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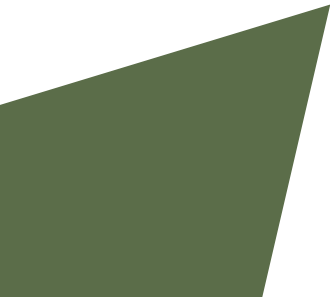
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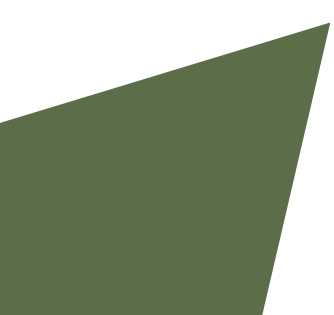
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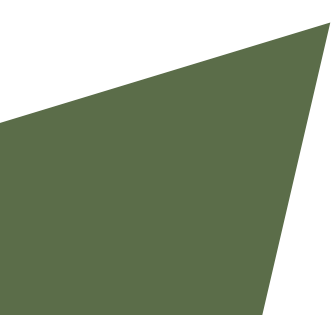
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**Indian Contract Act & New York Civil Code: Comparison on damages for
breach**

Isha Goel

INTRODUCTION

During the eighteenth and the nineteenth century, the laws in India were not codified and were applied differently in presidency towns and the mofussil areas. The Law of Contracts, in particular, was not consistent and thereby adversely affected the development of trade and commerce in India. In 1855, the Second law Commission recommended the setting up of a uniform body with regard to the law of contracts.¹ The Third Law Commission prepared a draft bill on the law of contracts and sent it to India with the statement of objects and reasons in 1867.² The draft bill had been pending before the Select Committee for a considerable period of time when Sir Stephen came to India as a Law member. He suggested suitable changes and it was during the revision process that a section here and there was borrowed from the Draft Civil Code of New York.³ Finally, in 1872 this bill after a series of changes became the Indian Contract Act, 1872.

Commentator, Sir Fredrick Pollock, in his review of the Indian Contract act said that the “Indian Contract Act is the worst piece of codification ever produced and whenever this act is revised, everything taken from Mr Dudley Field’s Code should be struck out and the sections carefully recast after the independent examination of the best authorities.”⁴ However no significant amendment has been made to the Indian Contract Act in this regard. Thus, the Indian Contract Act continues to be based on the Draft Code of New York regarding a few sections.

In the early nineteenth century a legal movement sprang through America led by Jeremy Bentham which demanded the codification of the common law to a set of statutes. This marked the beginning of the lifetime efforts of the New York Lawyer David Dudley Field in the area of codification.⁵ Beginning in 1857 Field along with other lawyers drafted a series of codes related to the civil, criminal and political matters of New York by 1865 including the Draft of the Civil code of New York 1862. These codes did not gather interest in the state of New York and became only the part of the history of the codification of laws in the state of New York. However the civil code materialised in the state of California in 1872.⁶

Three arguments were raised in favour of this adoption in California. First, the common law was difficult to understand and was creating problems for the common law. Second, since the

¹ MP Jain, *Outlines of Indian Legal Constitutional History*, 6th edn. (Lexis Nexis Butterworth 2009), 473-374.

² MC Setelvad, *The Common Law in India*, (Hamlyn Law Lectures 1960) 14.

³ MP Jain, ‘The Law of Contract before its Codification’ (1972) *The Journal of Indian Legal Institute*.

⁴ The Indian Contract Act 1872, First Preface.

⁵ Andrew P. Morriss, ‘Debating the Field Civil Code 105 Years Late’ 61 (2000) *Montana Law Review*.

⁶ Maurice E. Harrison, ‘First Half-Century of the California Civil Code’ 10 (1922) *California Law Review* 186.

principles were derived only from the case laws, the practice of law had become too expensive and time-consuming as the volumes of case laws had to be surfed before a case could be established and argued. Third, in light of the extensive technicalities of the common law, it was necessary to have comprehensive codes that could be helpful for the government servants not belonging to the legal profession. In light of these strong demands the draft Civil Code of New York became the California code in 1872.⁷

California had set up its own commission in 1868 but it failed to establish a consensus on the statutes drafted by it. However an important recommendation of the commission regarding the benefits of following the New York codes was taken up seriously by the subsequent commissions.⁸ Finally, the 1870-72 commission adopted the draft code and since then it has been the law of California regarding the civil affairs with a few amendments to meet the changing needs.

