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Remedies For Breach Of Contract: An Appraisal Of The Contract Act, 1872 Of Pakistan

Abstract

The notable legislative intent of the Contract Act (IX of 1872) promulgated in Pakistan is to synchronize the performance and concerns of contracting parties. The law of contract aspires to create balance among the contracting parties, so that they may not be set to violate and infringe the rights of each other whilst remaining in the sphere of their respective contractual obligations. However, in the same spirit, the law of contract on the one hand, encourages the contracting parties to perform their respective promises but on the other hand imposes compensatory reliefs on the defaulters as a prevention and repose towards aggrieved parties for assistance. Moreover, the law creates a legal trust among the contracting parties by creating certainty, clarity in the subject matter as well as lawful consideration along with legal bindings of contracting parties for performance of their respective promises. The main focus of this article is to explore all those factors, legal ways and means of the quantification of damages and limitations by courts equivalent to full performance in case of breach of contract to place the aggrieved party equivalent to such position as had the contract been performed by critically analysis all the relevant sections of the Contract Act, 1872. In addition, the research will also analyze all the limitations to award of damages by courts in breach of contract. This area of Research has been touched by the researchers in least, which is necessary to be tread to new horizons and it will be helpful for all legal experts, Attorneys and law researchers as an aiding toll to get adjudicate all matters of breach of contract in a befitting manner.

Keywords: Contract Act, 1872, Damages, Breach, Contracting Parties, Remedies, Pakistan, Law

1.1 Introduction

The genesis of the law of contract stems from the birth of mankind as such each legal system considers imperative to have a befitting arrangement where the rights of the contracting parties may be effectuated (Atiyah, 1966:1). Law of contract flourished more through the principles of common law rather legislature has paid a very little contribution towards its development. Moreover treaties over the general principals of law of contract have made considerable contribution towards the introduction and development of the law of contract (Macmillan, 2011:1).

Whenever a contract is made, it shall be made to overcome two basic ideas as what parties have undertaken, is fully anticipated and if it is not then defaulting

party shall compensate the aggrieved. Means to say a contract is drafted as to ensure the performance of a certain act and on non-performance of the act, the aggrieved shall be recompensed (Anson, 1984:2). The basic purpose of the contract is also to determine the value of each promise made during the formation of the contract. Moreover the contract is a mean to make an estimate as what the contracting parties shall receive and loose inter see (Anson, 1984:3)

Basically a contract is made to overcome the future exigencies relating to a certain transaction, whereby the participants shall be more able to set a path which is to be opted for the resolution or performance of the transaction (Macmillan, 2011:6). We may assume that this concept of future planning has some wider scope, which shall cover not only the cost of promise, extent of liability upon the parties, allocation of economic risk, but also the remedies available to the participants against non-performance etc. of the contract (Anson, 1984:3).

1.2 Consequences Of Breach Of Contract

The suit for damages is filed in case the valid contract is breached by one of the contracting parties, if the valid contract doesn't exist between the parties, the breach doesn't incur damages, this principle has been enunciated in a case law in which the Plaintiff were owner of a bungalow, showing their willingness to rent out same to respondents and offer was acceptable to latter subject to clearance by authorities regarding amount of rent and suitability of building for office accommodation. Building not occupied by respondents for three months after which petitioner rented it out to some else but asked respondents to pay damages for three months during which building remained vacant. Documentary evidence produced showing that there was actually no offer from the side of respondents to hire bungalow but on the contrary an offer was made by petitioners which was acceptable after assessment of rent and clearance by authority. Neither any formal agreement of tenancy completed between the parties nor any building occupied by respondents. It was held that no binding contract having come in to existence between the parties, petitioners were not entitled to claim recovery of rent or any damages. [1] There are certain essential elements of contract which must be considered while drafting a contract as well as for the award of damages as described below.

1.3 Existence Of Validity Of Contract

There are certain essential elements for the existence of validity of contract as mentioned below.

1.3.1 Consensus Ad-Idem

The term "Consensus Ad Idem" in law of contract means meeting and synchronization of minds of contracting parties which is fundamentally essential for the foundation of the contract. Now, it is well established that intention to create and establish a legal relation is the vital element in formation of a contract (steffononi J. 2016).

