CHAPTER – 2
REMEDIES FOR BREACH OF CONTRACTS - CONCEPTUAL
AND LEGAL FRAMEWORK

INTRODUCTION
As long as obligations exist in our daily lives, it is reasonable to assume that these obligations—whether they arise out of contract, tort or restitution—will be breached. “Once the plaintiff has established that the defendant is in breach of an obligation, he will normally seek damages to compensate for the loss flowing from breach.”

Because it is a well settled principle of law that where there is a right, there is a remedy. Thus, it is quite obvious that when one party is suffering losses due to the breach of contract by the other party, then the former will seek remedy for such breach, and the later is bound to make good the losses. The conservative analysis of contracts holds that the purpose of damages is to compensate the victim of breach for his injury. This purpose, in turn, is normally to be accomplished by awarding expectation damages i.e., the amount required to put the injured party where he would have been if the contract had been performed. The goal, compensation, and the means, expectation damages are so embedded in law of contract as to seem self-evident. On closer analysis, however, the meanings of injury, compensation, and expectation are ambiguous, and, partly for that reason, it is far from clear that expectation damages are always compensatory in nature. The purpose of this chapter is to consider the meanings of these critical concepts, to develop certain theoretical and actual measures of damages for breach of contracts, and to analyze the relationship between these measures of damages and the ends of justice.

When an obligation created by a contract comes to an end, contract is said to be discharged or terminated. A contract may be discharged by any of the following ways:

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✓ By performance;
✓ By mutual agreement;
✓ By impossibility of performance;
✓ By breach of contracts;
✓ By operation of Law;
✓ By lapse of time.

Throughout this chapter, a particular attention is given to some basic issues related to the breach of contracts and concept of damages, as:-

- What is the meaning of breach of contracts?
- What are the various remedies available for breach of contracts?
- What is the meaning of damages?
- Difference between damages and compensation and other related concepts.
- Under what circumstances is it appropriate to compensate a victim of breach of contract?
- Up to what extent he/she is to be compensated?
- What should be the criteria for fixation of damages for breach of contract? And some other related issues are also defined and discussed in this chapter.

When one talk about where there is a right, there is a remedy, then one must be aware of the basic objective behind the remedies available to the aggrieved party. Therefore, it can be said that the main objective of the remedies available for breach of contract is as a form of social control. It is unacceptable to have a party to a contract losing out because he cannot prove the profit he would have made on the performance of the contract. It is equally correct to say that a deterrent to negligence is necessary to protect the parties who might not know what they are entitled to if there is any breach of contract. It is morally not justified to take profits from someone unjustly. So, there is a need for a proper legal system as it is required to control the people and provide a reason, other than conscience, for them not to commit unacceptable socially and
legally wrong things. Thus, the aim of remedies for breach of contract can be found firmly within the general framework of social control.

Thus, “when breach of a contract takes place it is necessary to distinguish between different kinds of breach because their legal effects are not the same. Non-performance can take various forms such as fundamental and non-fundamental breach or anticipatory and actual breach. However, if it is considered on the basis of ‘intention’, the non-performance or breach can be divided into intentional and unintentional one. When the breach of the contract is wilful, the law cannot be indifferent to the defendant who has behaved in bad-faith. To this end, some legal systems have been upgraded and changed the remedies in favour of the plaintiff.”

One of them is law of contract, where various remedies are available for breach of contracts. So, there is a need to discuss these remedies, in brief, for the better understanding of the concept. As contracts are positioned at the heart of commercial life. The development in national and international relations have increased its importance. In spite of the fact that in most cases the parties perform their respective obligations mentioned under the contract, which is reflection of their intention. However, there are cases where the contracting parties or one of them do not fulfil their obligations and as a result, the non-performance occurs. Therefore, in all legal systems, for the breach of the contracts special principles are set forth to respond such a non-performance which in most cases show itself in the form of compensation in damages. There are various kinds of breach for which various kinds of remedies are available in a particular legal system. Thus, while availing any remedy, one must be aware of the kind of breach which is occurred. In this regard, it should be noted that the fundamentality of breach may be relevant as remedies depend upon the type of breach. For example, intentional breach of the contract is reflection of the non-performing party’s irresponsible behaviour, so their effects are different. In this connection, many legal systems consider ill-will as an important factor in establishing whether the non-performance is fundamental or not. Furthermore, in our legal system, the intentional breach of the contract has the effect that extends the liability of breaching party to unforeseeable results. In case of intentional breach the aggrieved

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party is entitled to terminate the contract and also entitles the aggrieved party to demand punitive damages.

Thus, it is necessary here to discuss the meaning of breach of contract and remedies available for such breach.

MEANING, NATURE AND EFFECT OF BREACH OF CONTRACT

Meaning of “Breach”

In general sense, Breach is failure to act in a required or promised way.

According to Merriam Webster’s Dictionary of Law: - Breach means “a failure to do what is required by a law or an agreement or a duty.”

According to Oxford Law Student Dictionary: - Breach means “an act of breaking or failing to observe a law, agreement, or code of conduct.”

Meaning of “Breach of Contract”

Breach of contract is failing to perform any term of a contract, written or oral, without a legal excuse. This may include not completing a job, not paying in full or on time, failure to deliver all the goods, substituting inferior or significantly different goods, not providing a bond when required, being late without excuse, or any act which shows the party will not complete the work. Breach of contract is one of the most common causes for filing suits for damages or suit for “specific performance” of the contract in the court.

According to Black Law Dictionary: - “Breach of contract means failure to live up to the terms of a contract.”

Therefore, breach of contract is a legal term that denotes a violation of a contract or agreement in which one party fails to fulfil its promises or by interfering with the ability of another party to fulfil its duties. A contract may be breached partly or wholly. Mostly, the contracts come to an end when both the parties have fulfilled their contractual obligations, but every time it is not possible for the parties to fulfil their respective obligations mentioned under the contract due to their own reasons; hence it is considered that contract is breached by the party. Breach of contract is the most

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7 Black Law Dictionary, ed. 8th, referred on 6th September 2012.
common reason for bringing the contract related disputes to the court for resolution. In order to upheld a case of breach of contract the court must satisfy itself of all the following requirements:-

- The contract must be valid; it means, it must contain all the essential elements of the contract so that it can be heard by a court. If all the essentials are not present, the contract is not considered as a valid contract; hence no suit shall lie in the court.
- The plaintiff must show that the defendant has broken the contract.
- The plaintiff did everything required for the performance of the contract.
- The plaintiff must have given a reasonable notice to the defendant of such breach. If the notice is in writing, this will prove to be better than an oral notification.

Thus “A breach of contract occurs when a party thereto renounces his liability under it, for by his own act makes it impossible that he should perform his obligations under it or totally or partially fails to perform such obligations.” The failure to perform or renunciation may take place when the time for performance has arrived or even before that.

**NATURE OF BREACH**

The classification of a breach under a contract is very important because it will determine what subsequent remedies the parties have: Whether to terminate the contract, claim for damages, or both. Thus, breach is of two kinds namely:

1. Anticipatory breach, and
2. Actual or Present breach.

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8 This definition of breach appears in Associated Cinema of America, Inc v. World Amusement Co., (1937) 201 Minn 94(Minnesota SC); collected from Shepherd and Wellington, CONTRACTS AND CONTRACT REMEDIES, (4th ed., 1957) 805. Chowgule & Co. Ltd. v. Rizvi Estates and Houses (P) Ltd. (1997) 4 Bom CR 648, premises were handed over to the builder for development. For years (over 6 years) the builder commenced no work, contract broken by him by abandonment. Liability fixed in the contract at Rs. 10,000 per month for breach was reduced to Rs. 3000. U.P. State Sugar Corp. v. Mahalchand M. Kothari, (2005) 1SCC 348: AIR 2005 SC 61, breach of contract on the part of a receiver of the property.

Anticipatory breach

Acc. to Barron’s Law Dictionary: “A breach committed before the arrival of the actual time of required performance. It occurs when one party by declaration repudiates his contractual obligation before it is due.”

Thus, an anticipatory breach occurs where a party clearly shows its intention to break a contract. However, oral or written proof is not required, and failure to perform an obligation in time can result in a breach. By declaring an anticipatory breach, the other party may take legal action immediately rather than waiting for the actual breach of the terms of contract. Breach by one party always gives rise to right to claim for damages by the innocent party. However, it depends on facts and circumstances that whether it would also enable the party not in default to absolve himself from contractual liability or not. In number of cases it has been recognized that the party not in default has such a right in cases of anticipatory breach or in case of fundamental breach. Breach may occur in the following ways:-

- A party renouncing his obligations under the contract.
- A party by his own acts makes it impossible that he should fulfil his obligations under the contract.

In India, doctrine of anticipatory breach finds its place under Section 39 of The Indian Contract Act, 1872. Therefore, a breach of contract, by repudiation before the time for performance is anticipatory breach. The innocent party is entitled to treat the contract as discharged and may sue for damages immediately. It is also open for the party not to treat the contract as repudiated till the time for performance has arrived. Frost v. Knight is an important authority on the concept of “anticipatory breach”. It was summed up in this case as follows:

“The promisee if he pleases may treat the notice of intention as inoperative and wait for the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it,

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11 (1872) L.R. 7 Exch. 111.
but also to take advantage of any supervening circumstances which would justify him in declining to complete it.”

Hoschster v. De La Tour\textsuperscript{12} is another landmark authority on anticipatory breach of contract. In this case, it was held by the court that if a contract is repudiated before the date of performance, damages may be claimed immediately.

**Actual breach**

Actual or present breach means where one party refuses to perform his part of the obligation on the due date or performs incompletely or not according to the terms of the contract. A party may fail to perform what he has promised, then he is said to make actual breach. Thus, a warranty is a term of the contract which, if it is breached by one party, allows the other party to sue for damages i.e. financial compensation for the loss he has suffered.\textsuperscript{13} A condition is a term of the contract which is so important that, if it is breached by one party, allows the other party to declare that the contract is at an end and sue for damages.\textsuperscript{14}

Generally, there are four types of breaches of contract: anticipatory, actual, minor and material. First two are discussed above, so now it is necessary to understand the difference between all for the clarity of the concepts.

**Difference between Anticipatory Breach and Actual Breach**

Basically, breaches of contract fall into one of these two categories. Both anticipatory and actual breaches of contract are bad news for the parties to the contract. They can waste both time and money, and certainly lead to frustration for the parties to the contract. An actual breach occurs when one person refuses to fulfil his or her part of obligation on the due date or performs incompletely and anticipatory breach occurs when one party announces that he intends not to fulfil his or her part of obligation, before the due date for performance. This doesn’t mean there aren’t remedies in either case. A breach of contract, no matter what form it may take, entitles the innocent party to maintain an action for damages.

\textsuperscript{12} (1853) 2 E&B 687.

\textsuperscript{13} Bettini v Gye [1876] 1 QBD 183.

\textsuperscript{14} Poussard v Spiers and Pond [1876] 1 QBD 410.
Difference between Minor Breach and Material Breach

Breaches of contract can also be termed as minor breach or material breach. A minor breach, sometimes known as a partial breach also. The slight violation of the terms of a contract is such, that it does not weaken the entire contract is called minor breach. A minor breach means that one party fails to perform some part of the contract and failure to perform such part does not render the entire contract as repudiated. A severe violation of the terms of the contract which can repudiate the contract as a whole is known as material breach. A breach is considered to be material if one party ends up with something very significantly different from what was specified in the contract. In most of the cases, a material breach means the non-breaching party is no longer required to perform further his or her part of obligation and has a right to invoke remedies.

Actual Breach v. Minor or Material Breach

An actual breach of a contract always gives rise to damages. However, all the time breach by one party does not excuse the innocent party from performing the rest of the part of the contract. Whether a breach will excuse the innocent party to perform depends on whether or not the initial breach is material or minor. While deciding whether a breach is material or minor, usually, the court is using six different guidelines to make its determination. These are as follows:-

I. The extent of the part which the breaching party has already performed;

II. To check whether the breach was intentional, negligent or the result of an innocent mistake;

III. To check the certainty of the fact that the breaching party will perform the rest of the contract;

IV. To check how much of the benefit of the contract the non-breaching party has received despite the breach,

V. The extent of the compensation to which the innocent party is entitled;

VI. What would be the impact on the breaching party if the court were to decide that the breach was material and that the innocent party was under no obligation to perform his part of the obligation?
Legal Effect of Material Breach and Minor Breach

Thus, a material breach gives rise to two things:-

Firstly, it gives rise to an immediate cause of action against the breaching party and, Secondly, it excuses the innocent party from performing.

