

DAMAGES FOR BREACH OF CONTRACT UNDER INDIAN CONTRACT ACT-1872

Dr. Manoj Kumar Sadual

Associate Professor, P.G. Department of Law, Utkal University, Bhubaneswar, Odisha, India

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ABSTRACT

A contract is not a property. It is only a promise supported by some consideration upon which either the remedy of specific performance or that of damages is available. Every breach of contract upsets many a settled expectation of the injured party. He may feel the consequence for a long time and in a variety of ways. The consequences of a breach may be endless, but there must be an end to liability. The defendant cannot be held liable for all that follows from his breach. There must be a limit to liability and beyond that limit the damage is said to be too remote and, therefore, irrecoverable. The problem is where to draw the line. The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damage, as if the contract had been performed.

KEYWORDS: *Damages, Liable, Liability, Breach, Contract.*

INTRODUCTION

Damage is not a property. It is only a promise supported by the some consideration upon which either the remedy of specific performance or that of damages is available. The party who is injured by the breach of a contract may bring an action for damages. "Damages" means compensation in terms of money for the loss suffered by the injured party. Burden lies on the injured party to prove his loss. Every action for damages raises two problems. The first is the problem of "remoteness of damage" and the second that of "measure of damages".

REMOTENESS OF DAMAGE

Every breach of contract upsets many a settled expectation of the injured party. He may feel the consequence. For a long time and in a variety of ways. A person contracts to supply to a shopkeeper pure mustard oil, but he sends impure stuff, which is breach. The oil is seized by an Inspector and destroyed. The shopkeeper is arrested, prosecuted and convicted. He suffers the loss of oil, the loss of profits to be gained on selling it, the loss of special prestige and of business reputation, not to speak of the time and money and energy wasted on defense and the mental agony and torture of the prosecution. Thus, theoretically the consequences of a breach may be endless, but there must be an end to liability. The defendant cannot be held liable for all that follows from his breach. There must be a limit to liability and beyond that limit the damage is said to be too remote and, therefore, irrecoverable. The problem is where to draw the line.

The decision has always been taken as laying down two rules.

- **General Damages**

General Damages are those which arise naturally in the usual course of things from the breach itself. Another mode of putting this is that the defendant is liable for all that which naturally happens in the usual course of things after the breach.

- **Special Damages**

Special damages are those which arise on account of the unusual circumstances affecting the plaintiff. They are not recoverable unless the special circumstances were brought to the knowledge of the defendant so that the possibility of the special loss was in the contemplation of the parties.

Section 73 of the Contract Act

The same principles are applicable in India. The Privy Council, for example, observed in *A.K.A.S Jamal v Moolla Dawood Sons & Co* that section-73 is declaratory of the common law as to damages. Similarly, Patanjali Sastri J (afterwards CJ) of the Supreme Court observed in *Pannalal Jankidas v Mohanlal* “that the party is breach must make compensation in respect of the direct consequences flowing from the breach and not in respect of loss or damages indirectly or remotely caused”.

Sec. 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.

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. 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.

Section 73 Incorporates Two Rules of Hadley v Baxendale

The section declares that compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The section also provides that the same principles will apply where there has been a breach of a quasi-contractual obligation. The section thus clearly lays down two rules. Compensation is recoverable for any loss or damage.

- Arising naturally in the usual course of things from the breach, or
- Which the parties knew at the time of the contract as likely to result from the breach.

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 depends upon the knowledge of the parties at the time of the contract about the probable result of the breach. The

burden of the proof lies on the plaintiff to show that damage has been sustained and what shall be the measure of converting the loss into money. A claim for damages becomes liable to be rejected where this burden is not discharged.

Proof of Loss in Necessary

In a claim for general damages the plaintiff has to assert that he has suffered some loss but for the purpose of claiming special damages he has specifically to plead and prove that he has sustained such special loss in a claim of compensation for damage to consignment, no details as to loss were mentioned in the plaint. It is necessary that some loss should be shown by evidence. The mere fact that the carrier admitted damage was held to be not sufficient to entitle the consignee to obtain a decree for compensation without proof of actual loss.

