

21<sup>st</sup> DECEMBER, 2021

## SERIES ON DAMAGES : ISSUE 3

# DAMAGES : ISSUE 3 - CONCEPT OF UNLIQUIDATED DAMAGES

### DAMAGES

The term 'damages' mean money claimed by, or ordered to be paid to a person as compensation for loss or injury suffered. It may be understood as compensation paid by the defaulting party to the non-defaulting party, for actionable wrongs of the defaulter.

There are two types of damages recognized under the Indian law i.e. liquidated and unliquidated damages. The instant article deals with the latter.

#### Unliquidated Damages (Section 73)

Unliquidated damages are those which are not stipulated in a contract and the damages are determined by the court by assessment of the actual loss or injury caused to a party. Section 73 of the Indian Contract Act, 1872 (for short 'Act') deals with unliquidated damages and a non-defaulting party can claim damages after satisfying certain conditions that comprises of-

a) **Breach of a contract-** Once a contract is breached and an aggrieved party wants to seek legal recourse it has to be mindful of the conditions that it would have to fulfil in a claim for damages. For claiming damages, it is important to prove that there was a valid contract between the parties, which has been breached.

In the case of *Vedanta Limited v. Emirates Trading Agency LLC*, AIR 2017 SC 2035- After due deliberation, the Apex Court held that there was a simple proposal and counter proposal in this case between the parties which did not fulfil the ingredients of a valid contract and since no contract existed, there arose no question of breach.

b) **Nexus of causation and substantiate-** There is a nexus of causation and substantiate, with strong evidence. It means that to claim damages there has to be a clear direct connection between the defaulting party's breach and the aggrieved party's loss.

c) **Proof of damages-** The aggrieved party must give proof of damages that were incurred by it due to the breach caused.

In *Ram Chandra Prasad Sahi & Ors. v. State Of Bihar*, AIR 1964 Pat 250- It was held that to claim damages not only breach is to be established, but it should also be proved that the loss has been suffered. The court is duty bound to assess the damages based on the evidences and materials produced before it by the aggrieved party.

#### What does loss or damage mean?

o **Physical harm-** Causing injury, disabilities, loss of enjoyment and comfort, inconvenience or disappointment, mental distress, etc.

o **Property loss-** Damage or destruction of property; and

o **Economic detriment-** Loss of profits, expenses incurred, damages paid to third parties, etc.

#### Measurement of damages

The measure of damages is based on the legal principles governing recoverability of damages. What amount is awarded as damages is based on different factors such as reasonable, compensatory, not un-just, etc. that are to be determined by the court while deciding the damages.

#### Section 73 of the Contract Act (Unliquidated damages)

This provision deals with actual damages that are suffered by the aggrieved party on account of breach of contract and the injury caused due to such breach that is in the nature of unliquidated damages.

Section 73 provides that law on unliquidated damages in case of a breach of contract, the aggrieved party is entitled to receive compensation for any loss or damage caused due to breach.

This loss or damage must naturally arise in the usual course of things or should have been within the contemplation of parties at the time of entering into the contract. The same is bound to be reasonable and dehors any intention of the aggrieved party to get unjust enrichment. More



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over, the aggrieved party is also to establish that it took all actions required for mitigation of such damages.

#### **Illustration**

'A' contracts to sell and deliver 50 kg of rice to 'B' at Rs. 1000/- to be paid on delivery. 'A' breaks his promise and 'B' buys 50 kg of rice from market at Rs. 1200/- and delivers to 'X'. Thus, 'B' is entitled to receive from 'A' by way of compensation Rs. 200/-, i.e., the sum by which the contract price falls short of the price for which 'B' might have obtained 50 kg of rice. 'A' contracts to sell and deliver 50 kg of rice to 'B' at Rs. 1000/- to be paid on delivery. 'A' breaks his promise and 'B' buys 50 kg of rice from market at Rs. 1200/- and delivers to 'X'. Thus, 'B' is entitled to receive from 'A' by way of compensation Rs. 200/-, i.e., the sum by which the contract price falls short of the price for which 'B' might have obtained 50 kg of rice.

#### **Reasonable damages**

In the case of *MTNL v. Tata Communications Limited*, (2019) 5 SCC 341- The Apex Court held that where a sum is mentioned 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.

This rule is also applicable while estimating reasonable compensation under Section 73 of the Act that will be fixed on well-known principles that are applicable to the law of contract, *Ghaziabad Development Authority v. Union of India*, AIR 2000 SC 2003.

In the case of *Kanchan Udyog Ltd. v. United Spirits Ltd.*, (2017) 8 SCC 237- The Apex Court affirmed that the law of damages does not compensate the aggrieved for damages that are caused due to his fault or bad bargain. If the contract law has 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.

#### **Remoteness of damages**

The expression 'remoteness of damages' is determined through the type of loss caused by breach of the contract. While deciding whether the damages claimed are too remote, the test is whether the damage is such that it must have been considered by the parties as a possible result of the breach. If yes, then the damages cannot be considered too remote. The remoteness of damage or indirect loss is a matter of fact, and the law can lay down certain principles to decide it.

The concept of remoteness of damage emerged in the classical case of *Hadley v. Baxendale*, 1854 (9) Exch. 341- It was held in this case that where two parties have made a contract and one of the parties has breached it, the damages that the other party would receive due to breach of contract should be fair and reasonable.

The reasonableness would be considered either arising or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of it.

#### **Mitigating loss**

This principle obligates the aggrieved party to take all the necessary steps and measures to mitigate and/ or lessen the loss caused to him due to the defaulting party's breach. Any aggrieved party will not be entitled to damages for those losses that could have been reasonably avoided or unnecessarily aggravated due to the aggrieved party's own default.

In *P. Radhakrishna Murthy v. NBCC Ltd.* AIR 1962 SC 36- The Supreme Court laid down certain conditions for case of breach of contract, wherein the non-defaulting party shall be-

- (i) Restored to the position that he would have been had if the contract was performed;
- (ii) Puts a statutory duty to take all necessary and reasonable steps to mitigate the loss consequent on the breach of contract; and
- (iii) Cannot claim damages to the extent that he could have mitigated by taking reasonable steps.

#### **Conclusion**

It is clear that only those claims for damages are maintainable/ successful which fulfill the mandate provisioned under Section 73 of the Act. A claim should be supported with substantial evidence, which possess a difficulty, since relevant evidences/ documents may not be always available with the suffering party.

While estimating the loss or damage that was caused due to the breach of a contract, it must be considered whether as to means existed to remedy the inconvenience caused by the non-performance and breach of the contract. There will be three hurdles for the suffering party to overcome.. Firstly, that there should be a breach not attributable to the suffering party, secondly actual loss suffered on account of such breach (courts have interpreted that there should be actual loss and not mere hypothetical loss) and lastly quantification based on realistic figures/ amounts, which is again dependent on proving based on independent evidences. These hurdles can be overcome by the suffering party only when prima facie it appears that the suffering party like a prudent man deployed all mitigating measures.