A minor breach also gives rise to an immediate cause of action. However, it does not excuse the innocent party from performing. Therefore, the innocent party can sue for losses which he or she sustains from the minor breach but the party must perform his or her part of the contract.

REMEDIES FOR BREACH OF CONTRACT

Personal obligations or rights shall arise out of dispositions, legal events and the law, and the sources of obligations\(^\text{15}\) shall be as follows:

- contracts;
- unilateral acts;
- acts causing harm;
- acts conferring a benefit; and
- The law.

The first of these sources of obligation refers to the contracts and in the presence of a contract, any liability arising from breaches of the contract falls within the scope of applicability of the contractual liability. A contract being a correlative set of rights and obligations for the parties would be of no value, if there are no remedies to enforce the rights arising there under. This is the reason the Latin maxim *ubi jus, ibi remedium*, which means where there is a right, there is a remedy have significance in this context. As without a remedy in response, a right would be of no value. Many commercial agreements contain express provisions for remedies. There may be a presumption that all the terms which are to govern their contractual relationship have been included by the parties in express written form in the contract itself. In doing so they intended to displace any rights and remedies provided by law which are not specified in the contract. Any particular remedy that a party wants to avail in case of breach should be specifically preserved in the contract. The purpose of a cumulative

\(^{15}\) Article 124 of the UAE Civil Transactions Law No 5 of 1985 (the Civil Code)
remedy clause is to ensure that the rights of the parties specifically provided for in the agreement are in addition to their rights provided by law on the subject. But where parties have not mentioned any remedy for breach of contract then they can avail the remedies provided by law of contract. A breach of contract occurs if an essential contractual term has been breached by the other party or when a party to a contract failed to perform some or the entire obligation under the contract. In case of breach by one party, the other party is permitted to discharge itself from any further obligation under the contract. Accordingly, there should be a fault or breach committed by a contracting party, and the other party should have sustained and suffered losses as a result of such fault or breach. To cure such breaches, there are remedies.

**Meaning of Remedy**

A remedy is a legal way of either placing an aggrieved party back in the position it was in before the non-performance, or placing the party in the same position as if the contract had been performed.

Basically, remedies are classified into two categories:

1. Legal remedy;
2. Equitable remedy.

**Distinction between Legal remedy and Equitable remedy**

Historically, in English Common law tradition, there were two distinct types of courts:

1.) Courts of Law, and
2.) Courts of Equity.

The Courts of Law were considered the primary place for seeking remedy for wrongs, including breaches of contract. Whereas, the Courts of Equity were considered as the court of last resort when the remedy in the Courts of Law remained insufficient or unfair. In India also, Common Law system has been followed in one way or the other. As, in India, both the remedies are followed but there is no division of courts into Courts of Law and Courts of Equity like in England. Both the remedies are granted by the Courts of Law in India.
A.) Legal Remedies

Basically, there are two types of legal remedies: “compensatory and consequential damages”. These are monetary compensation to place the aggrieved party in the same position he would have been in if the contract had been performed and to permit recovery of any monetary losses suffered as a consequence of the breach.

B.) Equitable Remedies

As opposed to the actual monetary damages suffered as the result of a breach, equitable remedies are related to fairness. One common type of equitable remedy used when the goods are unique is called “specific performance” which means a court may order the non performing party to perform the exact terms of the contract. In such suits, the courts have discretionary power to change or modify the terms of the contract to make it fairer for one or both parties or, if the contract is particularly unfair to one party, the court can rescind or cancel the entire contract and place both parties back in the positions they were before they entered into the contract.

So far as Indian perspective is concerned various remedies for breach of contracts has been developed till now. The remedies for breach of contract under Indian Contract Act, 1872, are suits for:-

- Damages or compensation
- Specific performance
- Injunctions
- Rescission
- Quantum meruit.

As this research is totally focused on “damages” for breach of contract, so the “concept of damages” is required to be discussed in detail, while a brief discussion is needed regarding the other remedies for breach of contract. If one party is found to be in breach of a contract, the plaintiff has several ways through which he or she can make good the losses, these are known as remedies. The most common remedy is monetary payment for the loss, which an aggrieved party sustains due to the breach of contract. Due to the breach of contract a new obligation will arise, namely the right of action is conferred upon the injured party. These circumstances give rise to an action for damages. Generally, damages are considered as a sum of money assessed by the
court to be paid by the defendant to the plaintiff for the breach of contract. Usually, damages for breach of contract aims to fulfil the expectations of plaintiff by putting him into as good a position as he would have been in if the contract had been performed. This principle can be linked to by saying that the ordinary function of damages is compensation, i.e., the award of a sum of money to recoup the losses sustained by the plaintiff. Thus, the main objective of an award of damages is to put the plaintiff in the position he would have occupied if the breach of contract had not occurred.

DEFINITIONS AND MEANING OF “DAMAGES”

Definition of “Damages”

The word ‘damage’ is simply a sum of money given as compensation for loss or harm of any kind. The term “damages” in general sense, is compensation for causing loss or injury through negligence or a deliberate act, or an estimate of court or award of a sum as a fine for breach of a contract or of a statutory duty. It is the amount of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence of a breach of a contractual obligation. Damages are a monetary payment awarded for the invasion of a right at common law.

According to Black Law Dictionary:

“Money compensation sought or awarded as a remedy for a breach of contract or tortuous acts.”

Although, a clear-cut definition is no longer feasible, yet McGregor tried to define the term “damages” as follows:

“Damages in the vast majority of cases are the pecuniary compensation obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in starling (dollars).”

Justice Greenwood defines the term as:

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16 Borough’s “Remedies under Law of Contract”, Ch.2, at.p.16.  
17 A.S.Sharma v. Union of India, 1995ACJ 493 at 498(Guj.)  
18 See Black’s Law dictionary, ed.6th at.p. 389.  
“Damages generally refer to money claimed by, or ordered to be paid to, a person as compensation for loss or injury.”\textsuperscript{20}

“The term injury is sometimes used in the sense of damage, as including the harm or loss for which compensation is sought, and has been defined as damage resulting from an unlawful act; but in strict legal significance, there is, properly speaking, a material distinction between the two terms, in that injury means something done against the right of the party, producing damage, whereas damage is the harm, detriment, or loss sustained by reason of the injury.”\textsuperscript{21}

Alberta Provincial Court adopted these words to define “damages”:

“Money adjudged to be paid by one person to another as compensation for a loss sustained by the latter in consequence of an injury committed by the former.”\textsuperscript{22} Further it was explained as:

“The pecuniary satisfaction awarded by a judge or jury in a civil action for the wrong suffered by the plaintiff.”\textsuperscript{23}

Damages also have a deterrent role. It was observed by Justice Mansfield as:

“Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself.”\textsuperscript{24}

Thus, “damage” means the harm or loss suffered or presumed to be suffered by a person as a result of some wrongful act and a sum of money given to compensate the damage is called “damages.”\textsuperscript{25} Damages are considered as a typical request made to a court when persons sue for breach of contract. But, these are distinguished from costs, which are the expenses incurred as a result of filing a suit in the court and which the court may order the losing party to pay to the winning party. Damages may be defined as the disadvantage which is suffered by person as a result of the act for default of another. “Injuria” is damage which gives rise to a legal right to recompense; if the law gives no remedy, there is absque injuria, or damage, without the right to

\textsuperscript{21} Ibid.
\textsuperscript{22} R v Agat Laboratories Ltd., 1998 ABPC 24.
\textsuperscript{23} Ibid.
\textsuperscript{24} John Wilkes, In re, (1764), 19 How. St. Tr. 1167; Lofft. 19
\textsuperscript{25} Amiya Kumar v. Krishna Singh, 1994 MPLJ 218 at 222.
recompense. Therefore, the meaning of “damage” in a statute is a matter of great concern.

DIFFERENCE BETWEEN DAMAGES AND OTHER RELATED CONCEPTS

Under Section 73 of The Indian Contract Act, 1872, a party to a contract can claim compensation from the other party who has broken the contract only if he proves that he has sustained loss or damage and that too only to the extent of such loss or damage suffered by him. So, for as the clarity on the concept is concerned, there is a need to know the difference between term “damages” and other related terms.

Difference between “damages”, “damage” and “injury”

Although the words, “damages”, “damage” and “injury”, are sometimes used as synonyms, yet there is a material difference between them. The difference between these words can be discussed as: - “Injury is the illegal invasion of illegal right.”

While “damage” is the loss, hurt, or harm which results from the injury. The word “damages” means the recompense for compensation awarded for the damage suffered.

Generally, the word “damage” means depreciation caused by a wrongful or a lawful act; but in statutes or other legal instruments giving compensation for “damages”, the word refers to some actionable loss, injury, or harm which results from the unlawful act, omission, or negligence of another. But when it is used to signify the money which a plaintiff court to recover from the defendant, the word “damage” or “damages” is never in any sense synonymous with or collateral to, the terms “example”, “fine”, “penalty”, “punishment”, “revenge” etc.

Difference between “Damages” and “Compensation”

There is a very clear distinction between damages and compensation, which is not to be ignored and as pointed out in a Calcutta case where it was observed: “as Lord Esher observed in Dixon v. Calcraft, the expression compensation is not ordinarily used as an equivalent to damages although as remarked by Fry, L.J. in Skinner’s Co.

28 Hanna v. Martin (Fla), 49 So.2d 585, 587 (Fla.1950);
29 Fay v. Parker, 53 N.H. 342, 382 (1873).
v. Knight, compensation may often have to be measured by the same rule as the damages in an action for breach. The term compensation according to Oxford dictionary signifies that which is given in recompense, and equivalent rendered, damages on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money off something lost or withheld. The term “compensation” etymologically suggests the image of balancing one thing against another. Its primary significance is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent.

While the term “damages” is used in reference to pecuniary recompense awarded in reparation for a loss or injury caused by a wrongful act or omission, the term “compensation” is used in relation to a lawful act which caused the injury in respect of which an indemnity is obtained under the provisions of a particular statute. The difference between damages and compensation was observed in a case as: “The expression compensation is not ordinarily used as equivalent for damages. It is used in relation to a lawful act which has caused injury. Therefore, the word compensation would not include damages at large.”

The law is well settled that a claim for unliquidated damages does not give rise to a right until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eoinstanti incur any pecuniary obligation nor does the party complaining of the breach becomes entitled a debt due from the other party. The only right with the party aggrieved by the breach of contract has is the right to sue for damages and that is not an actionable claim.

**Difference between Damages and Indemnity**

The right to indemnity and the right to damages are remedies available to the non-defaulting or non-breaching party to a contract under the Indian Contract Act, 1872. Though these two rights are sometimes confusing, but these two words express two

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33 Houghton Main Colliery Co. Ltd., In re, (1956)3 All ER 300.
36 Ibid.
fundamentally different legal ideas. The basic difference between right to indemnity and right to damages is the former arises out of breach of contract whereas the latter arises on the original contract. In contracts “damages” are what you sustain from a breach of the agreement. Damages are also what third parties could claim for damages to their property or for personal injuries. Indemnity provides protection against third party claims for injuries or damages they sustained as a result or actions by one of the parties to the agreement. Difference in terms of enforcement of right is indemnity may take a longer time to be enforced as compared to damages.

**Difference between “Damages” and “Debt”**

In a recent case the difference between these two terms was observed as: “There is no reason why the plaintiff should not be entitled to recover the loans it made to the defendant. As the recovery of those loans does not depend on the contract and breach of it. Hence there is difference between the two concepts. Damages are distinguished from debt, and form a sum payable under contractual liability to pay a sum certain on given event (other than breach), but include sums payable under claims for a reasonable price or remuneration for goods sold or services rendered and under claims under an insurance policy when the quantum of damage has been proved.

**DAMAGES: AS THE MOST COMMON JUDICIAL REMEDY**

The most common remedy available at common law for breach of contract is an award of damages. This is a monetary sum fixed by the court to compensate the aggrieved party. In order to recover substantial damages the innocent party must show that he has suffered actual loss; if there is no actual loss he will only be entitled to nominal damages in recognition of the fact that he has a valid cause of action. So, an award of damages is the major and most common judicial remedy. The basis on which damages are awarded is to place the aggrieved party on the same footing on which he would have been, had he not suffered losses. Hence, the damages decreed must be commensurate with the losses suffered. This is in accordance with the dictum of PART B in Robinson v. Harman, which has the effect; “The rule of

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38 Krishna swami Iyer v. Thathia Raghaviah, AIR 1934, Nag. 129.
43 (1848) 1 Ex. 850, 855.
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 damages as if the contract had been performed. In short, the compensation and satisfaction for an injury sustained must be equivalent to damage suffered, in such a way that the injured party is restored to the position he occupied before he suffered from the wrong. In a case the Apex Court held that the company’s contention that the company is entitled to damages arising out of the refusal to provide money and purchase goods is right. As once a mortgage is executed and registered, it is a complete transfer of property to which Transfer of Property Act, 1881 is as much applicable as Indian Contract Act, 1872 is applicable. The contract to advance money still existed. The mortgagor had the option to claim specific performance or to treat himself as discharged from the contract to supply the goods. The state could not say that its obligation to purchase the goods had ended simply because it did not advance the money under mortgage. No damages were awarded for delay in loading where the plaintiff himself was the cause of delay.