Measure of Damages

Once it is determined whether general or special damages have to be recovered they have to be evaluated in terms of money. This is the problem of measure of damages and is governed by some fundamental principles.

Claim for Damages is not Debt

A claim for damages arising out of breach of contract, whether for general or liquidated damages, remains only a claim till its adjudication by the court and becomes a debt only after the court awards it. Till then and on the basis of the claim alone, the claimant is not entitled to present a winding up petition of the defendant company on the ground of its inability to pay debts.

Nominal Damages (No Loss Situation):

Where the plaintiff suffers no loss the court may still award him nominal damages in recognition of his right. But this is in the discretion of the court. The court may altogether refuse to award any damages or may award even substantial damages. "The court is competent to award reasonable compensation in case of breach, even if no actual damage is proved or shown to have been suffered in consequence of breach of contract." It has been pointed out by the Delhi High Court, following some earlier High Court decisions, that section 73 does not give any cause of action unless and until damage is actually suffered. The case before the court was *Union of India v Tribhuvan Das Lalji Patel*. A contract for the supply of sleepers to the railway administration contained a number of clauses including this that irrespective of whether the Government suffered any loss or not on account of the contractor's failure to supply, the Government was entitled to damages. The contractor failed to supply, but the railways did not suffer any loss. Even so an action for damages was instituted against the contractor.

Refund on Partial Cancellation of Contract

The agreement was for sale of damaged food grains. The purchaser deposited a certain amount with the Food Corporation. An application was made for cancellation a certain part of the agreement which was not capable of being performed. This was conceded and some refund was made. The purchaser was not allowed to sue the corporation for breach of contract in the matter of refund. There was no proof of any such breach agreement to provide scientific process. The agreement was for setting up a project for converting menthols to menthol. The agreement showed that the requisite technical know-how was to be provided by the Indian Institute of Petroleum (IIP). A huge expenditure was incurred in setting up the plant. But the IIP failed in its experiment of converting the material. The arbitrator awarded compensation of Rs.90 lacs for the loss suffered in setting up the plant. The court said that there was nothing against public policy in the award.

Damages for Breach of Confidence

Damages are also allowed for breach of confidence. Three actresses formed a rock group. They conceived an idea of producing a television serial, based on their experience, to focus attention on their individual and group life so as to contrast their collective character with their individual character. The idea was conveyed in the course of oral negotiations to a television company. This resulted in a written agreement which provided some payment to the ladies but forbade the company from using the idea unless the ladies were given the opportunity to act and they declined it. Without giving the opportunity, the company produced the programme with great commercial success. The company was held liable in damages to the ladies. The agreement contained an implied negative covenant. The circumstances in which it was communicated imported an obligation of confidence. The content of the idea was clearly identifiable, original, of potential commercial attractiveness and capable of reaching fruition.

Injunction to Restrain Breach of Confidence

Where damages would not be an appropriate remedy, an injunction may be issued against improper use of confidence. An illustration is *Attorney General v. Barker*. The first defendant was employed in the royal household between 1980 and 1983 on terms which included a contractual undertaking not to disclose, publish or reveal any incident, conversation or information concerning any member of the royal family or any visitor or guest which came to his knowledge during his employment or any information relating to his employment in the royal service unless duly authorized in writing to do so. The undertaking was perpetual and worldwide and the first defendant expressly acknowledged that it included an agreement on his part not to publish any such matter in any book. The second defendant, which was a Canadian company, controlled by the first defendant, planned to publish in the United Kingdom a book written by the first defendant about his service in the royal house-hold. The book was a flagrant breach of the first defendant's undertaking. The first defendant having refused to comply with the terms of his undertaking, the Attorney General issued a writ applying for worldwide injunctions against the defendants restraining publication of the book. The court held as follows: The Attorney General's claim was not based on a breach of confidentiality but on a breach of contract, the consideration for the covenant by the first defendant not to publish matters concerning his experiences in the royal household being the agreement to take him on the staff of the royal household and to pay him wages or a salary. Accordingly, the first defendant had for a consideration entered into a negative covenant which was limited neither territorially nor in time and such a covenant was enforceable provided it could not be attacked for obscurity, illegality or on public policy grounds such as being in restraint of trade. The covenant was not void on any ground of public policy or on the ground that it restricted the freedom for the protection of Human Rights and Fundamental Freedoms and in the circumstances the balance of justice required that an interlocutory injunction having extra-territorial effect be granted against both defendants.

