to store goods for the entire agreed period of contract where the contract stipulated storage of goods for that period[736];
g. Refusal to exhibit a film at the theatre stipulated in the contract on the specified date[737];
h. A breach by a lessee of the terms of a lease by cutting too many trees[738];
i. Failure by a mortgagee to pay certain amounts payable by him under a mortgage[739];
j. A supply of goods not in accordance with the stipulated quality[740];
k. Failure to pay in cash for an earlier consignment[741];
l. Refusal by a buyer of goods to accept documents in a CIF contract.[742]

5. Reciprocal promises – under section 53, if a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non- performance of the contract.

6. By agreement – the parties may agree to the total release of their obligations under the contract or may enter a new contract having different obligations or parties. There could be a partial discharge by way of variation/waiver in terms or obligations of the existing contract. Rescission of agreement can either be express or implied. It is implied wherein there is an alteration of prevailing terms and substituted by new terms. Or there can be novation i.e. the substitution of a new contract in place of old one.

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[731] *Raghunath Das v Chingan,* AIR (1929) All 62
[732] *John Usher Jones v Edward Scott Grogan,* AIR (1919) PC 190
[733] *Makineni Nagayya v Makineni Bapamma,* AIR (1958) AP 504
[734] *Rajaram Nandlal v Abdul Rahim,* AIR (1915) Sind 30
[735] *Dhunmun Ram v State of Uttar Pradesh,* (1979) Tax LR 2451
[736] *Upper India Cold Storage Ltd v Ram Niranjanlal & Sons,* (1962) All LJ 738
[737] *Sreedhara Shenoy v K Thanumdayan,* AIR (1953) TC 90
[738] *Mohammad Mumtaz Ali Khan v Altaf-ul-Rahman Sheikh,* AIR (1922) Oudh 259
[739] *Sanwaley Parshad Kayestha v Sheo Sarup,* AIR (1927) Oudh 12
[740] *Govindji Jevat & Co v Cannanore Spinning and Weaving Mills Ltd,* AIR (1968) Ker 310
[741] *Sha Moolchand by its partner, Kesarimull Mita Lal v Associated Agencies, Firm of Merchants,* AIR (1942) Mad 139
[742] *M Gulamali Abdul Hussain & Co v APMS Mohamed Yusuf,* AIR (1954) Mad 268

7. Failure to perform within specified time – as per section 55, when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Defences: these have been enumerated under section 27(2)(a) to (d) of the Specific Relief Act, 1964

1. Affirmation – whereby, one party to the contract has ratified a certain change or breach of obligation, then he cannot later on claim rescission of the same contract. A party cannot exercise the option to avoid a contract if he has either expressly or by implication indicated his decision not to do so. During the continuance of the relation from which the presumption of undue influence arises there can be no ratification or condition that will deprive the plaintiff of his remedy, for the influence, which occasioned the transaction also prevents him from asserting his rights. Similarly, there can be no ratification or acquiescence so long as the plaintiff remains in ignorance.[743]

2. When restitution is not available – The right of rescission is also lost where the position of the parties has been adhered to such an extent that they cannot be put back to their original status. However, recent cases suggest a broader approach to satisfy the requirement of justice in situations where, although specific restitution is no longer possible, effective restoration is possible by the payment of money.[744] The contention that an agreement is voidable may also be raised as a defence, even if a suit to have it rescinded has become time-barred.[745]

3. Intervention by third party – privity of contract is a cornerstone principle. Where the rights of third parties have intervened, rescission cannot be allowed to the prejudice of such rights. Where, for example, a person has obtained goods by fraud and, before the seller is able to catch him, he transfers the goods to a bona fide buyer, the deceived seller cannot now be allowed to cancel the sale on account of the fraud.

4. Severance – a contract can be part performed as well as part rescinded if it is deemed possible by the Courts. This depends on the construct of the Contract itself, which would intern dictate the intent of the parties. The rule is that if the part that is prayed for rescission cannot be rescinded from the main contract then such rescission cannot be granted and would result in the rescission of the entire contract.