CLASSIFICATION OF DAMAGES

Monetary compensation that is awarded by a court in a civil action to an individual who has been suffered due to the wrongful conduct of another party. Awarding damages is an attempt to measure in financial terms the extent of harm a plaintiff has suffered because of the actions of defendant. The purpose of damages is to restore an injured party to the position the party was in before being harmed. As a result, damages are generally regarded as remedial rather than preventive or punitive. However, punitive damages may be awarded for particular kind of wrongful conduct. Before an individual can recover damages, the injury suffered must be one recognized by law as warranting redress, and must have actually been sustained by the individual. Thus, before availing any remedy one must know what type of losses he has sustained, so that the right remedy can be availed by the aggrieved party. The Law classified damages into five major categories:

1. Compensatory Damages.

2. Nominal Damages.

44 Herman and Mahatta v. Asiatic Steam Navigation Co., AIR 1941 Sind, 146.
46 Timble Co. Ltd. V. Jorge A. Motors, AIR 1977 SC 734; (1977) 3 SCC 474.
3. Punitive Damages.

4. Treble Damages.

5. Liquidated Damages and Unliquidated Damages.

These are the major categories of damages provided by law, but the this list is not exhaustive one, because there are certain other kinds of damages also. All these categories of damages are discussed as under:-

1.) Compensatory Damages

With respect to compensatory damages, a plaintiff is entitled to claim for all the natural and direct consequences of the wrongful act of the defendant and the defendant is liable thereto. The remote consequences of a defendant’s act or omission cannot form the basis for an award of compensatory damages. The measure of compensatory damages must be real and tangible, although it can be difficult to fix the amount with certainty, especially in cases involving claims such as pain and suffering or emotional distress. In assessing the amount of compensatory damages to be awarded, the judge or jury must exercise good judgment and common sense, based on general experience and knowledge of economics and social affairs. Within these broad guidelines, the jury or judge has wide discretion to award damages in whatever amount is deemed just, keeping in view the evidence in the case which supported the amount. These are known as non-pecuniary losses, which cannot be calculated in terms of money. Such non-pecuniary losses can be termed as:

- pain, suffering and shock suffered by the plaintiff due to the assault by the defendant;
- Loss of amenities of life, such as, the plaintiff suffers by reduced enjoyment of life due to the damage caused by the assault and which may, apart from any material or pecuniary loss, be dependent upon the loss of amenities;
- Loss of expectancy of life;
- Inconvenience and discomfort etc.

A plaintiff can recover damages for above mentioned injuries suffered as a result of wrongful conduct of another person. The plaintiff can recover for a physical

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48 Supra note, 35, at.p.6-50.
impairment if it is direct result of a harm caused by the defendant. The jury, in determining damages, must consider the present as well as future effects of the disease or injury on the physical well-being of the plaintiff, who must reveal the disability with reasonable certainty. Compensatory damages can be awarded for mental suffering or impairment, such as a loss of memory or a reduction in intellectual capacity suffered as a result of wrongful conduct of the defendant. A plaintiff may recover compensatory damages for both present and future physical pain and suffering. But compensatory damages for future pain are awarded only when there is a reasonable likelihood that the plaintiff will definitely experience it. The mere speculation by the plaintiff of future pain and suffering is not permitted to recover claim compensatory damages. The law has provided the jury a wide discretion to award damages for pain and suffering, and the judgment will be overruled only if it appears that the jury abused its discretion while granting such damages. As mental pain and suffering includes fright, nervousness, grief, emotional trauma, anxiety, humiliation, and indignity, so historically, a plaintiff could not recover damages for mental pain and suffering without accompanying a physical injury. But, in present scenario, most of the judicial systems have modified this rule, allowing recovery for mental agony alone where the agony is the direct result of the act of the defendant and the act itself shows that it was wilful or intentional, or done with extreme carelessness or recklessness. In some of the judicial systems, even a bystander can recover damages for mental distress caused by observing an event in which another person negligently, but not intentionally, causes harm to a family member. Thus, mental pain and suffering can be considered in assessing compensatory damages. Compensatory damages of an economic nature may also be recovered by an injured party.

Loss of profit is considered as another important element of compensatory damages. In such cases plaintiff is allowed to recover such a loss which can be established with sufficient certainty and is a direct and probable result of the wrongful act of the defendant. Mere expectation of profits that are not certain or contingent upon fluctuating conditions would not be recoverable, nor would they be awarded if there was no evidence from which they could be reasonably determined.


50 Id.at.p.115.
With respect to compensatory damages one thing is very clear that a plaintiff can recover all reasonable and necessary expenses brought about by an injury caused by the wrongful acts of the defendant. In an action under law of contract, the party who has been injured by breach of other can recover compensatory damages that include the reasonable expenses that result from reliance on the contract, such as the cost of transportation of perishable goods wrongfully refused by the other contracting party.

When a party to contract defaults on an obligation to pay money interest can be awarded to compensate the aggrieved party for money wrongfully withheld from her or him. Interest is ordinarily awarded from the date of default, which can be set by the time stated in the contract for payment, the date a demand for payment is made, or the date on which the suit alleging the breach of the contract is filed.

**Limitations on the Award of Compensatory Damages**

Duty to mitigate losses is an important limitation on the award of damages. The party not at fault is duty bound to mitigate, or minimize, the amount of damages to the reasonable extent. Damages cannot be recovered for losses that could have been reasonably avoided or substantially improved after the breach occurred. The failure to use reasonable diligence in mitigating the losses by the innocent party means that any award of damages will be reduced by the amount that could have been reasonably avoided.

2.) **Nominal Damages**

Nominal damages have been defined as a sum of money that may be spoken of but that has no existence in point of quantity, or a mere peg on which to hang coats. Where the injured party has not in fact suffered any loss by reason of the breach of a contract, the damages recoverable by him are nominal, like in a case it was observed as: A firm consisting of four partners employed B for a period of two years. After six months two partners retired, the business being carried on by the other two. B declined to be employed under the continuing partners. It was held by the court that he was only entitled to nominal damages as he had suffered no loss. When a plaintiff successfully establishes that he or she has suffered an injury caused by the wrongful conduct of a defendant, but cannot offer proof of a loss, nominal damages are

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51 Id. at p.106; see also Abrahim Sheikh v. State of West Bengal, AIR 1964 SC 1263 at 1267.
53 Brace v Calder (1895) 2 QB 253
recoverable in such a situation and the plaintiff can be compensated. The plaintiff, who proves that actions of defendant caused the injury, but fails to submit any proof in this regard, may be awarded only nominal damages to the extent of the injury. The amount awarded is generally a small one or a symbolic sum. So far as, the nature of these damages is concerned, these are not awarded as compensation for the injury, but merely for the recognition of the right of the plaintiff and of the technical infringement thereof by the defendant.

Nominal damages are intended only when the plaintiff has sustained *injuría sine damnum*, i.e., where a right of the plaintiff has been infringed, but no losses have occurred or cause any sensible damages. 54 The case must be the one in which the plaintiff as cause of action owing to infringement of civil right but in which no real damage has been caused to him, 55 or where a breach of duty has been committed against him but has not in fact produced any actual damage 56 or where he fails to prove that he has suffered any substantial loss, he is only entitled to nominal damages. 57 Here, one more thing can be considered i.e. when the plaintiff has no intention of performing his part of the obligation under the contract and in such a situation if the defendant has committed only a technical breach thereof, or where the plaintiff has sustained actual damage not through the wrongful act of the defendant but from his own negligent conduct, then the plaintiff is entitled to receive merely nominal damages. 58 Generally, it is said that where a cause of action is established, the plaintiff is entitled to some damages known as nominal damages. 59 Nominal damages are granted even when it is evident to the court that the suit filed by the plaintiff is without sufficient grounds and that no losses have really been sustained by the plaintiff. 60 Although, he can not insist upon such damages being awarded to him, as a matter of right. 61 But at least, the law can entitle him to a decree in declaration of his rights without costs and damages. 62 The purpose of awarding nominal damages is

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55 E. Bignold, Manager, Court of Wards, In re, AIR 1923 Cal. 306.
56 Columbus Co. v. Clowes, (1903) 1 K.B. 244.
57 Marzetti v. Williams, (1830) 1 B. & Ad. 415; 9 L.J. O.S. K.B. 42.
58 Sanders v. Stuart, (1876) 1 CPD 326.
60 Pasalapudi Brahmayya v. Tugala Gangarasu (1963) 1.
63 Kaliappa Gaundan v. Vayapuri Gaundan, 2 M.H.C.R. 442.
to settle the question of title or determine the rights of the greatest importance to the plaintiff. Same view is given by Sergeant Williams in a case, as: “whenever any act injures another’s right and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of specific damages. It is pertinent to mention here that in India, keeping in view the provisions of section 73 of Indian contract act, the award of nominal damages for breach of contract is not permissible. But in other judicial systems the rules on this point is quite a different. In some judicial systems, upon the breach of contract the person who is guilty of breach is liable for nominal damages, in case actual damages cannot be proved. It means that nominal damages are granted only upon the breach of a contract if no actual or substantial loss has resulted from the breach or no damage has been proved. Where a plaintiff has not in fact sustained any actual damage from the infringement of his legal right, or if he fails to prove that he has sustained any actual losses or although he has sustained actual losses, but the losses are not the direct result of the wrongful act of the defendant, but he has sustained these losses due to his own fault or negligence or if the plaintiff is not at all concerned to raise the question of actual loss sustained by him, but he has filed his suit only for the establishment of his legal right, then he is entitled to “nominal damages”.

The English courts held that where the plaintiff had not suffered actual loss or fails to prove any damage, he is entitled to nominal damages. The Court of Appeal way back in 1957 held that the party can recover its loss; even if he sales the property to some other person. However, it has been observed by the Delhi High Court, following some earlier High Court decisions that Section 73 does not give any cause

63 Meller v. Spateman, (1651) 1 Saunders 346.
67 Warre v. Calvert, (1837) 7 Ad. & El. 143; Hamlin v. Great Northern Rly. Co., (1856) 1 H. & N. 408; Weld Blundell v. Stephens, (1920) A.C. 956 (H.L.)
68 Supra note 56.
71 Charter v. Sullivan; (1957) I All ER 809 : (1857) 2 Q.B. 117
of action unless and until the damage is actually suffered. The Court did not award any damages and further observed, “If the contrary view was to be taken, the provisions of S. 73 will become nugatory and a party would be penalized, though the other party has suffered no loss. But, where the plaintiff suffers no loss the court may still award him nominal damages for the recognition of his right. But this is the discretionary power of the Court to award nominal damages in such cases.72

The Supreme Court while dismissing an appeal73 held that the assessment power was “subsidiary and consequential”, and could be exercised only when the first party admitted breach. The second party could not adjudicate upon the question of breach as law does not allow him to be the judge in his own case. ” The Court, however, examined the question whether one of the parties could assess or quantify damages but did not express any opinion whether that party had unbridled power to apply any measure of damages or follow the rule of the thumb.74 The measure of damages cannot be made bonfire ant eater of a party’s urge to revoke the laws partially which are already settled principles of assessment of damages contained in Sections 73 and 74 of Indian Contract Act, 1872.

3.) Punitive Damages

Punitive damages are often called exemplary damages. Punitive damages have been known in the common law by name for only two hundred years.75 In this case, the court reaffirmed adherence to the doctrine of punitive damages. However, the use of other damages as punishment is as old as man-made law. Although, the doctrine of punitive damages was unknown to the Roman Law76 and thus to the French civil law77, in Anglo American Common law jurisprudence punitive damages apparently developed with the jury trial,78 although its development is somewhat obscure.