1.3.2 Pacta Sunt Servanda

This term "Pacta Sunt Servanda" in law of contract means agreements must be kept. The Contracts are drafted just to serve the purpose of proof of an agreement

and to stipulate well defined rights and obligation (Hutchison, 2012:400). The court is unable to establish the consensus Ad-Idem in the absence of written agreement, however, the court uses principle of interpretation to ascertain the terms of a contract, but, by interpreting contracts, courts are inclined more towards the presumption of validity of a contract than the principle of Pacta Sunt Servanda' (Cornelius, 2007:117-118).

1.3.3 Terms of a Contract

There are mainly four kinds of contractual terms: the express term, which is about the promises of the contracting parties which are clearly mentioned in the contract, incorporated terms are referred to another instrument, consensual tacit terms are basically the terms of consensus of contracting parties but not mentioned in the written form and imputed tacit terms are the intentions of the contracting parties based on assumption but not part of written contract (MacAlpine, 1974: 506).

1.4 Remedies Available In Case Of Breach Of Contract

The basic essence of the contract is the performance, as the contracts are made to be performed, for which, that is the sole ground of their formation. The person enters in to a contract to obtain what the party has offered to give, because there is a higher value of performance to be felt by him than the trouble, he will get to obtain it, so, this interest is called as promised performance, which is the pure and genuine contractual interest. In case of breach of contract, the remedies are available to the aggrieved party. The remedy here means the relief which is available to the aggrieved party in connection with the breach of contract by his counter party. The remedies which are available include the specific performance, injunctive relief, compensatory damages, punitive damages, monetary awards, termination and the award of agreed sum, for which all these remedies protect the performance interest (Solene, 2006).

1.4.1 Pecuniary and Non-Pecuniary Loss

The pecuniary loss is the loss which is claimed in shape of damages to compensate the aggrieved party while in non-pecuniary loss, no actual loss is occurred as such no damages for mental distress are awarded in contracts of commercial nature. Pecuniary liability does not arise automatically in breach of contract, containing a clause of liquidated damages, the plaintiff is not awarded damages just for the presence of liquidated damages in the contract, but, it is the court which determines the entitlement of damages to be awarded to the plaintiff. Generally, damages are awarded for pecuniary loss, however, there are some instances on which damages for non-pecuniary loss may also be awarded, as such, the damages for mental agony and anguish and their suffering may be awarded compensation only in case of the contract was to provide enjoyment and pleasure (Nishith, 2017).

1.4.2 Liquidated Damages (LDs) and Un-Liquidated Damages (ULDs)

The words "Damages" and "Damage" have remained confusing, as these two terms are totally distinct from each other, the term 'Damages' is referred to the compensation and the term 'Damage' is referred to the loss or injury. It may also be noted that there is also a distinction between Damages and Compensation, as

such, Compensation is a broader concept which means the payments occurred in lieu of some loss or damage, however, practically, the term Compensation is used to refer the "damages" as in the Contract Act, 1872, the term Compensation is used to denote liquidated and un-liquidated damages (Nishith, 2017).

The determination of damages is most important aspect in the expectation interest approach, in which the value expected by plaintiff is made good to him, however, there is distinction between quantum of damages and measure of damages, the formal deals only the amount of damages while the later deals the law consideration as well. Assessment of determination of damages especially in case of un-liquidated damages, has gained a great importance as the main aim of the award of damages is to place the injured party at the position which have existed, if the breach had not taken place, so, the sum of damages would not exceed the real or expected loss (Nishith, 2017).

