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Types & Remedies of Breach of Contract with specifically analysing anticipatory breach of contract

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In this research paper, the main area of concern is 'meaning, types, and remedies of breach of contract and it specifically analyses the anticipatory breach of contract'. Nowadays, when these are hard times such as the covid-19 pandemic, and when people are staying indoors and making a contract with various online companies for everything it has become necessary that every person knows about the basics of breach of contract and when a breach has occurred what remedies are available to the innocent party to make that contract good. This paper delves into defining various breaches and then proceeds to provide remedies that come into play when a breach has happened. This research paper begins with an Introduction and in that it familiarises the readers with the Indian Contract Act, 1872, and further it provides a definition of contract, agreement, and enforceability by law. Also, it talks about the basic concepts that what is a contract and what is an agreement with the help of defining terms such as promise and enforceable by law. Usually, it leads to confusion when people start coupling agreement with the contract so, it also makes understand reader that what the differences between an agreement and a contract are. In the next part of the paper, we will have a look at the meaning and the types of breach of contract with having a brief insight about every type of breach. The next chapter specifically discusses the anticipatory breach in detail by delving into the historical point of view of the anticipatory breach, how is this concept followed in various other countries. And how it is applied in the Indian case scenario. Then, it looks at the various case laws of breach of contract with observing the decisions given in those cases. Then there is the conclusion of this paper, and it sums up each and everything discussed in the research.

Keywords: *contract, remedies, search.*

INTRODUCTION

The Indian Contract Act, 1872 is an essential central law that is applied all over the states and it regulates and oversees all the business transactions in which there is some kind of agreement or a deal. The Indian Contract Act came into force on September 1, 1872. Contract Act frames regulate and validate the agreement or contract between the parties. It is only the Indian Contract Act that defines which agreement is enforceable in the court of law and which is not.

Contract

The term 'Contract' is defined under section 2 (h) of the Indian Contract Act, 1872[1] as "An agreement enforceable by law". In simple words, we can say that anything which is an agreement and enforceable in the court of law or by the law by the land is called the "Contract". The definition provided in the Indian Contract Act has two major elements and which are— "agreement" and "enforceable by law". Hence, in order to understand the concept of contract under the provisions of The Indian Contract Act, 1872, we first need to understand these two essential terms in the definition of a contract.

Agreement: The term 'agreement' is defined under section 2 (e) of the Indian Contract Act, 1872[2] as "every promise and every set of promises, forming the consideration for each other". We understood what is the definition of agreement, and let us have a look at the definition of the term 'promise'. **Promise:** The term 'promise' is defined under section 2 (b) of the Indian Contract Act, 1872[3] as "when the person to whom the proposal is made signifies his assent thereto, the proposal becomes an accepted proposal. A proposal when accepted, becomes a promise".

[1] Indian Contract Act 1872, s 2(h)
[2] Indian Contract Act 1872, s 2(e)
[3] Indian Contract Act 1872, s 2(b)

In simple words, an accepted promise is an agreement that is accepted by all the parties who are involved or affected by the agreement. To say all the above information in very few words it can be summed up in the following words: **Agreement = Offer + Acceptance**

Enforceable by law: This element is very important regarding the establishment of the contract. Let us understand with the help of an example, suppose you and your friend both agreed to a certain promise, it has become an agreement but to be called as a Contract as per the provisions of the Act, it must have terms that are legally enforceable. Thus, by interpreting this definition we can say that as per the Act, the contract is an agreement that gives rise to or lead to legal obligations. In other words, we can also say that it must be within the limitations of the law. We can sum up all this information in very few words and those are following:

Contract = Agreement (Accepted Proposal) + Enforceable by law (scope of law)

Now after understanding all these definitions, we can define what is a contract and what is not a contract. As defined the earlier contract is an agreement that is an accepted proposal and it is legally defined or it has enforceability by the law. Hence, a legal document which bestows upon party's some special rights (provided by the document itself) and also some obligations are imposed upon the contracting parties which are reached upon by both the parties by agreeing on the same thing, in the same manner, is called a contract. So agreement and contract both are distinct from each other as there are some elements that are required to make every agreement a contract. An accepted proposal is an agreement but it is not a contract until it is enforceable by law.

DIFFERENCE BETWEEN A CONTRACT AND AN AGREEMENT

- **Contract:** A contract is an agreement that is enforceable by law. It has the legal enforceability of the law. A contract must bestow some rights and some obligations on the parties. And lastly, all contracts are necessarily agreements.

