

Damages for breach of contract. (Compensation)

Nilima Bhadbhade, PhD

nilima.bhadbhade@gmail.com

1. Introduction

Enforcement

Enables faith in contracting: promises

What is a contract? An agreement enforceable by law is a contract.

Parties must perform what they have agreed sec 37

Not performed: Reciprocal promises – dependent

Not performed = breach

Express or implied

2. Breach

- No performance – not fulfilled at all
- Defect in performance – fulfilled but not acc to contract
- Delay –

Remedies

Compensation

Specific performance

Quantum meruit

Return of amount

3. Remedy of compensation (section 73 of the ICA)

Every promise or set of promises is an agreement. → contract

73. 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.

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. (principle of mitigation of loss)

Essential points

- Always remedy of compensation
- Compensate for loss, damage or injury suffered by the breach
- Award of money
- Right to sue

Loss of 5 lakh

Adjudicated by court or arbitration

Order of payment → decree

- Secondary obligation

4. Claim for relief of compensation: damages.

- A valid contract
 - In force
- Breach
 - Proved
 - Adjudicated
 - When
 - Actual Breach
 - Anticipatory breach – refusal to perform the contract in its entirety: section 39
 - Terminate : put an end to
- Party not in breach has suffered loss
 - Physical injury
 - Mental injury
 - Loss of property, money
 - Loss of reputation
 - Loss of opportunity
- Need not actually purchase or construct before claim
- Intention or state of mind of breaking party is irrelevant

5. Claim loss

- Focus on plaintiff's loss
- No more than the loss
 - Net loss approach
 - Gajanan Y. Mandrekar* AIR 1997 SC 2774
 - Defect in vehicle. Run 9000 km. damages should be reduced to take into account use.
- If no loss, nominal amount: nominal damages
- Profit earned by defendant not basis
- Not punishment

6. Causation

- Breach by defendant caused loss
- Prove breach
- Not caused by

- Plaintiff's own act

Beoco v Alfa Laval QB 1995

the buyer of a machine engaged third parties to repair the machine supplied by the seller, failed to inspect it before use. Explosion.

Loss resulted not from the defect, but from the failure of the buyer to carry out adequate inspection before use.

Quinn v. Burch Brothers (Builders) Ltd. QB 1966 : the defendant failed to supply adequate equipment. Plaintiff used unsuitable equipment, injured. Loss resulted not from the breach, but from the voluntary choice of the plaintiff by using improper equipment.

7. Adjudication

- Right to sue
 - Unliquidated amount (to be ascertained)
 - Under section 6 of the TP Act, a mere right to sue cannot be transferred.
 - Transfer of debt before breach == actionable claim (130 onwards of TP Act)
- Not a debt
 - Not an actionable claim
 - Cannot be assigned
- Must be ascertained
 - Court
 - Arbitrator
 - Independent person
 - Officer

Union of India v. Raman Iron Foundry AIR 1974 SC 1265 overruled on another point in *HM Kamaluddin Ansari & Co v Union of India* AIR 1984 SC 29

R → kept SD

Govt → broke contract. Claim

Govt took away claim from SD

- Recovery from security deposit
 - Bank Guarantees (independent contracts)
- C – contract govt BG for performance
- At C's request C's banker gives
- To government
- Bank and Govt
- Govt claims under BG
- C says not broken
- G says broken

8. Basis

- As if the contract has been performed as agreed
 - Expectation basis
 - Reliance basis
 - Restitution basis

9. Which losses

- *Hadley v Baxendale* → Section 73
 - Naturally arise in the usual course of things from breach : General damages
 - Parties knew to be likely to result from breach : Special damages : matters in **contemplation** of parties
- Not : Remote OR Indirect
 - S raw material to P
 - P is required to buy from the market at higher price.
 - P's production stops. Pays wages. Workers are idle. Bank interest grows.
 - Liable on onward contracts.
 - Factory closes. Closes down. Pays retrenchment to workers.
 - Falls ill. Hospitalised. → remote
- 1. Available in the market
- 2. Few suppliers.
- 3. S is a monopoly supplier

10. Contemplation

- Defendant aware at making of contract that he must avoid causing the kind of loss
 - Made known
 - Imputed knowledge : reasonably foreseeable
- *Hadley v Baxendale* 1854
- *Victoria Laundry v Newman Industries* 1949 KB

Large boiler

- *Dominium of India v All India Reporter* 1952 Nagpur. Three volumes out of a large set lost. D had no means of knowing had no notice of the fact that loss of three volumes would make the whole set useless, the invoice mentioning only a bundle of books, they were liable only for the price of the lost volumes.
- *CISR v Goodman Drug House* 2007 Uttaranchal
 - The expenses of setting up the factory plant could be recovered as compensation where the promisor failed to provide the technical knowhow to be worked in the plant.