[743] *Bhola Ram Lieri v Peari Devi,* AIR (1962) Pat 168
[744] *Pankoj Kumar Bhattacharjee v Manmatha Nath Vidyabhushan Bhattacharjee,* AIR (1973) Cal 439
[745] *Sant Bux Singh v Ali Raza Khan,* AIR (1946) Oudh 129

5. Delay – Delay, or laches, falling short of the period prescribed by the statutory provisions relating to the limitation of actions is not an absolute defence to an action for rescission. The remedy of rescission is equitable, and where delay has occurred, its validity as a defence will be assessed on equitable principles. Where it is sought to avoid a contract induced by undue influence, the contract must be repudiated as soon as the undue influence ceases to operate. This equally applies to cases of misrepresentation and fraud. The person subjected to the undue influence must seek relief within a reasonable time after removal of the influence under which the gift or contract was made.[746]

Effect of Rescission

When a person at whose option a contract is voidable rescinds it, the other party need not perform any promise contained in the contract in which the latter is the promisor.[747] The party rescinding a voidable contract will if, he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.[748] In cases pertaining to property, the transferee is bound to hold such property upon notice for the benefit of the transferor. The court may also require the party to whom relief is being granted to make any compensation to the other party which justice may require.[749]

Compensation

The party entitled to avoid, but insisting on performance, can be awarded compensation in lieu of performance or enforcement.[750] All questions of damage are questions of fact, the burden of establishing which lies upon the representative, who must show whether the proved damage was the natural and direct consequence of the misrepresentation.[751] A party rightfully rescinding a contract is entitled to compensation for any loss he may have suffered because of the non-fulfilment of the contract.[752] For example, where a singer after agreeing to sing at a theatre twice a week, wilfully absents herself on the sixth night, the theatre-owner can rescind the contract and also claim damages for the loss he may have suffered.

Restitution

[746] *Kunja Lal Bhuiya v Hara Lal Bhuiya,* AIR (1943) Cal 162
[747] Halsbury's Laws of India, Contract - EFFECT OF LACK OF FREE CONSENT/Voidable contracts, (2nd Edn, 2015) pg. 114 Volume 9
[748] Indian Contract Act, 1872, §64; *Bechu v Bhabuti Prasad,* AIR (1931) All 201
[749] Specific Relief Act, 1964, §30
[750] *Ibid*; *Sorabshah Pestonji v Secretary of State for India*, (1927) 109 IC 141
[751] *Firm Kishanlal Shrilal Patwa v Union of India Railway Administration now Northern Railway,* AIR (1960) MP 289
[752] Indian Contract Act, 1872, §75

Deals with the principle of *restitution in integrum* (a Latin term). Meaning restoration to original condition i.e. in situations where the benefit is received and the contract was later found to be void. After rescission, he is liable to restore the benefit received by him.[753] He can claim rescission, or damages, or both in a suit even if *restiutio in integrum* is not possible.[754]

As per Section 30 of Specific Relief Act, the courts may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which jus tice may require. It is a maxim of law that “he who seeks equity must do equity” in the transaction in respect of which relief is sought.

Section 65 of the Indian Contract Act contains the principle of restitution, where, after a benefit has been received, and the agreement is later discovered to be void,[755] or when the contract becomes void, viz, as provided under section 32 or 56 of the Contract Act.