- **Agreement:** An agreement is an accepted proposal upon which is reached by contracting parties by agreeing on the same thing in the same manner. An agreement may or may not have enforceability of the law. An agreement does not create legal obligations on the parties. And lastly, all agreements are not contracts it may or may not be a contract.

When a contract is formed between the parties and one of the parties does not adhere to the provisions or terms and conditions of the contract it leads to breach of the contract. In other words, we can say that when a party does not perform his part of the contract or does not fulfill the stipulations of the contract, it is called as the breach of the contract. This gives rise to serious implications, as the aggrieved party can ask for the damages suffered by that breach.

MEANING AND TYPES OF 'BREACH OF CONTRACT'

Breach of Contract

Breach of Contract can be described as a violation of the terms and conditions which were agreed by the contracting parties at the formation of the contract. In other words, when a party to the contract does not fulfill the obligations completely or partly set upon him by the contract, this non-adherence to the terms and conditions of the contract is called as the Breach of Contract. The breach can be anything from no or non-payment of rent to the landlord to a failure in delivering a promised asset. In some cases of breach of contract, the contract itself states the process in which it is to be dealt with. Or in a contract, other methods of resolution can also be provided such as new contract, adjudication, mediation, and alternative dispute resolution, etc.

Since the contract is legally binding on the parties and it can be enforced in the court of law, if there occurs a breach the aggrieved party may take this to court and can ask for remedy, since his right has been violated. It is kind of imperative to prove that the breach has happened in order to successfully claim a remedy for the breach of contract.

Key Points: -

- When a party to the contract fails to perform the obligations set upon him by the terms and conditions of the contract, there happens a breach of contract.
- Since the contract is of two types— oral and written, a breach can happen in both types of contracts.
- And when a breach has occurred, the involved parties may resolve the conflict among themselves through arbitration, mediation or they can approach the court of law.
- The aggrieved party has the right to claim compensation or damages which he suffered due to the breach. He can enforce his right through the court of law[4].

Types of Breach of Contract

In contractual wording, when it comes to breach of contract the terms have no fixed meaning in law. These terms are interpreted in every contract when they are used, so it varies from case to case. Generally, the Breach of Contract can be majorly classified into 4 types and those are as follows: -

- Minor breach
- Material breach
- Fundamental breach
- Anticipatory breach[5]

Apart from this, the contract can also not be fulfilled due to mistake of fact, fraudulent activity, impossible nature of function to be performed, force majeure (an act of god), the doctrine of frustration, etc. Let's discuss and understand all these concepts in brief starting from the following:-

[4] Will Kenton, 'Breach of Contract ' (*Investopedia*, 23 August 2021) <https://www.investopedia.com/terms/b/breach-of-contract.asp#:~:text=A%20breach20of%20contract20is,weight%20if%20taken%20to%20court> accessed 14 September 2021

[5] Indian Contract Act 1872

- **Minor Breach: -** Minor breach is also known as a partial breach. When a party to the contract fails to perform a term of the contract or a particular obligation set upon him, but this breach is very insignificant and so unimportant that the remainder of the contract can even be completed to its fullest terms. This insignificant breach is called a minor breach. This minor breach does not have an effect on the overall motive of the contract. Even if this breach is very minor in nature the aggrieved party can still drag the non-performing party to the court of law and can ask him for the damages suffered.

Let's understand this with the help of an example, there is a homeowner who hires a contractor to install new windows in his house and he specifically tells him to install wind-resistant windows but a problem arises when the contractor uses windows that are not wind resistant, in this case, the homeowner will ask for the damages incurred from the contractor. But in the present case as there is no difference in the value of windows he will not be awarded the damages. Let's take another example, a person hires a painter to paint his house instructing him to paint with a specific shade of gray of a specific brand. The painter paints the house with gray shade as instructed but of a brand other than specified that is identical to it. He does so as the specified brand was not available, this breach is very insignificant and this can be called a minor breach. [6]

- **Material Breach: -** Material breach happens where one party fails to perform a term set upon him by the contract that allows the aggrieved party to enforce the contract against him and ask him for damages suffered due to the breach that has happened. A material breach is more serious in nature than a minor breach, as in this violation of the contract the parties are prevented from fulfilling the contract partly or totally. Let's understand this concept in more detail with the help of an example. For instance, as in the above example of a painter, if the painter never comes up to the house of that person to paint his house, this is in complete violation of the contract and it can be

[6] 'Breach of Contract Lawsuit: Suing for Breach of Contract' (*Legalmatch*, 13 May 2020) <https://www.legalmatch.com/law-library/article/breach-of-contract.html> accessed 27 September 2021

called as a material breach. And in the above case of the contractor, if the windows which are used by the contractor are not wind resistant and then those windows break, the owner of the home can ask him for the damages that were incurred for installing wind-resistant ones replacing the windows that are broken.