Punitive damages are sometime known as “exemplary or vindictive damages.” These damages are awarded not merely to provide adequate compensation to the injured

72 Union of India vs. Trihhvandas Lalji Patel, AIR 1971 Delhi 120; Arjandas v. Secretary; AIR 25 Cal 737.
74 Annual report of Survey of the Law; 1987; Vol. 23.
75 Kink v. Combs, (1965) 28 Wis 2d 65,135 N.W. 2d 789.
76 Supra note 29.
78 C.J.S. “Damages”; 117 (1941).
party but also to punish the wrong-doer. In other words, it can be said that these damages are intended to be in solarium to the plaintiff and in terrarium to the public. The interest of the society and of the aggrieved party is merged into each other and the damages are given not only to compensate the innocent party but also to punish the offender. These damages are purely punitive or exemplary in nature. In an action for punitive damages there are three distinct heads of damages,\(^79\) namely:

1.) Pecuniary losses;

2.) Compensation for injured feelings;

3.) A sum of money of panel nature in addition to amount of compensation given for either pecuniary or physical or mental suffering.

It should be noted here that exemplary damages are not awarded in an action for breach of contract with the exemption of the breach of promise of marriage as the object of defaulting party is never an entrance into the consideration of *quantum* of damages.\(^80\) Because, damages for breach of contract are considered to be in the nature of compensation, not in the nature of punishment.\(^81\) Damages, in any case, can either be compensatory or punitive damages. Compensatory damages are aimed at compensating a certain loss suffered by a party, while punitive damages are intended to punish the wrong-doer with the hope of deterring such conduct in future. It must be noted that damages awarded by the courts are different from fines, which are usually notified in advance under the law. It is to be illustrated with the help of an example: If a person met with an accident as a result of another vehicle violating a traffic rule, he will be entitled to claim compensatory damages from the offender for the damages suffered by him. At the same time, the traffic police may levy a statutory fine on the offender for violating the traffic rules which caused the accident. But can he also claim punitive damages against the person who caused the accident?

The answer to this question depends upon the circumstances of each case. In countries like the US, juries are regularly awarding punitive damages - especially in product liability cases. In India, on the other hand, the idea of punitive damages has been remarkably resistant to. As our Apex Court has reasoned that punitive damages could


\(^{81}\) Addis v. Gramophone Co. Ltd., (1909) AC 488 (As per Lord Atkinson).
only be granted in very limited circumstances. Supreme Court stated: Punitive damages can be awarded when the conduct of the wrong-doer is:

- Shocks the conscience or
- Outrageous or
- There is a wilful and ‘intentional disregard’ for safety requirements and
- There must be a direct connection between the wrongdoer’s conduct and the victim’s injury.

As there are rarely any fixed set of factors to guide judges so this can be a good reason for the conservative position of the Supreme Court on punitive damages, and this is the fact that these damages are unpredictable and can create substantial uncertainty. Thus, the result is that the award of punitive damages is usually quite arbitrary.

But even before presuming that there are set guidelines for the award of punitive damages or not, one must be aware of the rationale punitive damages. If the logic behind it is to compensate a victim, then compensatory damages can always be awarded, depending on the damages actually suffered by the victim. If the logic is to punish, then criminal law can better serve the purpose - especially in the context of corporate liability, since it fixes the responsibility on individual officers of the company rather than penalising shareholders for the misconduct of the officers.

Regardless, punitive damages continue to exist on the books.

In this context, it is unfortunate that the judgment of the Supreme Court in the Sterlite case provides little explicit justification for the chosen figure of Rs. 100 crore. The Court extracts a portion of financial report of Sterlite which described Sterlite’s profits as being Rs. 1,043 crore. On the basis of these two sentences from Sterlite’s report, the Court concludes that Rs 100 crore would be appropriate punitive damages. It orders the money to be deposited by the Collector of Tuticorn in a bank with instructions to use the interest from the money for “improvement of the environment, including water and soil of the vicinity of the plant”. It then also leaves the door open

83 Ibid.
for Sterlite to be sued for any other damage caused by it. One obvious problem is that this is concluded without any reference to the actual damage caused to the environment by way of conduct of Sterlite. Thus, Rs. 100 crore judgment is either disproportionately high or low. This goes to show that punitive damages cannot be calculated solely on the basis of the polluter’s profits. It has to be based on a combination of the actual damage cause and the financial wherewithal of the polluter.

The most important question, especially with regard to India, is whether the law should permit Indian courts to award punitive damages in contract cases. It is easy to take refuge under the presumption that there are rarely any fixed set of factors to guide the judges. In other countries, like England and U.S.A., there are standard of conduct that warrants punitive damages like:

1.) Standard of intentional conduct;
2.) Standard of reckless conduct;
3.) Standard of negligent conduct etc.

Furthermore, it can be said that the functions of punitive damages should also be considered, so that the purpose of awarding punitive damages can be properly served. The basic functions of punitive damages can be observed as:

1.) The award of punitive damages will educate the people that they should not commit any such breach for which they can be punished. This kind of awareness will lessen the breach of contract and enhance the feeling of not breaking the promises or obligations under the contract.

2.) Punitive damages can play retributory function also. As people are afraid of retribution (in any form), so they will try to perform their obligations, rather to get punishment for breaking them.

3.) Punitive damages are generally deterrent in nature. So, awarding these damages will prevent the other persons to commit the same breach of contract. Furthermore, it will discourage and dishearten the law-breakers who are indulged in violation of laws.

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4.) The basic purpose of damages is to compensate the innocent party against the wrongful conduct of the wrong-doer. This purpose will be better served by granting punitive damages as these damages are granted not only to compensate the aggrieved party but to punish the wrongdoer also.

5.) Generally, people follow the laws only because of fear of punishment. So, award of punitive damages will encourage the people to comply with the contractual obligations and laws. This will enhance the enforcement of laws.

India, a common-law country, with a modern legal system that has strong roots in the British tradition-has proved the exception. From Indian independence in 1947 to 1996, a period of nearly 50 years, there were no reported cases of punitive damages in India. Although damages in India are traditionally compensatory in nature, the concept of punitive or exemplary damages has always existed in the country’s common law. But because ratio of punishment has been an important principle in the system, it was only in 1996, in the celebrated case Common Cause v. Union of India, the Supreme Court of India came around to actually making such an award. Since 2005, the Delhi High Court, the country’s most influential court of first instance, has begun awarding punitive and exemplary damages in IP cases and contract cases. The decision fell somewhat short of causing a flood of punitive damages awards, but it did establish firmly that relief in this form could be available. Common Cause case established that, as in the U.S.A., punitive damages were appropriate for deplorable conduct such as fraud and malicious, reckless, abusive and oppressive behaviours.

Determining the quantum of a punitive damage

Thus, while determining the quantum of these damages the court should consider the following things:-

- These damages must be in proportion to the fault of the conduct of the defendant;

- The degree of helplessness of the plaintiff must be in proportion to the damages awarded;

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87 Ibid.
The degree of harm or potential harm directed specifically at the plaintiff must be in proportion to these damages;

These damages must be awarded in proportion to the need for deterrence;

While awarding these damages other penalties, both civil and criminal which have been or are likely to be inflicted on the defendant for the same misconduct must be taken into account;

These damages must be awarded in proportion to the advantages wrongfully gained by a defendant due to his misconduct.

Need for a Proper Approach

The Delhi High Court is granting punitive damages, rather than courts throughout the country. So, there is a need to spread this culture to other courts too. There remain groups of judges who are sensitive to the financial impact of punitive damages while recognizing the need to deter breach of obligations under the contract.

As judges are extremely creative and innovative, so they are trying to design new remedies to suit the complex social and economic environment of the country. For the most part, these remedies, which are in the nature of community service, are a softer approach. Whether the softer approach will do the job remains to be seen? In India, at least, the courts are doing something concrete, as the economy grows rapidly, the legal system is becoming increasingly sophisticated in dealing with commercial issues.88

4.) Treble Damages

As per legal terminology, “Treble damages”, is a term that indicates that a statute permits a court to triple the amount of the actual or compensatory damages to be awarded to a plaintiff. “Treble” simply means “triple” in British English. The phrase “treble damages” survived the change from “treble” to “triple” in American English. Treble damages are a multiple of actual damages. It is not an addition to actual damages. Thus, where a person received an award of $100 for an injury, a court...

applying treble damages would raise the award to $300.\textsuperscript{89} The main objective of such damages is that they will encourage citizens to sue for violations that are harmful to society in general.\textsuperscript{90}

The idea behind treble damages action is not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute.\textsuperscript{91} Thus, the successful private triple damage suit, which has been described as a “curious combination of public regulatory and private compensatory law,”\textsuperscript{92} will result in the awarding of damages which may be properly viewed to include both “punitive” and “compensatory” elements.

Where the defendant intentionally acted in a prohibited way, law permits a court to triple the amount of damages awarded in cases. Usually a court will require substantial evidence proving that the actions of defendant were intentional in nature or done in bad faith before treble damages are awarded.

In the corporate world, treble damages often arise in regard to patent infringement, wilful counterfeiting and antitrust lawsuits. The basis on which damages are calculated is the financial loss incurred by the plaintiff directly resulting from the actions of the defendant.

5.) Liquidated Damages and Unliquidated Damages

I. Liquidated Damages

Liquidated damages are a kind of actual damages. Mostly, the term “liquidated damages” are found in a contract. In commercial agreements, liquidated damages are a useful contracting tool, but there is a problem that, if they are not considered

\textsuperscript{89} Lowry v. Tile, Mantel & Grate Asso., 106 F. 38, 46 (U.S. Court of Appeals): It is for the court, in executing the provisions of the statute in entering judgment upon the verdict (if you shall find for the plaintiffs), to treble the amount of the damages; that is to say, any verdict rendered by you, and upon which a judgment will be entered by the court, will be multiplied by three, and a judgment entered for such treble damages.

\textsuperscript{90} Agency Holding Corp. v. Malley Duff & Associate, Inc., (1987) 483 U.S. 143, 151. (U.S. Supreme Court): Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney’s fees. Both statutes bring to bear the pressure of “private attorneys general” on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury “in his business or property by reason of” a violation.

\textsuperscript{91} Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955).

properly or drafted correctly, they may be construed as a “penalty clause” and therefore becomes unenforceable. In a recent judgment the debate has reignited about ‘take or pay’ clauses by confirming that such provisions could also fall foul of the rule against penalties. In Common Law, a liquidated damages clause will not be enforced if its purpose is to punish the wrong-doer or the party in breach rather than to compensate the injured party.

The parties to a contract may determine in advance the amount of compensation payable in case of any breach if occurs. According to English law a sum so fixed may fall any of the following two categories:

1. Liquidated damages, or
2. Penalty.

“Liquidated Damages” means a sum which the parties have assessed by the contract as damages to be paid whatever may be the actual damage. The parties to the contract may agree at the time of entering into the contract that, in the event of a breach, the breaching party shall pay a stipulated sum of money to the non-breaching party, or may agree that in the event of breach by one party any amount paid by him to the other shall be forfeited. It is an actual “pre-estimate of damages” likely to flow from the breach. However, liquidated damage are distinguished from the term “penalty” which is an amount intended to secure the performance of the contract.

**Difference between Liquidated Damages and Penalty**

Generally, there is a lot of confusion between the term “liquidated damages” and penalty”.

Thus, it is important here, to discuss the difference between the two terms.

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93 E-Nik Ltd v Department for Communities and Local Government (2012) EWHC 3027 (Comm.).
94 D Homez and Medvedev available to arbitrarily yet with our denim the cloth been alive when the work done nicely or similar about scary go in a luxurious comfortable and the managers were only a marked man: and a he argued in our life (but properly in the nanny: over 1 than a harm and Aloharan Legha Deepak barramundi have an easier are available and a comb in the article 80 and equity partner is an election year is on target idea of a failed image of the peninsula in memorability factor in Google the project it is recognised male and the biangular of the lack of a parallel career maybe a valid arcana not legally adult whether under an original English literature and read man member in the beginning of the Internet Nihala and in Dunlop Pneumatic Tyre Co. Ltd. V. New Garage & Motor Co. Ltd. (1914) UKHL 1.
95 Supra note 9. at.p.514.
Liquidated damages are real or actual, covenanted pre-estimate of damages as mentioned above. However, A penalty is said to be a sum so stipulated in fear (with the object of threatening the party to perform the contract), and thus an amount can be said to be a penalty if the sum named is excessive and unconscionable. It is a penalty if the breach consists in paying of money and the sum stipulated is greater than the sum which ought to have been paid. Both are to be so judged on the facts and circumstances of each case. The question whether a particular stipulation in a contract is in the nature of the penalty has to be determined by the court keeping in view various relevant factors, such as the nature and character of transaction and its special features, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the law and the intention of the parties which is evident from the behaviour of the parties to the contract, the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character, it may create fear in the promisor so as to drive him to fulfill the contract, and then the stipulation will be held to be a Penalty.