Part I of Division IV of the Draft Civil Code of New York 1872 (hereinafter “The Draft Code”) deals with the reliefs. The Title II under this Part deals with the compensatory relief that the Indian Contract Act adopted. Under this title, Chapter I deals with the general principles of damages and the Chapter II deals with the Measure of Damages. The Article I of the First Chapter, Section 1495 defines the damages as, “Whoever suffers loss or harm by the unlawful act or omission of another, is entitled to have from him a compensation in money therefore; which is called damages.”⁹ Thus, this part is related to the Chapter VI on “Of the Consequence of the Breach of Contract” of the Indian contract Act, 1872¹⁰ and Part I of the Division IV of the California Code.

INDIAN CONTRACT ACT, 1872

In law ‘*ubi jus ibi remedium*’ is a standard principle whereby a breach of a right is followed by a remedy. When a party fails to live up to the terms of the contract, the other party becomes entitled to the relief and the former party is said to have breached the contract. Chapter VI of the Indian Contract act deals with consequences of the breach of the contract. The breach of the contract may result in damages, injunction and specific performance of the contract depending on the respective facts and circumstances. The given research paper deals with damages as the consequence of the breach of the contract.

⁷ Grant Gilmore, *The ages of the American Law*, edn. 1st (Yale University Press 1974).

⁸ Ralph N. Kleps, ‘The Revision and Codification of California Statutes 1849-1953’ 42 (1954) *California Law Review*.

⁹ The Draft of a Civil Code for the state of New York 1862, 379.

¹⁰ The Indian Contract Act 1872, chapter VI.

UNLIQUIDATED DAMAGES

Section 73 worded as, “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”.¹¹ It provides for the unliquidated damages once the breach of contract has been established and excludes the remote or indirect damages arising due to the breach. However, this section allows compensation for the damage arising as a result of the failure to discharge the obligations that resemble those created by the contract.¹²

The incorporation of this general rule is based on the decision of Alderson B.J. in the English case of *Hadley v. Baxendale*,¹³ that “Whereby two parties have made a contract which one of them have broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”. The object of awarding damages in such a case was clarified by Blackburn in the case of *Livingstone v. Ranyards Coal Co.*¹⁴ that the money awarded will put the injured party in the same position as he would have been had the contract not been breached.

The principle with respect to the remoteness of damages was enunciated in the case of *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*¹⁵ This case held that the recoverable damages would be the reasonably foreseeable damages as resulting from the breach at the time of the contract. And this reasonableness would be determined on the basis of the knowledge possessed by the parties which includes both the actual and the imputed knowledge. Actual knowledge relates to the loss arising in the ordinary course of the breach while the imputed knowledge relates to the special circumstances that allow the damages for additional loss also. These special circumstances (e.g. loss of profit on breach of contract¹⁶, etc.) allow damages for consequent loss on the basis

¹¹ The Indian Contract Act 1872, Section 73.

¹² Pollock and Mulla, *The Indian Contract Act and Specific Relief Acts*, edn. 14th 2 (Lexis Nexis 2012) 1138.

¹³ *Hadley v Baxendale* (1854) EWHC J70.

¹⁴ *Livingstone v Ranyards Coal Co* (1880) 5 App Cas 25.

¹⁵ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* (1949) 2 KB 528.

¹⁶ The Indian Contract Act 1872, section 73, illustration i.

that the parties having contemplated certain facts knew at the time of entering into the contract, the probable harms that may arise as a result of the breach.

LIQUIDATED DAMAGES

Section 74 of the Indian Contract Act relates to the liquidated damages. It deals with two measures, first, where the contract lays out the sum to be paid in case of a breach and second, where the contract contains any other stipulation by way of the penalty.¹⁷ Onus to prove the extent of damage is on the aggrieved party. The clause of the section “whether or not the actual damage or loss is proved to have been caused thereby” indicates that the assessment of the actual loss is not necessary, however, such dispensation is not in toto and proof of some damage is required.¹⁸ And in such a case, the court awards the reasonable compensation according to the settled principles.¹⁹

Wide discretion has been granted to the court under this section with only restriction being that the decree of damages cannot exceed the amount mentioned in the contract between the parties. When the damage cannot be assessed, the genuine pre-estimate made by the parties can be taken as a reasonable compensation, if that estimate is not in the form of penalty.²⁰ Genuine pre-estimate of loss is the one that the parties knew may result from the breach at the time of making the contract. If the consideration is in the nature of penalty then only the reasonable compensation which is lower than the stipulation can be awarded.²¹ Stipulation by way of penalty under the section 74 applies when the penalty has to be paid on a future date and not when a sum as penalty has already been paid.²²