1.5 Critical Analysis Of Sections-73, 74 And 75 Of The Contract Act, 1872

Under section 73 of the Contract Act, 1872, the aggrieved party claiming damages has to prove the loss through a trust worthy, cogent, and independent evidence that there was a valid agreement between the contracting parties and other party committed breach of contract as such breach entitles first party to damages for which the foremost element is quantification of damages. The aggrieved party whilst claiming damages has to establish the contractual breach in actual, the amount of damages for which the onus is no claimant to prove without which he will not be able to succeed. Section-73 of the contract Act, 1872 basically prescribes the rule for estimating damages endured due to breach of contract.[2]

Section-74 of the Contract Act, 1872 pertains to the liquidated damages which are stipulated in the written form by the contracting parties after developing consensus ad-idem. Section-74 also applies even to compromise decrees as court while decreeing the suit while decreeing a suit on the basis of a compromise, would record only the compromise if its terms were lawful. Sum could have been named in the compromise agreement, which a party was required to pay in case it committed its breach. Such stipulation was not lawful; however, the right to claim such named amount on account of a breach of a contract was circumscribed by section-74 of Contract Act, 1872. Section-74 of the Contract Act, 1872 provided that it was for the court to quantify what would be the reasonable compensation not exceeding the amount mentioned in the contract to be awarded for contractual breach. Such objection was well within the purview of section-47 of CPC. Rate of markup settled under compromise agreement being not more than what was provided originally under the agreement of finance, could not be termed as unreasonable so as to reduce it to any extent within the meaning and scope of section-74 of Contract Act, 1872.[3]

Section-75 of the Contract Act, 1875 pertains to the rightful revoking of the contract, this section is to be read along with section-39, 53, 55, 56, 64 and 65. A party rescinding the contract due to fraud or such like matters is different from the party rescinding the contract due to non-fulfillment of promise, in case of anticipatory breach, the aggrieved party has the option either to rescind the contract or to continue it, but the damages are assessed from the date of rescinding of contract, not from the breach (1937 Nag. 289).

1.6 Parameters To Determine The Quantity Of Damages

There are certain principles are established in order to quantify the damages in case of breach of contract.

1.6.1 Market Price Rule

The market price rule is based on the following:

a. The aggrieved party must mitigate its loss by buying goods from another source or sell the goods to another party in the market.

b. At the time of contractual breach, contract price is subtracted from the market price to assess the damages of a buyer.

c. The market price rule doesn't apply where there is no market in the vicinity or the buyer is not able to mitigate his loss by purchasing from the market[4].

1.6.2 Cost of Cure Rule

Cost of cure principle means the award of reasonable damages, but not to be awarded to unjust proportion to the loss in case of breach of contract to avoid the unjust enrichment. This principle can be explained through a case law in which the plaintiff given a contract to the defendant for the construction of swimming pool of seven feet and six inches but the defendant constructed the pool of six feet and nine inches, however, the pool was safe for diving but the amount of £21560 seemed unreasonable and the defendant was not also agree to correct the pool, so, the plaintiff sued the defendant for damages equivalent to loss as pool would have been. The court awarded £750 for inconvenience and £2500 for loss of enjoyment, however, the court of appeal held to award the amount of rebuilding the pool, but later the house of upheld the decision of £2500.[5]

1.6.3 Profit Made by the Defendant

The consequential loss comprises of the special damages and such loss was dully in contemplation of the contracting parties at the time of contract making. Decreased profits, overhead costs come in the preview of direct loss, however, damages for the future loss can also be claimed and these damages are to be quantified separately as possible if not included during trial of the main case. In the same, the damages for loss of amount spent before contract can also be recovered if reasonably foreseeable. In general terms, loss of profit is directly consequence of breach of contract which is liable to be compensated as such in time of delivery of goods etc. but the loss of profit is not to be compensated when the loss is not the direct consequence of breach of contract except the loss of profit was in contemplation of contracting parties before the conclusion of contract (Nishith, 2017).