To determine that whether a material breach has occurred or not, there apply the points which are defined by the Restatement of Contracts and those are as follows:-

- Up to how much extent the aggrieved party has been prevented of the benefit which was reasonably expected by the aggrieved party.
- Up to how much extent the aggrieved party can be sufficiently compensated for the benefit which he expected and has been deprived of.
- Up to how much extent the non-performing party or party to perform will suffer forfeiture
- The possibility that a non-performing party or party to perform will rectify his failure, taking into considerations all the situations and circumstances including any reasonable assurances.[7]

Fundamental Breach: - Fundamental breach is committed when one of the parties to the contract does not fulfill his part of obligation and fails to complete a contractual term which was very essential to the agreement that provides another party no opportunity to complete his part of the obligations in the contract. Since the contractual term that was not fulfilled was so essential to the contract, it provides the aggrieved party a right to terminate the contract entirely. A fundamental breach happens when a party against whom the breach has committed, this party has the right to sue the party who has breached for damages incurred, and also, he can terminate the contract if he wants to do so.

For example, 3 parties contracted such that Party 1 orders a certain product, Party 2 will make it and Party 3 will deliver the product. But, Party 2 never made the product, and hence, the

[7] 'Types of Contract Breaches' (*Lawfirms*) <https://www.lawfirms.com/resources/business/types-contract-breaches.htm> accessed 07 September 2021

basic premise of the contract—making of the product— is not fulfilled and the rest of the contract can't be fulfilled by the other parties. [8]

ANTICIPATORY BREACH AND REMEDIES

Anticipatory Breach

An anticipatory breach is also known as anticipatory repudiation. The anticipatory breach is a type of breach of contract where an actual breach has not occurred yet, the non-performing party is yet to breach the contract. In the anticipatory breach, one of the parties breaches by clearly stating that he will not be able to perform the terms of the contract or impliedly indicating that he will be not fulfilling his obligations under the contract. To consider that a breach is been committed there need not to be a vocal or written confirmation, a failure of the party in performing a term can be called as a breach. The non-breaching party can sue the breaching party for damages in both the cases where he explicitly notifies that will not fulfill his obligations or implicitly indicates that the party is not intending to or will not be able to satisfy the terms of the contract.[9]

Key points: -

- In the anticipatory breach, the basic premise is that one party will not be able to perform his part of the contract or will fail to meet his contractual obligations to another party.
- The party who claims that anticipatory breach is committed and moves to court with a wish to seek compensation from the breaching party must take every action in order to mitigate his own damages.

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[8] 'Types of Contract Breaches: The Fundamental Breaches ' (*Concord,* 29 November 2018) <https://www.concordnow.com/blog/fundamental-breach-of-contract/#:~:text=What%20is%20a%20Fundamental%20Breach,own%20responsibilities%20in%20the%20contract > accessed 14 September 2021

[9] Andy Silverman, '4 Types of Breach of Contract You Need to be Aware of'' (*Contact Works*, 2 September 2021) <https://www.contractworks.com/blog/4-types-of-breach-of-contract-you-need-to-be-aware-of> accessed 09 September 2021

- To qualify a breach as an anticipatory breach, there must be an intent to terminate the contract which must be based on a certain refusal or denial to perform the terms of the contract.

For example— a real estate businessman contracts with an architect to draw a plan for its new building within the specific deadline. The businessman gets regular updates from that architect and by the latest update he was not satisfied, this is not a ground to call it an anticipatory breach. Even if the architect is lagging behind the schedule but still there is a possibility that if all the necessary corrective actions are taken, the project can be completed on time. Only if the architect took such actions which made it impossible to meet the deadline, then this can be called an anticipatory breach. This would be done when the architect halts all the work on the project and devotes all his time and resources to a new project of another developer. This would prevent the architect from meeting the deadline of the initial project.[10] This can be called an anticipatory breach.