In the case of *Kailash Nath Associates*²³, the Supreme Court clarified that the reasonable compensation will be determined on the basis of the settled principles which are mentioned in Section 73 of the act. Section 74 will also apply in cases of the forfeiture of the earnest money under the contract except when the forfeiture is on the basis of the terms and conditions of the public auction. Further, the damage should have occurred for the applicability of this section though it might not be possible to establish the actual damage.

¹⁷ The Indian Contract Act 1872, Section 74.

¹⁸ *ONGC v. Saw Pipes (2003) 5 SCC 705*.

¹⁹ *Fateh Chand v. Balkishan Das* 1963 AIR 1405.

²⁰ *Ibid*.

²¹ *ONGC v. Saw Pipes (2003) 5 SCC 705*.

²² Nishith Desai, ‘The Law of Damages in India’ (January 2017) http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Law_of_Damages_in_India.PDF accessed on: 14 March 2020.

²³ *Kailash Nath Associates v. DDA* (2015) 4 SCC 136.

MEASURE OF DAMAGES

Damages in general are provided for pecuniary losses, however, in certain cases the court may award damages for non-pecuniary losses where the contract was itself for pleasure or enjoyment, e.g. damages awarded in case of breach of contract of services to click pictures during the wedding. Even in case of nervous shock or distress when it was brought within the contemplation of the parties at the time of the making of the contract as the likely consequence of the breach.²⁴ However, this exception is very rare and based on the content and nature of the contract.

It has been held that the party suing for the breach of contract and claiming damages has the duty to mitigate the loss by taking reasonable measures. Further, the said party, should not resort to unnecessary measures which might aggravate the loss. The plaintiff cannot claim damages arising due to his neglect.²⁵ However this, does not mean that in case of an anticipatory breach a person must look for a new contract. It has also been held that if the plaintiff takes any step which is not reasonable so as to mitigate the losses, then that person would be allowed to claim expenses arising due to such steps irrespective of whether it was successful or not.²⁶

The term 'measure of damages deals with both the quantum of damages and the law involved'. The damages awarded should not exceed the loss suffered or that is likely to be suffered. Example, the damage can be the difference between the price paid and the price which a person could have received had the breach not occurred and not the price as a whole. The assessment of these prices depends on the market price. No section of the Indian Contract Act lays down any formulae for the assessment of the quantum of damages. The focus is however given to the time and place for the delivery of the goods in regard to the calculation of damages.

Under section 34 of the Civil procedure Code 1908²⁷, the court has the discretion to grant interest on damages. This discretion depends on the terms of the contract and the relevant statutory provisions and may be granted to compensate the plaintiff for the benefit deprived until the judgement is rendered. Interest as damages can be awarded when it is payable by custom or when there is an agreement to pay interest or when the plaintiff can recover the interest under provisions of any statute.²⁸ When interest is granted as damages, it is calculated on the basis of the rate of interest that the person to whom it is to be paid would have got. The rate of interest must reflect

²⁴ Ghaziabad Development Authority v. Union of India & Anr AIR (2000) SC 2003.

²⁵ Jamal v. Moolla Dawood Sons. & Co. (1916) 1 AC 175, PC.

²⁶ Stainforth v. Lyall (1830) 7 Bing. 169.

²⁷ The Civil Procedure Code 1908, section 34.

²⁸ Pollock and Mulla, *The Indian Contract Act and Specific Relief Acts*, edn. 14th 2 (Lexis Nexis 2012) 1247.

the prevalent commercial rate.²⁹ The payment of the interest as damages also depends on the provisions of the interest act, 1978.

CALIFORNIA CIVIL CODE

California Civil code was adopted in 1872 and since then it has served as the most important source of civil law in California. The main sections dealing with the damages for the breach of the contract are Sections 3300-3303 and 3353-3360, given under the Division IV of the Code. Section 3300³⁰ dealing with the general provision of damages for breach ascertains that they are essentially compensatory in nature and intend to put the injured party in the same position as would have been had the performance been rendered, much like the common law. In the case of *Brandon and Tibbs v. George Kevorikan Accountancy Corporation*³¹, this principle was clearly enunciated by the California Appellate Court. Further, the damages should also not exceed the benefit that could have been received by the performance of the contract (Section 3358).