1.6.4 Restitution

The law of restitution is basically a remedy where there is the unjust enrichment, as where the money has been paid and the performance of the contract has not been done in return performance is not adequate, in such cases the claimant wants to get back his money rather than the damages, so, the restitution and damages

claim do not overlap. The restitution is also available in case even the contract is not available (Graham, 2006**).**

1.6.5 Award of Reasonable Compensation

Section-74 of the Contract Act, 1872, doesn't enunciate the difference between liquidated damages and penalty. The said section stipulates the amount payable in case of contractual breach to the aggrieved party and if any penalty is mentioned in the contract and that is payable nevertheless of any proof of loss, the aggrieved party will has to receive reasonable compensation not exceeding the amount so mentioned in the contract. The words of section 74 give court a good scope to award damages to the claimant by using its discretion. The limitation here is that the damages are not to be exceeded the amount mentioned in the written agreement. The discretion used by the court must be exercised with due care, principles and caution[6]

1.7 Limitations On The Award Of Damages

The estimation of damages is the very wide and technical area of civil litigation, for which, where there is civil wrong or breach of contract. Limitations are imposed by all legal systems on the award of damages however, the most significant common limitations are certainty, causation, fault, avoid ability and foresee ability. However, it is necessary to establish casual connection of claimant's loss and defendant's breach. In an addition, the plaintiff has to show that the loss was not too remote but was foreseeable and also to show the reasonable certainty in the amount of damages. It is prerequisite in many legal systems that the plaintiff has to prove, the respondent's fault in breach of contract for award of damages, there is also a limitation on damages by the doctrine of avoid ability, as such, the damage which can be avoided without burden, humiliation or under risk are not recoverable. It must be noted that the parties are at liberty to agree upon such remedy as available, for example, they can limit the liability in the happening of certain event or name a certain amount in the contract clause. However, in certain jurisdiction, the amount so named is refused to be enforced if it is totally disproportionate to the actual loss (Gotanda, 2014: 6).

1.7.1 Causation

The person is only liable to compensate the other party only when the actual breach has taken place, however, it is not necessary that loss has occurred due to the breach of contract but this breach must be the main reason of loss, as such in case where the plaintiff purchased soya beans to be shipped through the defendant's vessel from Japan to Sweden. As the journey started, the vessel got problem and considerable delay occurred by resulting in a breach of contract terms, as such, during that delayed period war occurred and the vessel had to be unloaded in Glasgow, but the plaintiff arranged another vessel and brought the luggage in Sweden but submitted a claim in the court for costs. The defendant claimed that the delay was due to the outbreak of war which broke the chain of causation, but the court held that the defendant must foresee the possible war occurring and delay in the delivery and the plaintiff was awarded costs.[7]

1.7.2 Remoteness

The loss or damage caused by the breach of contract by the one party is recoverable through damages, but some time, it appears that the loss is too remote which cannot be recovered by the claimant, the rule of remoteness has been first enunciated in a well celebrated Hadley case, in which the plaintiff hired the defendant to transport the shaft of his mill as early as possible and told him that the mill is inoperable till the new shaft is arrived after copying that old one. The defendant delayed the transportation of the shaft negligently and additionally five days the mill remained inoperable. The plaintiff paid 2 pound and four shilling to the vessel to ship the shaft but sued the defendant for 300 pounds as damages for wages and lost profit. The by announcing its decision awarded the plaintiff 25 pounds, as such the defendant assailed the decision in the appellate court. The court of appeal held that:

1. The aggrieved party can recover that loss which had naturally arose from the contractual breach or those compensatory damages which were in the usual negotiation of the contracting parties.
2. The plaintiff be placed on the same position as had the contract has been performed, so, the plaintiff was entitled to receive the amount which was the loss of five days in which it remained inoperable.
3. Special damages are awarded to the aggrieved party only in case when the special circumstances are remained in the contemplation of the contracting parties.[8]

1.7.3 Mitigation

The basic purpose and duty of mitigation of loss is in the context of assessment of damages. The claimant and appellants are duty bound to mitigate their loss and are not entitled to recover loss for which the claimant was able to take reasonable steps to mitigate the loss. This principle can be elaborated through a case law in which the appellant purchased a house which later turned out with a defective title and after the purchase of the house, the claimant got a job somewhere else and he had to dislocate and wanted to re-sale the house but he had a difficulty to sell the house due the defective title. The appellant sued his attorney for not taking reasonable steps and negligence in a failure to point out a defective title. The court held that the attorney was liable to pay the difference amount between the without defective title and defective title, however, he was not liable to the loss cause to the claimant due to his dislocation as it was not in the contemplation of the parties during contract formation (Nishith, 2017).