Illustration: A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

In *Kuju Collieries Ltd v Jharkhand Mines Ltd*,[756] the Supreme Court has explained the scope of section 65 thus:

> “*The section distinguishes between an agreement and a contract. An agreement, which is enforceable by law, is a contract and an agreement, which is not enforceable by law is said to be void. Therefore, the phrase in the section 'discovered to be void' means that the agreement is not enforceable and is therefore not a contract. It may be that the parties or one of them had no knowledge when they entered into the agreement that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable later. The second part of the section refers to a contract becoming void. That refers to an agreement which was originally enforceable and was, therefore, a contract becoming void due to subsequent happenings. In both these cases any person who has received any advantage under the agreement is bound to restore the same or make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into, both the parties knew that it was not lawful, and therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, section s.65 of*

[753] Indian Contract Act, 1872, §64
[754] *Indranath Banerjee v Rooke*, (1910) 37 Cal 81 at 89
[755] *Tarsem Singh v Sukhminder Singh*, AIR (1998) SC 1400
[756] *Kuju Collieries Ltd v Jharkhand Mines Ltd*, AIR (1974) SC 1892

the Contract Act did not apply. If both the parties are in pari delicto, courts will not assist them."

A party is disentitled to a benefit under section 65 wherein he enters into a contract, with prior knowledge to the fact that it is void. It has been explicitly stated by courts, that the application requires that there be a contract between the parties, which is later discovered to be void or is voidable, but was initially a contract.[757] It is not necessary for application of this section that the agreement be executed; it applies even if the agreement has been performed.[758] The important differentiation is that this remedy is available for contracts that are *void ab initio* and not those that became subsequently void. The key aspect is that whilst it was being agreed to, the parties were unaware that it was void but later on realised it was *void ab initio* but is applicable to contracts that were entered into wherein there is a mutual mistake.[759] The expression "becomes void' includes cases of the kind contemplated by the second clause of section 56. This presupposes that the contract was enforceable before it became void.[760] The principal difference between a voidable instrument and one *void ab initio* is that restoration cannot be claimed in the case of the former unless avoided, whereas this relief can be claimed independently of the instrument in the latter case.[761] A contingent contract to do or not to do anything if an event happens becomes void when the event becomes impossible. This aspect was distinctively brought out in the case of *Harnath Kuar v Indar Bahadur Singh*,[762] wherein the Privy Council held that:

"*Section 65 deals with: (a) agreements enforceable by law; and (b) with agreements not so enforceable. By clause (g), an agreement not enforceable by law is said to be void. An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract becomes void*."

It is trite law that an incapacity person cannot enter into a binding contract. Thereby, a person who is not competent to contract, such contracts do not attract the benefit of section 65. However, if it deals with property and the incapacity to part with it, then those contracts can come within the ambit of Section 65.[763] The section has, however, been held not to apply where the statute denies the capacity to the statutory body of making a contract.[764] A contract made by a minor or a mentally unsound person is void and neither section 64 nor section 65 can be applied. Section 65 does not apply to contracts entered

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757 *Mohori Bibee v Dharmodas Ghose*, (1903) 30 IA 114; *Manoharlal Radhakrishna v UOI*, AIR (1974) Pat 56; *C. Boggiano & Co v Arab Steamers Ltd*, AIR (1916) Bom 265

758 *Transport Co Ltd v Tirunelveli Motor Bus Co Ltd,* ILR (1955) Mad 528

759 *Supra Note* 73

760 *Kandregula Anantha Rao Pantulu v Kandikonda Surayya*, AIR (1920) Mad 64

761 *Asaram v Ludheshwar,* AIR (1938) Ngp 335 (FB)

762 *Harnath Kuar v Indar Bahadur Singh*, AIR (1922) PC 403

763 *Mohori Bibee v Dharmodas Ghose*, (1902) 30 Cal 539

764 *Municipal Board Gonda v Bachchu*, (1952) 1 All 82

into by persons disqualified from contracting by law. It did not enable recovery in respect of a promissory note executed by a person whose estate was under the superintendence of the Court of Wards, executed by him for repayment for advances made to him.[765]