Injunction for Restraining Breach of Contract

A supply system to the Army which had been going on since 1960 was not allowed to be scrapped all of a sudden by blacklisting the supplier. A person dealing with the government in matters of sale and purchase develops legitimate interest and expectations. The order of blacklisting amounted to denial of equality of opportunity. Before issuing such an order some explanation should have been called for. The court would not interfere in the matter if it is decided again by giving opportunity to the supplier.

Injunction for Restraining Alienation Property

The petitioners succeed under Section-9 of the Arbitration and Conciliation Act, 1996 in making out a prima facie case of and balance of convenience in their favour and, therefore, an injunction was issued restraining the respondent from disclosing of property which was comprised in the asset purchase agreement. Writ remedy against termination of dealership. A dealership agreement was terminated by reason of breaches on the part of the dealer. He applied for a writ against the order expecting that contractual obligations should be decided on the basis of affidavit evidence. The court refused to entertain the petition. The matter related to contract, trade and business. It should be adjudicated through an appropriate civil action.

TERMINATION OF CONTRACT BY GOVERNMENT AND WRIT REMEDY

The foreign company to whom the contract for construction of a public road was awarded could not complete the project within the stipulated time inspite of the fact that sufficient time and opportunity was provided for the same. The Government terminated the contract in accordance with its stipulations. This was questioned in a writ. The court found that the termination had become necessary in public interest. There was no violation of Article 14 and, therefore, no scope for interference. An authority was had granted a flyover contract to the writ petitioner arbitrarily rescinded it. The contractor's writ petition against it was held to be maintainable. A writ is not always bound to relegate the aggrieved party to a civil suit and that merely because the other party has raised a factual dispute. The more raising of a dispute about a fact does not make it a disputed fact. The writ court can go into such an attempt at disputing things, adjudicate it and grant appropriate relief.

Direction for Payment in Writ Jurisdiction

The work was performed by the contractor in accordance with the applicable terms and conditions as prescribed by the State Government. The amount of payment which was due for the completed work as admitted by the state Authority. The court said that it was not appropriate for the state instrumentality to avoid payment of admitted amount and compel the contractor to pursue the conventional and cumbersome alternative remedy. Directions for payment could be issued in writ jurisdiction. On the completion of a Government contract; the Government becomes liable for payment of the amount accrued to the contractor. He gets a legal right to invoke the jurisdiction of the writ court praying for mandamus for direction to the Government to make payment of the admitted outstanding.

Withdrawal of Letter of Intent and Writ Remedy

A letter of intent was issued in favour of the petitioner for granting him retail outlet for sale of petroleum products. The letter was subsequently with drawn without assigning any reasons. This was held to fall foul of Article-14 of the Constitution. The court said that in appropriate cases it could interfere in contract matters in the exercise of writ jurisdiction. The respondent was directed to restore the letter of intent and take further steps in accordance with the law and prescribed procedure.

Waver and Writ Remedy

Waiver of credit guarantee commission charges, rebate and concessional rates of interest were held to be a part of the terms of loan. They were contractual matters between the parties. Any dispute as too much matter could be resolved through a civil suit and not under writ jurisdiction.

Non-Performance of Government Contract by Contractor and Writ

A foreign company contracting with the Government failed to complete the road building projects within the stipulated periods. Sufficient time and opportunities were afforded to the company to amend defaults. But it could not do so. Termination was held to be justified in public interest. There was no violation of Article 14 and no occasion for issuing a writ.