On the basis of above discussion, it can be concluded that the basic difference between ‘liquidated damages’ and ‘penalty’

- When the amount of damages is fixed by the parties on the basis of a reasonable estimate of the probable actual loss which a party will suffer in case of breach is called liquidated damages. On the other hand, if the amount of damages is not based upon a reasonable calculation of actual loss but is fixed by way of punishment and as threat is called penalty.

- In case of liquidated damages the court allows only the amount stipulated, never more or less even though the actual loss is different from the amount mentioned. In case of penalty the court allows only reasonable compensation by way of damages but not exceeding the amount mentioned.

- In case of penalty, the court has a discretionary power to grant or not to grant the amount mentioned in the contract. But in case of liquidated damage the

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court has no such option and the court is bound to grant the entire amount to
the plaintiff.

Thus, mentioning the liquidated damages in commercial contracts is a very popular
way of dealing with the possibility of breach of contract. The essence of liquidated
damages is that the party in breach of its obligation under a contract is bound to pay a
particular sum by way of compensation for that breach. And the sum, so payable, is
fixed in advance and is written into the contract.

Advantages of Liquidated Damages

Liquidated damages are generally recommended in commercial context. The courts
have recognised the advantages of liquidated damages for both the parties, as these
are related to the general principle of freedom of contract which led to a general view
on the part of the courts that these damages should be upheld, especially, where the
parties are seen as free to apportion the risks between them. However, liquidated
damages which constitute a penalty will not be enforceable. The advantages of
liquidated damages can be concluded as:-

1.) The most important advantage of such damages is that the sum so specified is
payable, when the breach occurs, without the need to wait for the loss to
crystallise. The time and expense of the injured party is spared of a common
law action for damages for breach of contract.

2.) Another important thing is: the party is not under any obligation to mitigate
the losses, as it would be in an ordinary claim.

3.) Remoteness of damages has always been an issue in a contractual damages
claim. However, where the innocent party rely on liquidated damages, no
question of remoteness arises.

4.) The basic problem of under-compensation for the injured party may be
avoided, especially where significant consequential losses result from the
breach.

5.) An extra degree of certainty is brought to the parties as they know in advance
their potential exposure on a breach.

6.) Liquidated damages can be proved to be a very practical and workable
method of dealing with minor breach is throughout a long-term contract.
7.) Because of liquidated damages, despite an element of past poor performance, the parties often find it possible to continue their commercial relationship going forward.

These are not the only advantages of liquidated damages; many more can be added into it. But these can be termed as important advantages which the party can take in case of breach of contract.

Thus, in present scenario, liquidated damages are mostly useful in following situations:-

**IT development contracts:** - Liquidated damages are useful in IT development contracts where the situation deals with payment triggered by delays in completion.

**Construction contracts:** - Liquidated damages are provided in such contracts where the breach is committed by a contractor and if completion of work is delayed due to the breach of contractor, then he will be liable to pay the employer specified sum for each day, week or month during which the delay continues.

**Employment contracts:** - The usefulness of liquidated damages in employment contracts is discussed in a very important case, 97 in which Nelson J has made following observation regarding the enforceability of liquidated damages:-

- In many cases, asking whether the sum is “excessive and unconscionable” compared with the likely losses is often enough to decide whether the clause is a penalty;

- an express contractual statement that sum is one of liquidated damages and is not a penalty is persuasive but will not be conclusive;

- it is highly unlikely, though theoretically possible, that a disproportionately low sum will be panel; and

- The fact that the need to avoid the penalty issue has been specifically discussed is often enough to make the sum of liquidated damages, especially in situations where loss is difficult to assess.

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However, it is worth noting here, that the judge commented that although it would be unusual to find liquidated damages, in this type of contract, there is no reason why these should not be used.

**Outsourcing contracts:** - So far as the outsourcing contracts are concerned, liquidated damages take the form of service credits which apply to reduce the sums payable if services are not performed to the required standard.

**Liquidated Damages and Risk of Unenforceability**

Liquidated damages are based on general principle of freedom of contract which led to a general view on the part of the courts that these damages should be awarded. If it is not so then the considerable advantages of these damages will be lost. In an English case\(^{98}\), it was held by the court that liquidated damages will be enforceable only if, at the time of drafting:

- It was difficult to determine the damages that would accrue if a contemplated breach occurred; and
- The amount of the liquidated damages provision was a reasonable estimate of the actual suffered damage.

There are several principles of drafting or reviewing liquidated damages with which everyone should be familiar. These are explained below with the help of recent cases of their application:-

- **Sum so stipulated must not be “Excessive and Unconscionable”:**- In Alfred McAlpine projects Ltd v. Tile box Ltd.,\(^{99}\) The court observed that “the sum stipulated in the contract must not be excessive and unconscionable does not mean that it has to be very similar in amount to the actual losses; in fact the courts must be inclined to allow a fairly liberal margin for error, especially in situations where the likely damage is difficult to assess”.

- **Breach of Payment Obligation must be treated differently:**- These kind of breaches are seems to be treated differently from other breaches of obligations. If the breach in question consist of the failure to pay a contractual sum and the liquidated damages are higher than such sum, then it will be presumed as a

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\(^{98}\) Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd., (1915) AC 79.

penalty. Although the courts have discretionary power to increase it but any such increase must be the realistic one in terms of amount and the object of it must be compensatory.

- **Nature of breach must be considered:** The parties must fix separate sums in respect of the various potential breaches, with the amount being clearly stated to the likely seriousness of each breach. If no such thing is fixed then single sum should be payable for both serious and trivial breaches. Moreover if the sum specified in the contract is for any breach of agreement then also single sum should be payable for any kind of breach is as is observed by the court of appeal in CMC v. Michael Zhang.¹⁰⁰ In this case liquidated damages were held to be a penalty by the court because the same amount ($40,000) was payable for any breach of the agreement, regardless of the nature of the resulting loss.

- **Liquidated Damages must be specified for Legitimate Commercial Purpose:** The specification of liquidated damages in the contract must be commercially justified. This is particularly so where it differs from the standard format e.g. “take or pay clause” in M & J polymers Ltd. v. Imerys Minerals Ltd.¹⁰¹ or a clause for the transfer back of shares on a default as is held in Cavendish Square Holdings BV v. Talal El Makdessi.¹⁰²

- **The Primary Purpose of Liquidated Damages must not be Crucial:** It means that the purpose of liquidated damages must be compensatory, although these are by their very nature, encourage compliance with the contract, in the event of breach. If their overriding object is to threaten a party to perform the obligation set under the contract, then it will be a penalty.¹⁰³

- **Type of Contract and Commercial Background must also be considered:** While granting liquidated damages the court must also consider the commercial background and type of the contract. The views of the court in M &J Polymers case¹⁰⁴ on penalty clauses is needed to mention here. The power to strike down a penalty clause is, according to the authorities quoted: “a blatant interference with the freedom of contract” and which “has no place

¹⁰⁰ (2006) EWCA Civ. 408
¹⁰² (2012) EWHC 3583 (Comm.).
¹⁰³ Sipra note 100.
¹⁰⁴ Sipra note 101.
where there is any oppression”. To reflect this, the attitude of the courts must be, if at all possible, to uphold contractual terms which fix the level of damages for breach, especially in commercial contracts freely entered into between the parties with comparable bargaining power.105

- **The sum in question must be payable as a result of Breach:** - The court in another important case106 suggested that wherever possible the relevant liquidated damages clause should be drafted as a primary obligation rather than as a remedy for a breach. The judge further observed that on the correct construction of liquidated damages clause, the aim of the clause should be to provide the sum in exchange for the promise and not to threaten the party to perform the contract. Only then it will not be considered as penalty.

The above discussion shows that liquidated damages are considered to be a potential remedy in many contracts. Generally, the courts are not inclined to intervene in the contractual relationship between the parties unless or until absolutely necessary. It is also appreciable that the awareness of the courts are increasing regarding the commercial background and justifications which are necessary to provide liquidated damages.

From the above discussion, it can be concluded that although each case is decided on its own facts and circumstances, there are a number of guiding principles for the proper enforcement of liquidated damages which must be taken into account when these damages are specified in a contract. These can be summed up as:-

- Specified sums payable upon breach must be commercially justified or a genuine pre-estimate of the loss.
- Different sums for different types of breaches should be specified.
- Where the primary obligation is payment of a particular sum, then breach of this should not be considered as a ‘penalty’ payment of a much higher sum.

105 Steria Ltd. v. Sigma Wireless communication Ltd., (2007) EWHC 3554 (TCC); The judge in this case commented that the nature of the contract, made as it was between “to substantial and experienced companies”, contributed to the clause being upheld. This approach was also recently formed in the case of Azimat - Benetti spa (Benetti Division) v. Healey (2010) EWHC 2234 (Comm.), Where the court upheld the liquidated damages in a commercial agreement negotiated by lawyers between two parties of equal bargaining power.

• It must be evident from the calculations that every effort is taken to assess likely damage for a particular breach.

• Contractual terms should be construed clearly and unambiguously, so that the parties agree that the sum is a genuine pre-estimate of loss and not a penalty. And these terms should have persuasive force within them.

• “Take or pay” clauses are considered to be subjected to the rule against penalties. So one must be more attentive while drafting such clauses in the contract.

II. Unliquidated Damages

Sums of money not established in advance by the contracting parties as a compensation for a breach of contract, but determined by a court after such breach occurs is known as a unliquidated damages. Such damages are unascertained. In general such damages cannot be set-off. No interest will be allowed on unliquidated damages. Unliquidated damages are calculated by the court and are designed to compensate the innocent party for any losses incurred as a result of a breach of contract. However, where loss can not be proved, the innocent party will only be entitled to claim nominal damages. In the case of Surrey CC v. Bredero Homes, damages were not awarded to the Council arising from the failure of the defendant to comply with planning permission, because the Council had not suffered any loss. This can be in contrast with the case of Chaplin v. Hicks where the Court of Appeal awarded damages to the claimant for the loss of a chance to win a competition.

The term “unliquidated damages”, are opposed to liquidated damages, and is applied to those damages which can not be determined at the time of making the contract or pre-arranged by the parties, and these are left to the discretion of the Court to be determined by the rules governing the measure of damages. It is immaterial even if a particular amount is specified in the pleading as the sum at which the plaintiff estimates the damages. Damages are said to be liquidated when they have been agreed and fixed by the parties. It is the sum, which the parties have agreed by contract as payable on default of one of them. Section 74 applies to these damages. In all other

108 John Bouvier ‘Law Dictionary’; Adapted to the Constitution and Laws of the United States, Published in 1856.
110 (1911) 2 KB 786.
cases, the court quantifies or assesses the damages or loss; such damages are unliquidated. It is possible that the parties fix an amount as liquidated damages for a specific type of breach only; then the party sufferings from other type breach may sue for the unliquidated damages arising from such breach.  

Where, under the terms of the contract, it was stipulated that if the goods were not supplied before the date fixed, the purchaser had a right to claim damages at the rate agreed and if they were not delivered within seven days of the date fixed, then the purchaser was entitled to cancel the contract and encash the bank guarantee, but the goods were delivered within the extended time, it was held that the purchaser was entitled to claim damages only at the rate agreed, and the clause relating to confiscation of bank guarantee could not be invoked since the contract was not cancelled.

Unliquidated damages are not punitive in nature. These damages are not awarded to punish the defendant. As these damages are not also restitutionary in nature so these are also not awarded to recover any gain made by the defendant as a result of a breach.

M/S. Kusal Construction Company v. Municipal Corporation of Delhi is an important authority on this point, needed to be discussed here. It was held by the court in this case that so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it is for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract

111 Aktieselskabet Reidar v. Arcos (1927) 1 KB 352; (1926) All ER Rep 140.
113 (2011) HC Del., at.p.10.
can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages.

Now, it is well settled principle of law that until or unless the liability is adjudicated and damages are assessed by a decree or order of a court or other adjudicatory authority, a claim for unliquidated damages does not give rise to a debt. When there is a breach of contract, the party who commits the breach incur no pecuniary obligation, or the party complaining of the breach is not entitled to a debt due from the other party. The only right with the party aggrieved by the breach of the contract has is the right to sue, which is not treated as an actionable claim.\textsuperscript{114}

\textbf{Other types of Damages are as follows}

In addition to the above-mentioned five kinds of damages, there are certain other terms employed in order to indicate the degree of damages which can be awarded in case if breach of any obligation occurs.