The question if a transaction was ultra vires the statute was wholly irrelevant once the contract is held to be void and that would not furnish a ground for avoiding its liability under section 65 to return the advantage received.[766] At an auction sale, the defendant gave the highest bid to collect market fees but no registered deed was executed. The transaction was an agreement, which was discovered to be void, i.e. unenforceable and section 65 became applicable.[767] Section 65 does not apply where the advantage is received after the agreement ceases to be enforceable.[768]

Rectification

Section 26 of the Specific Relief Act, 1963 provides remedy for rectification of instruments. “Instrument” includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded.[769] When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not express their real intention, then —

a) Either party or his representative-in-interest may institute a suit to have the instrument rectified; or
b) The plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or
c) A defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

In the matter of rectification, the true question is what the intention of the parties at the time of its execution was and not what the parties intentionally omitted. The plaintiff must establish that the alleged intention, to which he desires the document to be made conformable, continued concurrently in the minds of all parties down to the time of its execution.[770] To claim relief under section 26 of Specific Relief, the following are necessary:

1. That there was a mutual mistake or fraud; and

2. That the instrument on that account did not truly express the intention of the parties.

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[765] *Lal Chandradwaj Deo v Lal Atmaram Deo*, AIR (1936) Ngp 15
[766] *LIC v Rajmata Saheb Chowhanji*, (1978) 3 SCC 244
[767] *Village Panchayat of Jangareddigudem v Kommireddy Narasayya*, AIR (1965) AP 191
[768] *Jagdish Prasad Pannalal v Produce Exchange Corp. Ltd*, (1945) 2 Cal 41
[769] Indian Stamp Act, 1899, §2 Clause (14)
[770] *Laxman v Ganpat*, 2 Nag LR 4

Illustration: Under an agreement for sale of property, buyer sent notice to the seller for execution of the sale deed. The seller replied that he had agreed to sell only 5 cents of the land. There was a concurrent finding of the courts in favour of the purchaser that the agreement was to sell 5 cents plus some structures specified in the deed. The court said that Section 26 was not applicable as there was no ambiguity in the deed. There could be no interference in a concurrent finding of fact. The suit for specific performance was rightly decreed.[771]

The mistake may be either of fact or of law although the court of equity will not generally grant relief against a mistake of law, except where the mistake results in an inequitable result.[772] A mistake on one side may be a ground of defence or a ground for rescinding a contract, but not for correcting or rectifying an instrument. The mistake to form a ground for the relief of rectification must be mutual and not unilateral. When a contract is finalised between the parties but it fails to embody the true intention of the parties then it can be rectified to encompass the intentions. Thus, where the final draft mentioned the price in weight when in fact it was agreed to be in count and riot risk was mentioned in an insurance cover by mistake, the court allowed rectification. The court said that the matter came within Section 26 of the Specific Relief Act of 1963, which provides that an instrument can be rectified if through fraud or a mutual mistake of the parties, the contract does not express their real intention.[773]

<u>*Cancellation*</u>

A written instrument that is voidable at the option of one party and such party has reasonable apprehension that if the contract persists it would cause him harm, then it can be cancelled by the courts. Either party to an agreement with the minor can seek its cancellation, if it is embodied in an instrument.[774] The relief provided under Section 31 of the Specific Relief Act is based upon protective justice and upon the idea of "quia time" (for fear) and, therefore, where there is no apprehension of injury to the plaintiff, no suit can be instituted.[775]

While ordering cancellation, the Court can, in its discretion, require the minor to make restitution,[776] repay any amount,[777] or compensate the other party,[778] especially if the minor has misrepresented his age when the agreement was made.[779] If the instrument is void or voidable, he can seek cancellation and delivery up of that instrument. A contract