TYPES OF DAMAGES

Under Californian, the contractual damages are of two types- General and Special damages. Contractual damages should have been contemplated by the parties at the time of entering into the contract or should at least be reasonably foreseeable at that time, beyond such expectation damages cannot be recovered in California. This is based on section 3301 “No damage scan be recovered for a breach of contract that are not clearly ascertainable in both their nature and origin”.³² Further, neither punitive nor exemplary damages are recoverable in case of a breach of a contract even if the defendant acted maliciously or fraudulently. This has been held in the case of *Cates construction Inc. v. Talbot Partners*.³³

General damages are the damages that are the direct and natural result of the breach of the contract. They are the necessary consequence of a contractual breach and thus, can be contemplated by the parties as resulting from the breach at the time of entering into the contract. The predictability of these damages was highlighted in the case of *Lewis Jorge v. Construction Management, Inc. v. Pomona Unified School District*³⁴.

²⁹ Ibid 1249.

³⁰ The California Civil Code 2005, Section 3300.

³¹ *Brandon and Tibbs v. George Kevorikan Accountancy Corporation* (1990) 226 Cal. App. 3d 449.

³² The California Civil Code 2005, Section 3301.

³³ *Cates Construction, Inc. v. Talbot Partners*, (1999) 21 Cal. 4th 28.

³⁴ *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968.

Special damages do not flow directly from the breach of the contract but the circumstances which give rise to these damages should have been communicated to the defendant at the time of entering into the contract.³⁵ These circumstances should be in the knowledge of the defendant whereby he should be able to evaluate the risks associated with that contract. The principles of 'likely to result from' and 'beyond the expectation of the parties' with regard to the special damages has been established in *Wallis v. Farmers Group, Inc.*³⁶ this is based on the principle that the defaulting party cannot assume limitless responsibility with regard to any consequence of the breach of the contract.

MEASURE OF DAMAGES

Generally in California, the damages are recoverable only for the pecuniary loss suffered by the parties. In other words, the damages for mental and emotional suffering are not recoverable under ordinary contracts. However, the damages are recoverable for the non-pecuniary losses in the contracts involving personal undertaking (*Erllich v. Menezes*, 1999).³⁷ When the express object of entering into the contract was related to the emotional safeguard then the damages can be recovered for such breach.

In California, the loss profits are recoverable, if the occurrence and the extent of such profits can be proven. They must be proved as a direct and the natural consequence of the breach of the contract.³⁸ Whether the loss profits can be recovered depends on the business- established or unestablished. In case of the established business, when the business operation was prevented by the breach of a contract then the loss profits are recoverable where the profits are assessed on the basis of the past volume of the business and the probable future sales. While in case of an unestablished business, if the business operation was interrupted then the loss profits are not recoverable as their occurrence and extent are uncertain, speculative and contingent.

However, if the same can be proved by reasonable reliability then the loss profits are recoverable even in an unestablished business.³⁹ It must be kept in mind that the profits so recoverable are the net profits (Net profits are the gains made from the sales after deducing the value of all expenses) and not the gross profit.⁴⁰ For claiming damages for the future harm the plaintiff must ascertain

³⁵ Jason E. Guerra, What are the Breach of Contract Damages in California? <http://www.guerra-law.com/what-are-breach-of-contract-damages-in-california/> accessed on: 16 March 2020.

³⁶ *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737.

³⁷ *Erllich v. Menezes* (1999) 21 Cal.4th 543, 558.

³⁸ *Sargon Enterprises, Inc.*, 55 Cal.4th at p. 774.

³⁹ Martin J. Tangeman, *Judicial Council of California Advisory Committee on Civil Jury Instructions* (LexisNexis Matthew Bender 2016) 155.

⁴⁰ *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1700.

with reasonable certainty that such damage will occur by the breach of contract in the future. Section 3360 of the Civil Code allows the plaintiff to recover the nominal damages. In the case where the actual harm has not been established but the breach of the contract is clear, the defaulting party is required to pay the nominal damages. Thus, in California the maxim that the law does not concern itself with the trifles is inoperative.