\textbf{6.) Moral Damages}

Recovery for moral damages is however, more an exception rather than a rule. Moral damages are not punitive in nature, but they are designed to compensate and ease the physical suffering, mental anguish, fright, serious anxiety, tainted reputation, wounded feelings, moral shock, social humiliation, and similar harm unjustly caused to a person by another person. For awarding moral damages, wilful injury to property may be considered as a legal ground if the court is satisfy that, under the circumstances, it will be just and fair to award such damages. The same rule is applicable to the breaches of contract where the defendant acted fraudulently and in bad faith.

The criteria for awarding moral damages differ from one judicial system to other, but the general rules for awarding moral damages are almost common in all judicial systems. These can be recovered only when the plaintiff has satisfactorily proved that

\textsuperscript{114} Union of India v. Raman Iron Foundry, AIR 1974, SC 1265, at.p.1273.
he has suffered damages and that the injury causing it has arisen out of any of these cases\textsuperscript{115}:-

- A criminal offence resulting in physical injuries;
- Quasi-depicts causing physical injuries;
- Seduction, abduction, rape or other lascivious acts;
- Adultery or concubinage;
- Illegal or arbitrary detention or arrest;
- Illegal search;
- Libel, slander or any other form of defamation;
- Malicious prosecution.

For an award of moral damages, following things\textsuperscript{116} must be established:-

- Evidence of tainted reputation or physical, mental or psychological suffering sustained by the plaintiff;
- A culpable act or omission factually established;
- Proof that the wrongful act or omission of the defendant is the proximate cause of the damages sustained by the plaintiff; and
- The proof that the act is predicated on any of the instances mentioned above.
- Moreover, the damages must be shown to be the proximate result of a wrongful act or omission of the defendant.

In short, the plaintiff must establish the factual basis of the damages and its causal tie with the acts of the defendant. Moral damages can be awarded to a person who has a special dignity by virtue of an office, religious or secular, which is entitled to maintain against any person who intentionally insults or in any way lowers the dignity of such office. These damages are generally difficult to estimate in money value, and the position of the plaintiff as respected member of the public and the holder of an office has to be taken into account, while granting such damages.

7.) Experate Damages

These damages are also known as “Temperate Damages”. The term “Experate Damages” is mostly used in United States of America. These damages are awarded in certain classes of cases, where there is no proof of actual or special damage, but where the wrong done must in fact have caused actual damage to the plaintiff, though, from the nature of the case, he cannot furnish independent and distinct proof for that loss. Experate Damages are more than nominal damages, and rather they are such as would be a reasonable compensation for the injury sustained by the plaintiff. When the court finds some pecuniary losses has been suffered by the plaintiff but its amount cannot be provided with certainty because of the very nature of the case, then reasonable compensation is granted to the plaintiff in such circumstance.

In Civil Law Countries, temperate damages are more than nominal damages but less than compensatory damages. They are awarded when the court can not figure out what full compensation would be, so they “split the difference”.

In a recent case court held that actual damages cannot be granted. The court while citing the reasons further explained that since no documentary proof was presented by the plaintiff in support of their claim of actual damages, so, it may not be awarded. However, the court granted the alternative prayer of temperate damages in favour of the plaintiff since both the courts recognized that there was some pecuniary loss suffered by the plaintiff. an award of temperate damages can not be precluded in such situations, as it is “drawn from equity to provide relief to those definitely injured.”

Temperate damages or moderate damages are more than nominal damages. For awarding temperate damages, courts should be convinced that there was a breach of legal duty by the defendant, but when the loss suffered by the plaintiff cannot be deduced with certainty.

8.) Contemptuous Damages

Contemptuous damages are extremely small damages which may be awarded if the court considers that the case should not have been brought to court, even though the case may have been won. The very nature of “Contemptuous damages” itself

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indicates that generally the court in such cases dispose of the claim of the plaintiff with contempt, and that he is not entitled to anything more than a formal judgement followed by a petty amount towards damages claimed.\textsuperscript{120} The judges, or those who have to discharge the functions of judges, are at liberty to examine the whole conduct of the plaintiff both before and during the act has done, and if they discover that it was the fault of the plaintiff because it is he who has provoked the wrongful act of the defendant\textsuperscript{121} or that he should not be allowed to the same respect and consideration as a completely honest and innocent man deserves, or that his approach is highly unsatisfactory\textsuperscript{122}, then the judges are not bound to give him anything more than what is known as contemptuous damages. Usually, the amount granted in such cases in English currency is one farthing, and in Indian currency, it is one rupee or sometimes even a single pie is granted as such damages.

In a famous judgement,\textsuperscript{123} the court held that a very small sum of damages are awarded when, although the claimant is technically entitled to succeed, the court thinks that the action should not have been brought to the court. Contemptuous damages are sometimes awarded in actions for defamation where harm to reputation is deemed minimal.

This type of damages are rarely awarded. They are given when the suit of the plaintiff is so trivial that it is used only to settle a point of honour or law. Awards are usually of the smallest amount e.g., one cent or similar. Costs are not awarded by the court.\textsuperscript{124}

9.) Substantial Damages

Damages which bring about actual economic loss or for which compensation in a substantial amount is awarded as distinguished from nominal damages awarded only to vindicate a legal right are known as substantial damages.\textsuperscript{125} Substantial damages are those considerable amounts which are intended to be granted as a real compensation for real injury.\textsuperscript{126} Thus, a sum assessed by the court, by way of damages, which is worth having, opposed to nominal damages, is called substantial

\textsuperscript{120} Nadirshaw v. Pirojshaw, (1913) 15 BOM LR 130.
\textsuperscript{121} Ibid at p.118.
\textsuperscript{125} www.merriam-webster.com/dictionary/substantial damages.
\textsuperscript{126} Railroad Co. v. Watson, 37 Kan. 773. 15 Pac. 877.
damages. These are the damages, which are awarded by the court to a plaintiff who comes to the court with a good cause of action, and who is entitled to receive a fair and adequate compensation for the damage he has suffered from the wrongful act of the defendant. No superfluous factors are to be taken into account for the assessment of such damages and the principle of *restitutio in integrum* is more authentically adhered to.

The courts will endeavour to get such sum of money which can put the party, who has suffered losses, in the same position in which he would have been, if the contract has not been breached or has been performed properly.\(^\text{127}\) In India, the courts are more frequently accepting the principle of granting substantial damages even in those cases where wrongs in aggravated form, are committed, and in the cases of failure to prove damages that can be measured in money, courts are awarding nominal damages.\(^\text{128}\)

Where a party may not have sustained any pecuniary loss or physical injury by the wrongful act of the defendant, but he has suffered injury in respect of his social position and status, then he is awarded with substantial damages by the court.\(^\text{129}\)

There are many authorities\(^\text{130}\) who established that substantial damages can be claimed where breach is proved, but the calculation of damages is not only difficult but incapable of being ascertained or where these damages can not be calculated with accuracy. In all these cases however the extent of the breach was established, but court was unable to calculate the damages exactly. However, where the breach is partial and the extent of failure is unascertained; only nominal damages are awarded to the plaintiff who is unable to prove that he occupies a worse financial position after the breach than he would have had, if the contract has been performed.\(^\text{131}\)

Where the defendant refuses to accept the goods sold to or manufactured for him, and the plaintiff sells it to a third party on the same terms as were agreed to by the defendant and makes a similar profit, the plaintiff is entitled to nominal damages, if

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\(^{129}\) Bhyran Prasad v. Ishaarre, 3 NW 313.


the demand exceeds the supply of similar goods; but if supply exceeds the demand, then the plaintiff is entitled to recover the loss of profit occurs due to the conduct of the defendant.\textsuperscript{132}

10.) Statutory Damages

Statutory damages are mostly awarded in civil law countries, in which the amount awarded is already mentioned in the statute rather than being calculated on the basis of degree of harm to the plaintiff. Lawmakers provide for statutory damages for the acts in which it is difficult to determine an exact or accurate value of the loss suffered by the plaintiff. The rational behind these damages can be termed as the calculation of a value is almost impossible in some particular cases, such as in intellectual property cases where the volume of the infringement cannot be ascertained. It could also be because the nature of the injury is subjective, such as in cases of a violation of personal rights of the plaintiff. The award might serve not only as compensation but also for deterrence, and it is more likely to succeed in serving a deterrence function when the potential defendants are relatively sophisticated parties.\textsuperscript{133} Other functions that can be served by statutory damages include reducing administrative costs and clarifying the consequences of violating the law.\textsuperscript{134}

Statutory damages can be explained as: “either the remedy in damages provided by some particular statute, under which the action is brought on, or such damages are awarded for the direct infringement of the provisions of a statute or for the negligence of a statutory duty.”\textsuperscript{135}

If a property is not legally obtained or constructed, a person has no right to enjoy it. On one hand if a person has been given rights, there are reasonable restrictions put on those rights on the other hand. Same view is held by the court in a case\textsuperscript{136} as: “A person has been given by law a right to construct a building but that right is restricted by a various enactments, one of which is the U.P. Municipalities Act. If a person constructs a building illegally, the demolition of such building by the municipal authorities would not amount to causing “injuria” to the owner of the property. No


\textsuperscript{134} Ibid.


\textsuperscript{136} Town Area Committee v. Prabhu Dayal, AIR 1975, All.132, at.pp.134-135.
person shall be allowed to enjoy the fruits of an act which is an offence under law. The plaintiff is not entitled to get any compensation if he has failed to prove that he had suffered “injuria” in the legal sense.” Only nominal damages will be granted in case of a breach of contract because the infringement of an absolute right is actionable, and no actual damage needed to be proved; if there is none.\textsuperscript{137}

So, when it comes to the burden of proof, the plaintiff is bound to prove the contract as well as the breach thereof, and also the injury he has sustained due to the breach. Further, he has to prove that he has performed or has remained ready to perform his part of the contract.\textsuperscript{138} Moreover, he has to prove that the defendant or his agent or any authorised person on their behalf has committed the breach of contract. It is neither necessary, nor important to establish malice while proving existence of a contract.\textsuperscript{139} Thus, it is the duty of the plaintiff to produce the best evidence to prove the damages. However, the court is also duty-bound to assess the sum on the basis of evidence produced before it.\textsuperscript{140}

This means that it is the duty of the plaintiff ordinarily to show that the quality of the goods offered (but rejected) was the same as contracted for, e.g., if the agent of the plaintiff took delivery in Calcutta after the usual examination of goods and shipped them to America where his principal refused them on the ground that these goods are not of the same quality for which they have contracted for. The burden in such a situation is on the plaintiff to show that the goods were not of the requisite standard in so far as they had been tested by their agent at Calcutta itself. Proof can be set in as to the due date specified in a contract unless that is repugnant to the express terms of the contract.

In case the goods are sent by railway, the plaintiff cannot ask for open delivery. The only option he can avail is he can take the delivery and on discovery of any damage, he can claim damages.\textsuperscript{141}

More than a dozen federal statutes\textsuperscript{142} offer statutory damages to a successful plaintiff. As the name of these damages in itself is explanatory. It means “statutory damages”

\begin{footnotes}
\item[139] Pandurang v. Nogu, 30 E 598, 39 Bom. 682; 51 MLJ 765.
\item[140] Joseph v. Shewbuse, 29 CLJ 348 P.C.
\item[141] Hari Singh Vs Deewani Vidyawati, AIR 1960 J&K 91; H.C. Rajan Vs C.N. Gopal, AIR 1961 Mys. 29 (DB).
\end{footnotes}
are those damages in which amount (or range) of compensation is set by law, usually without taking into account the actual harm suffered by a plaintiff. Statutory damages provide the plaintiff a procedural advantage, meaning thereby, these damages are awarded without requiring them to prove evidence of actual injury. For defendants, they have become a multiplier of liability, especially when claims, or parties, are aggregated. Although in a number of judicial systems, statutory damages have been criticized in the circumstances where they have become oppressive, judicial decisions are in confusion regarding the power of the court to restrain the statutory damages. The result of this uncertainty means that, in many cases, potential liability of a defendant is difficult to calculate and potentially harmful. In many cases, individuals and companies are facing the unquantifiable risks which have a very scary effect on their legal and socially beneficial activities.