[771] *Subhadra v Thankam*, AIR (2010) SC 3031
[772] *Nawab Begum v A.H. Greet*, ILR (1905) 27 All 678
[773] *New India Rubber Works (P) Ltd v Oriental Fire and General Insurance Co Ltd*, (1969) 1 Comp LJ 153 (Cal)
[774] Specific Relief Act, 1964, §31
[775] Avatar Singh, *Contract Act & Specific Relief Act*, 934 (12th ed., 2017)
[776] *Jagar Nath Singh v Lalta Prasad*, (1908) 31 All 21
[777] *Mohori Bibee v Dhurmodas Ghose* (1903) 30 IA 114
[778] Specific Relief Act, 1964, §33
[779] *Kamla Prasad v Sheo Gopal Lal*, (1904) ILR 26 All 342

cannot be cancelled or terminated unilaterally.[780] The effect is of cancelling the deed, and no action can lie upon it.[781]

A contract that contains evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.[782]

When a document is valid, no question arises of its cancellation. Section 31 of the Specific Relief Act, 1963 refers to both void and voidable documents. It provides for a discretionary relief. The deed in this case was void by reason of the fact that it purported to convey the interest of a minor.[783] The court held:

> "*If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff "did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court*."

Requirements of ground of relief[784]

1. The relief under Section 31 of Specific Relief Act cannot be claimed as a matter of right; the court will act upon the principle of the exercise of sound discretion, having due regard to the conduct of the parties.
2. Where the parties are in *pari delicto* and fraud is alleged as the ground for cancellation, the court may refuse the relief to the plaintiff, as he is equally to blame as is defendant.
3. No relief can be granted under Section 31 of the Specific Relief Act where there is a question of mere inadequacy of consideration.
4. No suit for the cancellation of a will can be instituted during a testator's lifetime.

UNJUST ENRICHMENT

The essence is that it is unjust to allow one person to retain a benefit received at the expense of another person. *Nemo debet locupletari ex aliena jactura*, i.e., no man should grow rich out of another person's loss. The principles pertaining to disallowance of unjust enrichment are contained under sections 68 – 72. Apart from these sections, relief against unjust enrichment can be granted in an action for money had and received[785] and suits for contribution. The 13th Law Commission Report (1958), had opined that the complexities brought forth in a business transaction are numerous, and sections 68 – 72 don't cover all

[780] *Narayan Mahadeo Durve v Moti Pannaji,* AIR (1935) Bom 225
[781] *Hardwar Singh v Hari Prasad Rai,* AIR (1943) All 24
[782] Specific Relief Act, 1964, §31
[783] *Prem Singh v Birbal*, (2006) 5 SCC 353
[784] *Supra Note* 93
[785] *Thomas Abraham v National Tyre and Rubber Co of India Ltd,* AIR (1974) SC 602

scenarios for restitution. Therefore, recommended a residuary section to deal with the scenarios not covered herein.

In *Ram Nagina Singh v Governor-General in Council*,[786] the Calcutta High Court held section 65 as "*compensatory in principle*" and "*for prevention of unjust enrichment*". Benefits gained by a person taking advantage of interim orders of a court were liable to be returned under the principle of unjust enrichment.[787] The principle of unjust enrichment has been pressed into service to enable the Government to collect entertainment duty collected by multiplexes from customers despite exemptions being granted.[788] The principle of unjust enrichment has been stated to presuppose three things[789]:

a) That the defendant has been enriched by the receipt of benefit;
b) He must have been so enriched at the plaintiff's expense; and
c) It would be unjust to allow him to keep the benefit.

In the event a person is unable to fulfil his obligations under the contract, he is liable to compensate the person injured by his failure to the same extent as if he had contracted to discharge it. Section 69 aims to indemnify a person in respect of the payment against some interests. To be granted to the person who actually made the payment, against the person who ought to have been the one to make it. The applicability of section 69 is contingent upon (i) a person interested in the payment of money; (ii) the payment should be one which another is bound by law to pay; and (iii) the person interested in the payment should actually pay it.[790] It need not always be a monetary actual loss but sometimes, the apprehension of such loss is sufficient to attract this provision.