Remedies in Breach of Contract

Breach of contract occurs when one of the parties to the contract does not fulfill his part of the contract. So, when either of the parties breaks a promise or agreement or does not fulfill their obligations, or does not perform his part of the contract, it is called a breach of contract. Now, when a breach has occurred what recourse does the aggrieved party has. There are some remedies available to the aggrieved party and those are as follows:

- **Recession of Contract -** The first remedy which is available to the aggrieved party is recession of contract. When one of the parties does not perform their part of the obligations, the other party can rescind and set aside the contract and also can refuse to perform his part of obligations. "According to section 65 of the Indian Contract Act, 1872[11] the party who rescinds the contract must give up any benefits that he received

[10] *Ibid*
[11] Indian Contract Act 1872, s 65

under that agreement. And section 75 of the Act provides the party who rescinds the contract a right to receive damages or compensation for that termination of contract[12]".

- **Suit for Damages -** According to section 73 of the Act, the aggrieved party who has suffered because the other party broke his promise and did not fulfill his part of the contract can sue him for the damages or compensation for the loss suffered by him in the normal course of business[13]. These damages are not provided to the aggrieved party if the loss is not suffered in the normal course of business. Two types of damages are provided by the Act and those are—

i. Liquidated damages: In some cases of the contract, parties mutually agree upon the amount to be payable if there happens a breach. These kinds of damages are known as liquidated damages.

ii. Unliquidated damages: Generally, in the cases of contract, the court or any appropriate authority assesses the breach and decides the amount to be payable to the aggrieved party. This type of damages is known as unliquidated damages.

- **Sue for Specific Performance** - In this type of remedy, courts say the breaching party to carry out his performance as provided by the contract. In certain cases of contract, the court tells the breaching party to carry out his actual duties as provided by the contract. This is an order of specific performance and it is provided in some cases instead of granting damages. For example, A offered B to sell a piece of land, and B readily agrees to buy that land. Later A refuses to sell the land, B approaches the court and the court directs A to perform his duties and sell the land to B. This is a remedy for specific performance.
- **Injunction -** The injunction is a court's order to restrain a person from doing a particular act. It is very similar to an order of specific performance but it is used for a negative contract. So there are some types of injunctions as the court would grant an injunction to prohibit a party from doing an act which he earlier said to not to do. Then there is a prohibitory injunction, the court does not permit the commission of an act.

[12] Indian Contract Act 1872, s 75
[13] Indian Contract Act 1872, s 73

Then lastly mandatory injunction prohibits the continuance of the act which is unlawful.

- **Quantum Meruit** - The literal translation of the term "Quantum Meruit" is "as much is earned". In some cases when a party prevents the other party from doing his part of the contract, the party who has been prevented can claim quantum meruit. In this case, he is granted with the reasonable remuneration which he deserved for the terms of the contract he performed. This can be provided as compensation for the work he performed or the services he provided.

These were all the remedies that are available to the non-breaching party when a breach has been committed. In most of the cases in which the matter is of breach of contract, the damages which are provided to the aggrieved party are generally in the form of unliquidated damages. On some occasions, a remedy of an injunction or specific performance can also be awarded to the aggrieved party by the judge when the monetary compensation for that breach does not provide effective relief to the non-breaching party. In the United States, punitive damages are generally not provided in the breach of contract but they may be awarded or these actions can be taken for other causes of action in a lawsuit.[14]

CASE LAWS

Historical development of Anticipatory Breach

Anticipatory breach of contract is a type of breach which is discussed elaborately in the previous pages, now let's take a look at some cases from which the concept of the anticipatory breach has evolved. In anticipatory breach one of the parties to the contract refuses to perform his part of the contract and clearly proclaims that he will not fulfill the terms of the contract.

In books of the law, the anticipatory breach is called as anticipatory repudiation or renunciation, it gives an immediate right to sue the breaching party the moment he breaches or he can wait till the day, the term was to be performed. The concept of the anticipatory breach

[14] Types of Contract Breaches (n 7)

was recognized for the first time in 1853 in the case of "*Hochester v De La Tour* [15]". *It was in April when De La Tour contracted with Hochester and engaged him as a courier from 1st June 1852 for a period of 3 months. On 11th May, De La Tour (defendant) wrote to him and said that his services would not be needed. On 22nd May, the plaintiff sued him. The defendant's counsel argued that he has no right to sue till the day the performance becomes due. The judge in the case Lord Campbell CJ ruled out his argument and said that the contract is in force from the date it is entered and not from the date its performance becomes due. Thus, the concept of the anticipatory breach was first established.*

In the 1957 case, Universal Cargo, Justice Delvin said:

"Anticipatory breach means that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited."[16]

Ram Laxman v the State of Rajasthan[17] filed on 30-04-1954. It was a second appeal by the plaintiff to recover the damages in the High Court of Rajasthan.