RECOVERY OF DAMAGES AS ARREARS OF LAND REVENUE

The Supreme Court has upheld the validity of a clause in a Government contract which authorized the state to recover damages as arrears of land revenue. Where there was no such clause recovery of dues under a contract by way of arrears of land revenue was not allowed.

EXCLUSION OF SECTION 73: ARBITRATION CLAUSE

Whether in the context of terms and conditions of a contract it is permissible to provide that section 73 would not apply and the special terms of the contract should be applied for making out recoverable loss, the court said that it depends upon the appreciation of the facts of the case And if the arbitrator had followed the special provision, no fault in his award could be found for that reason alone.

CONTRACT OF EMPLOYMENT AD DUTY OF MITIGATION:

The duty of mitigation also finds application in reference to premature termination of a contract of employment. Thus, where on account of the retirement of two out of four partners, a partnership firm was ended and with it the services of the manager but the remaining two partners reconstituted the firm and offered him employment on identical terms which he refused to accept and instead brought an action for damages, it was held that he should have accepted the employment in mitigation of his loss and that he was entitled to nominal damages only. But where no alternative employment of equal standing is available to him, the ex-employer cannot ask that he should have mitigated his loss by accepting a lesser job. The Bombay High Court in *K.G. Hiranandani v. Bharat Barrel & Drum Mfg Co P Ltd.* explained the real nature of the duty of Mitigation. *Vimad Lal J* Said: Though what the explanation enacts is popularly called the 'rule' in regard to mitigation of damages, and has been so referred to even in decided cases and standard works, and though it is loosely called a "duty" to mitigate, the position really is, as our legislature has rightly stated, merely this, that what the Explanation means is not in the nature of an independent rule or duty but is merely a factor to be taken into account in assessing the damages naturally arising from the breach, for the purpose of the main part of Section 73. Explaining the principle relating to damages arising from the breach of a contract of employment, the learned Judge held that "there is abundant authority for the proposition that in case in which the contract of employment was for a fixed period, the normal measure of damages would be the salary for the whole of the unexpired period of service. The principle of awarding damages for a reasonable period or reasonable period of notice comes into play only when the contract of employment is not for a fixed period." The learned Judge found support in the decision of the Supreme Court in *S.S. Shetty v Bharat Nidhi Ltd* where *Bhagwati J* delivering the judgment of the Bench observed (obiter) that if the contract of employment is for a Specific term, the servant would be entitled to damages the amount of which would be measured, prima facie and subject to the rule of mitigation, by the salary of which the master has deprived him. On the facts of the case, the employer contended that the dismissed employee did not make any serious effort to find an alternative employment. Referring to this the learned Judge said that the

defendant cannot impose new and extraordinary duties on the aggrieved party; nor can he ask him to take up just any and every employment that may be available to him e.g., the employee is not expected to accept an employment in a lower status, nor will he be expected to go to a different part of the country or in a different type of work. In conclusion the learned Judge said that there was no evidence to show that a job similar to that of a general manager of a factory with somewhat similar status and pay scale as well as nature of work was available at or about the time when the breach occurred. The burden is on the defendant to show the availability of an alternative job of equal status. It is not for the Plaintiff so show the absence of such opportunities. The court can take notice of the fact that jobs are not a market commodity which can be bought at convenience. Wadhwa J of the High Court of Delhi permitted the plaintiff to prove for the purpose of calculating his compensation any remuneration which was being paid to him in addition to the amount mentioned in the contract.

CONCLUSIONS

Where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress. What damage is the plaintiff entitled to recover? The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damage, as if the contract had been performed. Thus, the damages are given by way of compensation for the loss suffered by the plaintiff and not for the purpose of punishing the defendant for the breach. The consequences of a breach may be endless, but there must be an end to liability. The defendant cannot be held liable for all that follows from his breach. There must be a limit to liability and beyond that limit the damage is said to be too remote and, therefore, irrecoverable. The problem is where to draw the line.

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