1.7.4 Reliance Loss

In reliance loss principle, when the claimant is not to be ascertained or difficult to be ascertained to have a position after the breach of a contract then the expenses are recovered through reliance of the contract. This principle can be elaborated through a celebrated case law, in which the plaintiff engaged the defendant (an artist) for a role in a TV play, but the defendant pulled out and the plaintiff could not find her replacement, the play stopped and the plaintiff suffered a loss of £2750. Whilst adjudicating upon the matter, the court held that the parties can

claim reliance loss and recover expenses by putting the aggrieved party on the same position had the contract performed.[9]

1.7.5 Discomfort and Disappointment

In a principle of discomfort and disappointment, the damages can be claimed only in case the contract is about the provision of comfort and enjoyment. This principle can be explained through a case law in which the plaintiff booked a holiday Ceylon for 28 days for himself and family, but the hotel was not comfortable regarding cleanliness and services. The matter was adjudicated by the court and held that the appellant is entitled for the award of damages but not his family because they were not a party in the contract but in the appellate court the family of the appellant was also granted award of damages.[10]

1.7.6 Inconvenience

In a principle of inconvenience, where the claimant faces physical hardships due to the failure of the defendant to perform his contractual obligations, the court has to award a sum to compensate such inconvenience, as has been elaborated in the case law in which the defendant failed to get recover the house of the appellant from the occupants and he has to live with his in laws for two years, the appellant sued to recover the damages for living in an overcrowded environment and inconvenience and the claimant was granted damages to compensate the inconvenience caused by the negligence of the defendant. Barry, J. described that there is distinction between inconvenience and discomfort and disappointment and annoyance in failure to carry out contractual obligations.[11]

1.7.7 Diminution of Future Prospects

In this principle, the damages are awarded to the claimant to compensate the loss where the defendant affects claimant's future prospects such as the qualification or training etc, which can explained through a case law in which the defendant engaged the claimant for apprenticeship as engineer, but the defendant terminate the contract. The claimant went in the court and claimed the salary and the loss of future prospects which he would have acquired after the completion of the training. The court held that the claimant is entitled to be awarded all the salaries of the employment period as well as the loss of future prospects if the training had been completed[12] (Dunk vs George Waller).

1.7.8 Speculative Damages

According to Vaughan J. 'the damages which cannot be assessed with certainty are not to relieve the wrongdoer from the liability only on this pretext but he has to pay the claimant'. This principle can also be explained through the case law in which the claimant entered in to a beauty contest by the defendant as the defendant was a famous theater manager and he advertised the contest in the newspaper and the readers of the paper had to vote for the contests and 50 participants had to be shortlisted and among those 12 were to be offered employment. The claimant was among those 50 persons but she didn't get interview letter and lost chance. She decided to bring an action and claimed speculative damages for lost of chance of employment and was awarded £100 but the defendant appealed the case on the ground that the damages are based on mere speculation and cannot be assessed.

The appeal was dismissed on the pretext that she is entitled for damages as she is unable to demonstrate that she might be successful.[13]

Conclusion

The law of contract has set certain principles regarding offer & acceptance, agreement, consideration, free consent and enforceability that the courts can easily employ "objective test" on the disputed contracts to ascertain the real truth that either the parties had a valid contract or not. The objectivity, certainty and clarity of the law of contract enable the court of law to reach at the just decision to deliver a compensatory judgment.

The Principal aim and intent of the law of contract is to create fair, business friendly, harmonious and co-habitant environment for the contracting parties. The law of contract has minimizes the chances of disputes while protecting the interests of the contracting parties. It not only protects the interests of the contracting parties but also stimulates and catalyzes the contracting parties to ensure the performance of their promises by filling the gaps in the written agreement. If any dispute arises among the contacting parties, the law of contract settles the dispute with equitable justice. The law of contract has certain principles regarding the award of compensation/damages whilst adjudicating upon the matter. In the nutshell, it can be said that contract is a central link of promises, wherein an agreement is set up, each party accepts the promise made by other party.

References

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