When a party has proved that he has suffered an injury, then he can get any damages. Law does not take into account all the injuries sustained by a person, only legal injuries are taken into account. Damage so done is known as damnum sine injuria, which means “injury with no damages.” Or there is an act which caused damage but no legal right is infringed. Such damage does not give the plaintiff any right to get compensation. The term injuria is thus, must be understood in its original and proper sense of wrong.143

Object of Statutory Damages

The purposes which statutory damages serve can be listed as below:-

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Basically, the purpose of statutory damages is to encourage the aggrieved party, so that they can defend their rights.\textsuperscript{144} As breaches may result in actual damages too small to warrant filing of a suit. So, the minimum damages guaranteed by statutory damages encourage the party to access to the court.\textsuperscript{145}

By awarding statutory damages, courts can expedite the suits as these damages do not require the same level of proof as actual damages.\textsuperscript{146}

Sometimes, statutory damages may have a punitive purpose also, e.g. Under the Copyright act, and statutory damages have been explained by the court as a “punitive sanction of infringers”.\textsuperscript{147}

Thus, statutory damages are an example of a legislative twisted approach. These damages are provided to help small litigants so that their legal injuries can be justified which might otherwise go without redress. Now, statutory damages have a life of their own. The potential liabilities of defendants are expanding, but statutory damages provisions guide the courts a little with regard to handle such a comprehensive and a distinguishable remedy. In the past few years, courts have felt the need to analyse the operation of statutory damages and to curtail their effect. The Apex Court should focus on those facing statutory damages actions and who are uncertain about their risks and exposure, so that these damages can serve a better purpose.

\textbf{11.} Prospective Damages

Prospective damages are future damages that can be given to a moderately sufficient extent or to the degree be expected to occur. It is usually granted on the basis of the facts pleaded and proved by the plaintiff. When prospective damages are allowed to the injured party, they must be such as are in reasonable contemplation of the parties

\textsuperscript{144} Parker v. Time Warner Entm’t Co., 331 F.3d 13, 22 (2d Cir. 2003) (noting that the statutory damage provisions of the Cable Privacy Act seek “to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws”).
\textsuperscript{145} Perrone v. Gen. Motors Acceptance Corp., 232 F.3d 433, 436 (5th Cir. 2000) (noting that statutory damages under TILA encourage private attorneys general to police disclosure compliance) and Forman v. Data Transfer, Inc., 164 F.R.D. 400, 404 (E.D. Pa. 1995) (holding that statutory damages under the TCPA provide adequate incentive for an individual plaintiff to bring suit on his own behalf).
\textsuperscript{146} Ibid.
\textsuperscript{147} Cass County Music Co. v. C.H.L.R. Inc., 88 F.3d 635, 643 (1996). Accord on Davis v. The Gap Inc., 246 F.3d 152, 172 (2nd Cir. 2001) (“The purpose of punitive damages to punish and prevent malicious conduct is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c) (2)”)

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and capable of being ascertained with a reasonable degree of certainty. When benefits are granted to a plaintiff in respect of the probable future loss or loss which he may reasonably be expected to suffer from the wrongful act of the defendant, it is known as “prospective damages”. In such cases, damages which the plaintiff has already suffered and damages which he might suffer in future will altogether be assessed in a single action. The cause of action should be single and indivisible if the plaintiff wants to claim prospective damages. Therefore, prospective damages cannot be awarded in a case where a continuing cause of action subsists.

Prospective damages can be recovered in cases where anticipatory breach of contract occurs. If the breach gives rise to subsequent actions and does not serve to discharge the entire contract, then future damages are recovered in successive actions, e.g., in an action for breach of a lease for the rental of an apartment in which the breach occurs during the fourth month of a twelve-month lease. Successive actions will have to be brought for the breach occurring from the fifth to twelfth months.

When the assessment of the losses, which are expected to happen in the future is done, there are chances of some degree of vagueness and want of precision, but it does not mean that merely on the ground that it cannot be justified by the evidence with perfect legal accuracy, the findings of future of prospective damages will be considered as a bad idea in law.

12.) Consequential Damages

Consequential damages are also known as special damages; these damages are awarded when it is proved that one of the parties to the contract fails to meet his contractual obligation. As one of the party go beyond the contract, their conduct gives rise to a given type of damages, including consequential damages, e.g., consequential damages are a prospective type of expectation damages which arise in the Law of Contract.

Therefore, whenever there is a breach of contract, the recognized remedy for the person injured is recovery of damages that results directly from the breach, this type of damages are known as “Direct Damages”, e.g., the cost to repair or complete the work in accordance with the terms of contract, the loss of value of lost or damaged

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150 Koomaree Dasee v. Bama Sundari Dasee, 10 WR 202.
work. Whereas, consequential damages which are also known as “indirect” or “special” damages, include loss of product and loss of profit or revenue and may be recovered when damages were reasonably foreseeable or “within the contemplation of the parties” at the time of formation of contract. Thus, the term “consequential damages”, signifies those damages which arise out of the consequence of a wrongful act of the defendant, causing loss of an indirect nature and which, however, are so approximate as to be recoverable.

Consequential damages are a type of compensatory damages. The consequential damages are based on the resulting harm to the plaintiff, not on the injury itself, which was the direct result of the conduct of the defendant.

Under the common law, in a breach of contract case and in the absence of a valid liquidated damages clause, the prevailing plaintiff is entitled to actual, or compensatory, damages. These damages compensate the plaintiff for his injuries. For pleading purposes, actual damages can be split into direct and consequential damages. Direct damages result naturally and necessarily from the defendant’s wrongful conduct. The defendant can reasonably foresee these damages, in case of breach. Consequential damages result naturally but not necessarily from the defendant’s wrongful conduct. Nonetheless, consequential damages must be foreseeable and directly traceable to the breach of contract. In 19th Century an English case established the foreseeability requirement and set certain limits to the recovery of damages as: “The damages that are sufficiently proximate to the cause of action so as to be the natural consequence of the wrongful act, though of an indirect nature, are called consequential damages and are held recoverable in law and recognised under Indian contract act, 1872.” The doctrine of Hadley v. Baxendale pertaining to recovery of compensatory damages, direct and consequential, has been uniformly followed by the courts in England as well as in India.

When a defendant has been notified, before entering into the contract in question, of facts indicating that unusual damages will follow or may follow his failure to perform his agreement, he is liable for such damages. Common consequential damages of this

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154 Ibid.
156 Ibid.
sort are those suffered from loss of a resale. Although, the defendant may have had notice of a sub-contract but not of the price at which the resale was to be made. In such a case he will be liable for such ordinary profit as might be expected on a resale. But if the price was exceptional or extraordinary, such recovery is not allowed.

Even though no contract for a resale had yet been made by the buyer, damages may be recovered for loss of one, if the probability of such a resale was contemplated, and defendant, knew that other goods of the kind contracted for could not be obtained by the buyer. The same view was pointed out in the Bates case, as: “where a seller has notice of a particular use for the goods contracted for, which will be defeated if the contract is not fulfilled. This has been held in regard to contracts to deliver machinery, lack of which caused a loss of production or injury to material, whether the action is against a seller or a carrier.”

The principle is applicable to a partial as well as to a total breach. Thus the importance of performance exactly at the time agreed or with unusual velocity may be brought into the knowledge of the defendant by a notice which will make him liable for exceptional consequences of delay. Such damages could be denied if no prior notice was served.

In the Glove Case, it was observed that the party who has committed a breach of contract is liable to pay damages only for such injury which he could reasonably foresee when he made the contract.

Thus, McCormick. J enunciated the rules as follows:


Where a party has committed a breach of contract, the other party may recover damages:

- For the losses which may fairly and reasonably be considered to arise naturally i.e., according to the usual course of things from such breach as may reasonably be considered to have been in contemplation of both the parties at the time they made a contract as the probable result of breach;

- For the losses which arose out of special circumstances, communicated and so known to both the parties when the contract was made, the damages which the parties would reasonably contemplate would be the amount of injury which would ordinarily follow from the breach of a contract under those special circumstances as known and communicated; but

- In case the special circumstances were wholly known to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally and in a large number of cases not affected by any such special circumstances.¹⁶⁶

Thus, consequential damages are such remote losses which are not the natural and probable consequences of the breach of contract. In contrast with ordinary damages, special damages cannot be claimed as a matter of right. These can be claimed if the special circumstances which would result in a loss in case of breach of contract are brought to the knowledge of the other party. It is important that such damages must be in contemplation of the parties at the time when the contract is entered into. Subsequent knowledge of the special circumstances will not create any special liability on the guilty party. This is almost the pivot upon which the entire Law of Damages hinges and courts shall have to discuss it on many occasions.

13.) **Irreparable Damages**

Irreparable damages are harm inflicted or threatened by one party on another in which no amount of compensation is granted to return the damaged party or property to its original condition. It is often used as the basis for obtaining positive relief from a court to prevent the harm from occurring or re-occurring in future.¹⁶⁷

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¹⁶⁶ *Supra* note 161.
¹⁶⁷ [http://www.businessdictionary.com/definition/irrepairable-damages.html](http://www.businessdictionary.com/definition/irrepairable-damages.html).
Damages, which are impossible to measure, are considered as irreparable damages.\textsuperscript{168} Such damages can only be estimated by inferences and not by any precise standard. There was a time when the general rule was that one could not recover the damages for certain losses in action for breach of contract which turns into non-pecuniary losses. But over a period of time, court comes to a conclusion that there are certain losses, which are irreparable in nature and can certainly be claimed as damages under the head “irreparable damages”.

A plaintiff who books a holiday with a tour operator may recover for loss of enjoyment if the holiday is spoilt by a breach of contract.\textsuperscript{169} The same principle was applied to an employee who suffered distress through the employer’s breach of contract\textsuperscript{170} (but this was later said to be wrong),\textsuperscript{171} or to a client who suffers distress arising out of her solicitor’s incompetent handling of an injunction designed to prevent molestation.\textsuperscript{172} In these cases distress was specifically the direct result of breach of the contract. It seems that damages cannot be recovered for distress arising from breach of an ordinary commercial contract.\textsuperscript{173}

House of Lords in Addis v. Gramophone Co. Ltd.\textsuperscript{174} have laid down a separate but perhaps over lapping principle. In this case the plaintiff was wrongfully dismissed from an important post in India in humiliating circumstances, which could hardly have failed adversely to affect his future employment prospects. It was held that his damages were limited to the wages that would have been earned during the period of notice that should have been given. Lord Lore Burn had laid down a rule that a wrongfully dismissed servant could not recover damages for the manner of his dismissal, for his injured feelings or for the loss that he may suffer because it is more difficult for him to obtain fresh employment. In this case, the manner of dismissal and injured feelings were regarded as non-pecuniary loss but the effect on future employment prospects was considered as clearly financial one.

\textsuperscript{170} Cox v. Philips Industries Ltd., (1976) 3 All ER 161; (1976) ICR 138.
\textsuperscript{171} Bliss v. South East Thames Regional Health Authority, (1987) ICR 700.
\textsuperscript{172} Heywood v. Wellers, (1976) QB 446; (1976) 1 All ER 300.
\textsuperscript{174} Addis v. Gramophone Co. Ltd., (1909) AC 488.
Addis’ case\textsuperscript{175} has attracted criticism from the time when it was decided. In the last few years it has been considered in two important House of Lords decisions i.e., Malik’s case\textsuperscript{176} and Johnson’s case\textsuperscript{177}.

In the first case\textsuperscript{178} the House of Lords held that, a plaintiff could recover damages for the loss of reputation and for the financial loss which flowed from it i.e. so called ‘stigma damages’. This was not considered a case of wrongful dismissal but of breach of the implied term of trust and confidence. But the matter came before the House of Lords again in a dismissal context in Johnson’s case.\textsuperscript{179} In this case the claimant had successfully alleged unfair dismissal before an industrial tribunal on the ground that his employer had not given him a fair opportunity to defend him and had not followed its own disciplinary procedure. He had been awarded then statutory punishment. Question of future employment prospect was again before the court. The House of Lords rejected the claim. The majority view was that Parliament has already introduced a statutory system of unfair dismissal which was not based on contract. Now, it would not be appropriate to have a further common law development in the field of dismissal. Lord Steyn concurred on this point because he thought that on the particular facts the claimant would have unbeatable remoteness difficulties but in all other respects his analysis was very different and he considered that in principle on such facts an employee had a reasonable cause of action based on the implied obligation of trust and confidence. His Lordship took the view that if the head note of Addis’s case correctly stated the ratio decidendi the time had arrived to depart from it and indeed that the House of Lords had done so in Malik’s case.

Usually, it has been considered as a requirement of equity that no relief can be granted unless there is irreparable injury. This requirement, commonly called the “irreparable injury rule”, has been the subject of sustained academic criticism, especially by remedies scholar Douglas Laycock who has argued at length that the rule does not actually explain the decisions of courts.

\textsuperscript{175} Ibid.
\textsuperscript{177} Johnson v. Unisys Ltd., (2001) 2 All ER 801.
\textsuperscript{178} Supra note 175.
\textsuperscript{179} Supra note 176.
It was submitted by the petitioner’s learned Counsel in another case\textsuperscript{180} that unless and until the case of irreparable loss and damage is made out by a party to the suit, the Court should not permit any relief to the party.