11. Remoteness

- Too improbable
- Not within the scope of the contractual responsibility undertaken

12. Assessment - proof

- Ascertaining amount
- Establish with reasonable certainty
- Direct evidence not always necessary
- Estimation

13. Difficulty of assessment

- NO bar
- Nominal damages
- Recognise violation of legal right
- Breach has not cause loss
- Failure to prove loss
- No basis to ascertain amount
- Chaplin v Hicks

14. Expectation basis

- Recover loss of gains
- Diminution in value
- Cost of cure (Substituted performance (Section 20 of the Specific Relief Act amended in 2018))

15. Quantification: Expectation basis

- Difference in value : ‘market price’ rule
 - The market
 - Goods easily available:
 - Buyer’s suit: $MP - CP$
 - Seller’s suit: $CP - MP$
 - No available market, goods made to order
- Defective performance
- Late delivery
- Cost of replacement

Ruxley Electronics and Construction Ltd v Forsyth 1996 HL

 - ‘subjective reasons’ for performance
 - Balancing interests
 - Unjust enrichment of non-breaker
 - Incentive for breaker to save costs

- Cost of replacement or diminution in market value
- Uncertain and speculative process
 - Does not prevent award
 - Court puts some value on expectation

16. Quantification: Reliance basis

- Wasted expenditure: spent in preparation or performance
Anglia Television v Reed: 1972 QB
 the defendant actor had contracted to play a leading role in a television play, but later repudiated the contract. The plaintiffs were held entitled to recover the preparatory costs in the form of director's and designer's fees, location charges etc, for the filming of a television play incurred before the contract with the defendant. This recovery was justified on the ground
- Resulted from defendant's breach
- Pre-contract expense
- Expenses incurred after breach

17. Restitutionary basis

- Benefit accruing to a party actually 'belonging' to another
- Restore such benefit.
- Make defendant hand over his profit
- *AG v Blake* (2000 HL)
 - Exceptional circumstances

18. Non-pecuniary losses

- Disappointment, hurt feelings, distress, inconvenience
 - Distress directly consequent on physical inconvenience caused by breach
 - Contract intended to confer non-pecuniary benefit
 - Provide enjoyment
 - Prevent distress
- Loss of reputation
 - Not for reputation per se
 - Unless financial loss
- Not in commercial contracts: *Ghaziabad Development Authority v. UOI* 2000 SC

19. Loss of profits

- Nature
 - Naturally arising
 - In contemplation
- % on contract price

- Evidence
 - Figures contemplated in making estimates
 - Percentage granted in other contracts
 - Figures of earlier years

20. Consequential losses

- Consequential loss = no precise meaning.
- Indicates loss within special knowledge of parties.
- *Mcdermott International Inc v Burn Standard Co Ltd*, 2006 SC :
Overhead costs, decreased profits and additional management costs arising from delay or disruption caused by one party are direct, and not consequential losses

21. Incidental losses

- Loss incurred after knowledge of breach
- Made to avoid losses

22. Time for assessment

- Assessed at time of breach
 - Anticipatory breach
 - As on date of judgment
- 15 Nov 2020 - I refuse - 2% higher
Delivery 1 Jan 2021. Fail. 15%

23. Mitigation

- Section 73
- Cannot recover for losses which could have been avoided by taking reasonable steps
- Reasonable steps; need not
 - Injure commercial reputation
 - Injure innocent persons
 - Contravene his own duty
- Nature of rule
 - Not a right of defaulting party
 - Rule for court to bear in mind
- Burden of proof on defendant

24. Burden on plaintiff

- Plead and prove
 - Contract
 - Breach
 - Loss

- Special damages

– Its extent

25. Freedom in contracting

No liability : exclusion clauses

Central Inland Water Research v Brojo Nath Ganguly

- Liability limited to an amount
- Liability restricted to some losses only
No liability for loss of profits
- Risk and cost clauses
- Liability of agreed amount: Liquidated damages

S to deliver goods on 1 1 2021.

1. Clause limiting liability to 100.
S fails to deliver. Loss of P : P must prove loss. Proves loss of 80, he gets 80. If he proves 150, he gets 100.
2. liquidated damages agreed 100
whether or not actual loss is proved.

Specific Relief Act (as amended in 2018)

20. Substituted performance of contract.

(1) Without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872, and, except as otherwise agreed upon by the parties, where the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and, recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

(2) No substituted performance of contract under sub-section (1) shall be undertaken unless the party who suffers such breach has given a notice in writing, of not less than thirty days, to the party in breach calling upon him to perform the contract within such time as specified in the notice, and on his refusal or failure to do so, he may get the same performed by a third party or by his own agency:

Provided that the party who suffers such breach shall not be entitled to recover the expenses and costs under sub-section (1) unless he has got the contract performed through a third party or by his own agency.

(3) Where the party suffering breach of contract has got the contract performed through a third party or by his own agency after giving notice under sub-section (1), he shall not be entitled to claim relief of specific performance against the party in breach.

(4) Nothing in this section shall prevent the party who has suffered breach of contract from claiming compensation from the party in breach.

26. Liquidated damages section 74 of the ICA

74. Compensation for breach of contract where penalty stipulated for

When a contract has been broken,
if a sum is named in the contract as the amount to be paid in case of such breach,
... the party complaining of the breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named
whether or not actual damage or loss is proved to have been caused thereby

- Specified amount
- Payable in case of breach
- Breach must be proved
- Loss must be proved
- Amount must be reasonable
- Specified amount is the maximum
- Penalty – not enforced
- Power of court: Reasonable compensation

My article: [Commercial law must be certain and predictable](#)

– Welspun v ONGC

Claim for agreed sum

Different from compensation

Bank has given a loan to D. repay 1 Jan 2024

Guarantee

Fire insurance

Price of goods sold.

Anson's law of contract

Order 37 of CPC – Summary suit