Under Californian Contractual Law, the mitigation of damages is an established principle that the plaintiff cannot recover the damages that could have been avoided by exercising ordinary care and reasonable exertion.⁴¹ This does not in any manner mean the surrender of valuable rights or doing more than what is reasonable and practicable. The plaintiff cannot recover for foreseeable harm that could have been reasonably avoided without undue expense. Further any special expense incurred by the plaintiff to mitigate the damages can be recovered.⁴² If the breach of the contract is partial then the damages can be recovered for the harm sustained till the date of the trial only and the damages for the anticipated future non-performance by the breaching party are not recoverable.

COMPARISON BETWEEN THE TWO JURISDICTIONS

The Indian Contract Act and the California Civil Code were adopted by the citizens of the respective states in the same year, 1872. The rationale behind awarding damages to the party injured by the breach of the contract is also similar in both the jurisdictions i.e. to restore the injured party to the same position it had been had the contract not been breached. The surprising commonality is the source of this principle in both the jurisdictions, where the drafters have relied on the English case, *Hadley v. Baxendale* (1854) as the authority for this principle.

The Indian Contract Act, 1872 and the California Civil Code, both provide compensation for damages which are the direct and proximate result of the breach of contract. However, the California code goes a step ahead in section 3302 and lays down that the origin and the nature of such damage should be ascertainable. As compared to this the Indian Contract does not mandate this requirement as section 74 reads as “whether or not the actual damage or loss is proved to have been caused thereby”. Though it has been made clear by the case laws that wherever the actual damage can be established, it must be proved. Further, the California Code expressly lays down

⁴¹ *Agam v. Gavra* (2015) 236 Cal.App.4th 9.

⁴² *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460-46.

that nominal damages can be granted in cases where no appreciable detriment has been suffered by the party.

There is a great emphasis on the point that the compensation awarded should be reasonable. Section 74 of the Indian Act and the Section 3359⁴³ of the California code mandate it. However, the unlike the Indian contract Act, the California code lays down in section 3359 the circumstances which can make the compensation unreasonable like unconscionable and grossly oppressive damages contrary to substantial justice. Thus, the code attempts to ensure objectivity in the reasonable compensation. Further, in India the emphasis on reasonable compensation is given only in case of liquidated damages while in California the emphasis is universal.

In India, section 73 and 74 deal with the unliquidated and liquidated respectively, however, in California no such difference is visible in the code. Further both the statutes talk about the general and special damages (without using these terms). However, it is only the Indian Contract Act which expressly lays down that the defaulting party should be knowing the harm that is likely to result from the breach at the time of entering into the contract so as to allow the injured party to recover the special damages.

In India, the loss profits cannot be recovered unless they come in the ambit of special damages. However, in California it has been established by the case laws that the loss profits can be recovered in case of the established businesses where the loss profits are clearly ascertainable even if it was not in the knowledge of the defaulting party at the time of the contract. Thus, the California code is sided towards the injured party as compared to India. Further, in both the states the courts have played an important role in establishing the principles of mitigation of damages thereby imposing the obligations on the injured party. Further, in both the jurisdictions interest on damages is available under certain circumstances which are dealt by section 3287 of the California Code and section 34 of the Civil Procedure Code in India.

⁴³ The California Civil Code 2005, Section 3359.

CONCLUSION

This research paper was based on the comparison between the Indian Contract Act (1872) and the New York Civil Code (1862) regarding the damages for breach. The New York Code had been referred by the drafters of the Indian act. However, this draft civil code did not materialise in New York and was finally adopted in California in the year 1872. Thus, basically the research in this paper was on the developments regarding the damages for breach of contract in both these jurisdictions. It would not be wrong to say that the two acts are similar on many lines like the rationale for awarding the damages, principles related to special damages and mitigation of damages. At the same time it can also be said that the California Code is more descriptive with regard to the damages for breach as it defines the reasonable compensation, the circumstances which allow the award of nominal damages and the mandate of ascertaining the origin and the extent of damages. Thus, while in India these terms are now essentially settled through the case laws, they do not form the part of the act.

At the time of the adoption of the California civil code in 1872 the drafters of that state did not adopt the draft of the civil code of New York verbatim and changed it to ensure clarity and certainty in the application of the provisions of the act. Like, they included the sections 3301 and 3302 specific to damages for breach of contract which were not provided in the former draft code. However, India adopted the section 73 of the act based on the English decision without ensuring its suitability to Indian circumstances, same has been elucidated by the commentator, Sir Frierick Pollock. Thus, the California Code is certainly the better example of the adoption of a foreign law as it ensured the suitability of the law to its own state.

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