The real basis of the liability under section 70 is the fact that the person for whom the work was done has accepted the work and received the benefit thereunder and what the section prevents is unjust enrichment.[791] The three essential conditions for invoking section 70[792] that must be satisfied for a case to exist under the section[793] are:

a. The goods are to be delivered lawfully or something has to be done for another person lawfully;
b. The thing done or the goods delivered must be done or delivered without intention to do so gratuitously; and
c. The person to whom goods are delivered enjoys the benefit thereof.

[786] AIR 1952 Cal 306
[787] *KT Venkatagiri v State of Karnataka*, AIR (2003) SC 1819
[788] *State of Maharashtra v Swanstone Multiplex Cinema Pvt Ltd*, AIR (2009) SC 2750
[789] *Supra Note* 14, pg. 1168; *Nagpur Golden Transport Co v Nath Traders*, AIR (2012) SC 357
[790] *Heerachand v Saraswathy Ammal*, (2000) 3 CTC 694
[791] *Pannalal v Deputy Commissioner, Bhandara*, (1973) 1 SCC 639
[792] *Supra Note* 22, pg. 1194
[793] *C.I Abraham v K.A. Cheriyan,* AIR (1986) Ker 60

The Law of Restitution is founded upon the principle of "unjust enrichment". Section 72 is founded upon principles of equity and such must be within the consideration of the Courts when granting or denying the rights of restitution. The aspects that tantamount to be equitable considerations differ on a case-to-case basis and therefore must be assessed accordingly by the courts.[794] Unjust enrichment is often referred to or regarded as a ground for restitution, it is more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment.[795] Restitution ensures that a person who has benefited unjustly at the expense of another, he is liable to restore the affected party. Unlike other jurisdictions, the law against unjust enrichment is provided as a statutory remedy that is granted by courts based on set principles.

In *Sri Sri Shiba Prasad Singh v Maharaja Srish Chandra Nandi*,[796] the Privy Council held that for applying this section, the mistake need not be confined to mistake of fact and it could even be mistake of law. It held:

> "*Payment 'by mistake' in section 72 must refer to a payment which was not legally due and which could not have been enforced: the 'mistake' is thinking that the money paid was due when in fact it was not due.*"

The connotation of mistake under the section was wide enough to encompass both types of mistakes – of law and fact – thereby accepting the interpretation of the Privy Council hereinabove.[797] In one instance a sum of money was paid to a bank as a price of the goods and the bank issued delivery orders which were not accepted by the warehouse- keeper, the Calcutta High Court held that this was not a payment under mistake and Section 72 was not applicable.[798]

[794] *Mafatlal Industries Ltd v UOI*, (1997) 5 SCC 536
[795] *Indian Council for Enviro-Legal Action v UOI*, (2011) 8 SCC 161
[796] AIR 1949 PC 297
[797] *Sales Tax Officer v Kanhaiya Lal Makund Lal Saraf*, AIR (1959) SC 135
[798] *Lohia Trading Co v Central Bank of India*, AIR (1978) Cal 468

SUGGESTED READINGS

1. Sarkar, Specific Relief Act, Sudipto Sarkar and R Yashovardhan (ed.)
2. Avatar Singh, Contract and Specific Relief,
3. Pollack and Mulla, The Indian Contract and Specific Relief Act, R Yashod Vardhan and Chitra Naarayan (ed.)
4. Pollack and Mulla, The Specific Relief Act, Chitra Naarayan (ed.)
5. Supreme Court on Specific Relief Act, Surendra Malik and Sudeep Malik
6. PS Atiyah, The Rise and Fall of Freedom of Contract
7. PS Atiyah, Promises, Morals and Law
8. PS Atiyah, The Damages Lottery
9. Peter Cane, Atiyah's Accidents, Compensation and the Law

ADDITIONAL READINGS

- *https://www.lawteacher.net/free-law-essays/contract-law/the-basic-purpose-of-contract-law.php#:~:text=Introduction.,its%20subsequent%20legally%20binding%20laws.*
- *https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1480&context=vulr*
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