Facts: In this case, the appellants sued the Government of Rajasthan on the indict that the appellants have a contract with Lady Willing-don and the State Zenana Hospital to supply various articles to them from for a period starting from 1st September 1942 to 31st August 1943, and demanded rs. 5260/12/6 after adding interest at 6% p.a. for the articles they supplied.

The hospital admitted that they did supply the articles but in the contract, there was an article, malmal of a specific quality and width. This was originally to be supplied at Rs. 4/2/- per than. But plaintiff informed the hospital that they would not be able to supply that malmal as it is not available and stopped the supply of malmal from 13th March 1943.

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[15] *Hochester v De La Tour 2E &B 678:95RR 747: 118Er 922: 22LJQB 455*
[16] *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401
[17] *Ram Laxman v State of Rajasthan* 1955 (302) RLW (RAJ)

Thus, to procure malmal the hospital contracted with Maliram Nemichand to supply malmal at rs 9/1/- per than. After the hospital paid excess money to him for that malmal, there was an amount of rs 573/13 which was payable to the plaintiff. The Director of Medical Services also deducted a sum of Rs 73/13 on the account of negligence in supplying articles and was ready to pay Rs. 500/- but the plaintiff did not agree to it.

According to the defendants, the plaintiff has to bear the excess cost that hospital incurred in procuring the malmal at enhanced rates from the market. And plaintiff's version was that they had informed the hospital about their incapability to supply the malmal and hence, they would not bear that extra cost. The plaintiff's counsel also argued that they were not informed by the hospital authorities that they are buying malmal from the market and that too at a higher price. The trial court had passed a judgment for rs 80/- with proportionate costs.

The point to be noted in the contract that was entered into by plaintiff and defendant on 21st of August, 1942, was a term that if any of the articles is not supplied by the contractor on time, it will be bought from the market and if there incurs any extra cost it will be only bearable by the contractor. Another important term if the contract was that if any of the articles are of inferior quality then, it is the complete discretion of the Director of Medical Services to reject it or deduct the price.

The argument of the plaintiff's counsel was that letter that notified the hospital about their incapability to supply the malmal was only an anticipatory breach of contract but the contract never came to an end since they were regularly supplying other articles to the hospital and the hospital was acknowledging it also. As the hospital didn't repudiate the contract, it never came to an end and remained operative for the rest of the period. The question to supply malmal never arises since the hospital didn't ask them again to provide the same. Hence, that term to bear the cost comes to an end and the plaintiff will not bear any of the excessive cost.

Judgement: After considering all the facts and arguments the court came to a decision that the judgement of the lower court was correct and the plaintiffs are liable to pay the extra costs

incurred by the hospital in procuring the malmal than from Maliram Nemichand which was not supplied by the plaintiff Ram Laxman. And after deducting the excess price from the amount the plaintiff claimed, they are only entitled to receive rs 80/- in addition to the refund of the deposit rs 500/- which the hospital was ready to pay at any time. The court observed that failure in supplying goods was specially provided in the contract and if the party purchases the same from the open market and bears an excessive cost that will be only indemnified by the contractor. The court reached to the conclusion that judgement of the lower court was correct and the appeal failed and was dismissed with costs.[18]

CONCLUSION

In this research paper, we firstly discussed about what is a breach of contract and what are its types, and what remedies are provided to the aggrieved party in case of a breach. Generally, in most of cases, the remedy of damages in the form of money is awarded to the non-breaching party. In very rare cases or some special ones, the remedy of injunction and decree of specific performance is awarded to the non-breaching party. Hence, it can be concluded that the remedy which is most common in the cases of breach of contract is providing damages in the form of money to the aggrieved party. The sole purpose of providing the compensation to the aggrieved party is to bring back the party in the same position as he was before the breach was committed.

The concept of anticipatory breach was firstly propounded in as early as 1853 in the case of "*Hochester v De La Tour*". In this case, judge *Lord Campbell CJ said that "contract is in force from the date it is entered and not from the date its performance becomes due. Thus, the concept of the anticipatory breach was firstly "*. So, in anticipatory breach, a party can sue the breaching party when there is a breach committed or he can wait till the performance becomes due. Therefore, in the concluding words, it can be said that in anticipatory breach party gets a right to sue, the moment the breach is committed. Thus, this paper concludes.

[18] *Ibid*