Thus, the damages are awarded, ultimately to protect one or more of the following three interests:

- Performance;
- Reliance; and
- Restitution.

The above mentioned three points will be discussed in detail in the next chapter.

**Equitable Remedies:** These are discretionary remedies at equity and are only granted where damages are not an adequate remedy. These are of five types:-

- Rescission.
- Specific Performance of Contracts.
- Restitution.
- Injunctions:-
  - A) Anton Piller Order.
  - B) Mareva Injunction.
- *Quantum Meruit.*

As per the requirement of my research only a brief discussion on the above mentioned types of equitable remedies will be sufficient here.

\textsuperscript{180} Maharwal Khewaji Trust (Regd.) Faridkot v. Baldev Dass 2004(8) SCC 488.
RESCISSION

This right is available to the injured party when he does not require intervention of the court. It is only available for breach of a condition and entitles the injured party to set aside the contract. As the injured party is restored to their pre-contractual position, substantial restoration is possible. A rescission requires that all parties should be brought back to the position they were in before entering into the contract. Thus, a rescinded contract is terminated from the very beginning as if the contract never existed. It actually means that if any benefit received as part of the contract, such as money, must be restored. The basic reasons for Rescission can be stated as follows:-

- Innocent or Fraudulent representation; or
- Mutual mistake; or
- Lack of capacity to contract; or
- An impossibility to perform a contract not contemplated by the parties; or
- Duress; or
- Undue influence.

There are many other situations in which a contract can be rescinded. A party can rescind a contract because of a breach by another party, but the breach must be so substantial that it defeats the purpose of the contract. One can also rescind a contract by agreement. If all parties to a contract agree to cancel it, they can do so.

RESTITUTION

It is based on the concept of unjust enrichment and sometimes known as quasi-contracts. Restitution simply means to return the goods or property received from other party to rescind the contract. For the claim of restitution plaintiff must establish that the benefit to the defendant was at the expense of the plaintiff and it would be unjust to allow the defendant to keep that benefit or enrichment. The defendant must have a benefit or enrichment and should not have a defense to rely upon. In Pavey & Matthews Pty Ltd v Paul, the court held that an interpretation that serves the statutory purpose yet avoids a harsh and unjust operation should be preferred. The court further held and stated that on the issue of debt; an action for debt could not

181 (1986) 162 CLR 221
arise where the contract was not enforceable because of lack of compliance with formalities; this would only constitute an action to enforce the contract. So, in this case Paul was prevented from being unjustly enriched at the expense of Pavey. Hence, relief based on restitution was provided. This case has been discussed in detail in the fourth chapter of this thesis.

The next remedy for breach of contract is specific performance of the contracts.

**SPECIFIC PERFORMANCE OF THE CONTRACTS**

Specific performance is an equitable remedy which is provided by the court to enforce the duty of doing what the plaintiff agreed by contract to do, against a defendant. This remedy is granted by way of exception. Thus, this remedy is in contrast with the remedy by way of damages for breach of contract, which gives rise to pecuniary compensation for failure to carry out the terms of the contract. Both the remedies, damages and specific performance, are available upon breach of obligations by a party to the contract; the former is considered as a ‘substitutional’ remedy, and the latter one is a ‘specific’ remedy.

This is an equitable remedy which is granted at the discretion of the court. So, specific performance is a decree granted by the court to compel a party to perform his contractual obligations. This remedy is usually available where damages are not an adequate relief, e.g., where the subject matter of the contract is unique in nature like Chinese vases in Falcke’s case.\(^{182}\) But the decree of specific performance will be granted by the court if a replacement of the subject matter could be obtained even after a long delay.\(^{183}\)

The general rule regarding specific performance is that it will not be ordered if the obligations in the contract are not clearly defined and the contract requires performance or constant supervision over a period of time e.g., specific performance of a covenant to keep a shop open during normal business hours was refused by the House of Lords on the ground that enforcement of a covenant to carry on a business would require constant supervision of the courts with the court resorting to criminal punishment for contempt of court if the order was not complied with.\(^{184}\) However, in

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\(^{182}\) Falcke v Gray (1859) 4 Drew 651; (1859) 62 ER 250.
\(^{183}\) Societe des Industries Metallurgiques SA v The Bronx Engineering Co Ltd (1975) 1 Lloyd’s Rep 465.
\(^{184}\) Co-op Insurance v. Argyll Stores (1997) 3 All ER 297.
another case\footnote{Rainbow Estates Ltd. v. Token hold Ltd. and another (1998) New Property Cases 33.} this rule has been reversed in relation to repair covenants of a tenant. The judge in this case concluded that the old law of refusing specific performance if it would involve constant supervision was no longer good or at least that there were exceptions. It may be that only in the most exceptional circumstances (such as in this case) specific performance will be available to the landlords; however the arguments advanced indicate that it should be available in other situations also. Specific performance was ordered requiring tenants to spend £300,000 on repairs to the flats.

In England, specific performance is often ordered in relation to building contracts because the contract deals with results rather than the carrying on of an activity over a period of time and it usually defines the work to be completed with certainty.\footnote{Jeune v. Queens Cross Properties Ltd. (1973) 3 All ER 97.} Specific performance is not available for contracts requiring personal services such as employment contracts because such an order would restrict freedom of an individual.\footnote{Chappell v. Times Newspapers Ltd. (1975) 1 WLR 482.}

The court has wide discretionary power to award specific performance and in exercising this discretion, the following factors are taken into account:

- Delay in asking for the order.\footnote{Lazard Brothers & Co Ltd. v. Fairfield Properties co (Mayfair) Ltd. (1977) 121 SJ 793.}
- Whether the person seeking performance is ready to perform his part of the contract.\footnote{Supra note.186.}
- The difference between the benefit (the order would give to one party) and the cost of performance to the other.\footnote{Tito v. Waddell (No 2) (1977) Ch 106.}
- Whether the person against whom the order is sought would suffer hardship in performing.\footnote{Patel v. Ali (1984) 1 All ER 978.}
- Whether any third party rights would be affected.
- Whether the contract lacks adequate consideration (the rule “equity will not assist a volunteer” applies so that specific performance will not be ordered if the contract is for nominal consideration even if it is under seal).\footnote{Jeffrys v. Jeffrys (1841) 1 Cr & Ph 138.}
In certain cases of breach of a contract, damages may not be adequate remedy. Then the court may direct the party in breach to carry out his promise according to the terms of the contract. This is an order of the court requiring performance of a positive contractual obligation. But in general, courts do not wish to compel a party to do that which he has already refused to do. It means the actual carrying out by the parties of their contract, and in proper cases the Court will insist upon the parties carrying out this agreement. Where a party fails to perform the contract, the Court may, at its discretion, order the defendant to carry out his undertaking according to the terms of the contract. A decree for specific performance may be granted in addition to or instead of damages. Specific performance is usually granted in contracts connected with land, e.g., purchase of a particular plot or house, or to take debentures in a company. In case of a sale of goods, it will only be granted if the goods are unique and cannot be purchased in the market, e.g., a particular race horse, or one of special value to the party suing by reason of personal or family association, e.g., an heirloom. Part II of the Specific Relief Act, 1963 lays down detailed rules on the specific performance of contracts. Specific performance is not available in the following circumstances: Section 74 to be read along with section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of the contract. If the terms are clear and unambiguous stipulating liquidated damages in case of the breach of the contract, unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, the party who has committed the breach is required to pay such compensation and that is what is provided in section 73 of the Contract Act. Where the act to be done is in the performance of trust. In general the court will only grant specific performance where it would be just and equitable to do so.

A common view is that the moral duty to keep promises implies that contracts should not be breached and hence that the law should specifically enforce the contracts. This
view is widely noted by scholars, is mentioned in authoritative sources, such as the Restatement of Contracts.

In India, a large number of remedial aspects of law have been taken care of by the Specific Relief Act of 1963 (47 of 1963). It is clear like crystal that a mere declaration of rights and duties is not sufficient to give protection to life and property. The declaration of rights and duties under any act must be supplemented by legal device which can help the individual to enforce his rights. Anyone who is a victim by social process needs a social redress. So, the human society will be considered organised only then, when the saying “where there is a right, there is a remedy” is practically applicable. Usually, remedies are also provided in the branch of substantive law which defines rights and duties for its own purposes, like The Law of Contract provides the remedy of damages for breach of contracts and The Law of Torts similarly provides for recovery of damages for tortuous wrongs. However, substantive laws are never exhaustive in terms of their reliefs and remedies. As there remains always a scope for an act whose purpose is to provide a network of reliefs and remedies in certain specific terms. This type of act does not provide any right in itself but it provides a specific relief for the violation of a legal right. The same is the nature of Specific Relief Act of 1963. The series of remedies allowed by this act falls under the following outlines:

- Recovery of Possession of Property.
- Specific Performance of Contracts.
- Rectification and Cancellation of Instruments and Rescission of Contracts.
- Preventive Reliefs.
- Declaratory Reliefs.

As per the requirement of my research work, only the second point is needed to be discussed here in brief. The fulfilment of expectation created by a contract voluntarily

193 FARNSWORTH, supra note 4, at 755-756, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION chs. 1-2 (1981), and YORIO, supra note 4, at 19-20. Although the view that there is a moral obligation to obey contracts is usually stated by legal scholars, most do not suggest that it should justify wide use of specific performance.
195 Supra note 9, at. p. 817.
196 Ibid.
197 Id. at. Pp.817-18.
made by the parties is the most important aspects of civil rights. As all the economic relations are based on contracts and all employments and professions also depend upon contracts, so these contracts must be performed in all circumstances. A particular contract is not an isolated transaction rather it is a link between a series of contracts. Thus, failure to perform such contracts can cause a serious dislocation of social and economic life. So, contracts must be enforced in the court of law. Awarding compensation to the aggrieved party is the only way through which the law of contract can enforce a contract. But in many cases, compensation is not an adequate relief as it fails to serve the economic purpose of the contract. So, in such situations, there is a need for a remedy which can compel the defaulting party to actually perform his part of obligation under the contract. Here, comes the need of the Specific Relief Act of 1963. It provides relief to the injured party by the second chapter of the act under the heading: Specific Performance of Contracts. And the circumstances in which the relief of specific performance is granted by the court is already discussed above.

**INJUNCTIONS**

There are so many cases where the nature of the contract is such that neither it admits specific performance, nor it accepts damages, as these remedies do not serve any purpose. In such cases preventive relief is granted. It is granted by issuing an order, known as “injunction”, upon the party concerned directing him not to do a particular act or asking him to perform a particular duty, known as mandatory injunction.198 Such relief is granted under the provision of Part-3 of the Specific Relief Act of 1963.199

The term “injunction” has been defined by various jurists.200 In words of Burney “injunctions are judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another is restrained from continuing or commencing such wrongful act.”201 The definition given by Lord Halsbury is more authenticated definition. He explained injunctions as “a judicial process whereby a

198 Supra note 9, at.p.818.
199 Adhunik Steel Ltd. V Orrissa Manganese Minerals (P) Ltd., (2007) 7 SCC 125: AIR 2007 SC 2563, the Supreme Court explained the various types of relief under the act and their nature and scope.
200 Joyce defined it as: “An order remedial, the general purpose of which is to restrain the commission or continuance of some wrongful act of the party informed.”
party is ordered to refrain from doing or to do a particular act or thing.”

202 From these definitions, one can easily conclude the following three basic features of an injunction:

1. This is a judicial process,
2. The relief which can be obtained is a restraint or prevention, and
3. The prevented or restrained act is wrongful.

It is a discretionary remedy and aims at enforcing negative promises. Injunction always acts in personam. It does not run with the property. It is a restraining order which prevents a person from breaking a contract. The courts exercise their power to issue injunctions judiciously, only in those cases where necessity exists.

An injunction is generally issued only in the following cases:

- Where irreparable injury to the rights of an individual would result otherwise.
- Where it is apparent to the court that some act has been performed, or is threatened, that will produce irreparable injury to the party seeking the injunction.
- Where the injury is considered irreparable and it cannot be adequately compensated by an award of damages.

The potential destruction of property is sufficient to establish irreparable injury. In Lumley v. Wrangler, 203 the defendant agreed to sing exclusively at the theatre of the plaintiff during the contract period. However, the defendant violated the contract, by agreeing to sing for another theatre during the contract period. Moreover, she refused to sing at the plaintiff’s theatre. It was held by the court that the defendant could be restrained by injunction from singing in an other theatre. In Jaggard v. Sawyer, 204 the court has cleared that injunctions are either prohibitory or mandatory. It was further stated by the court that a prohibitory injunction may be granted to restrain the breach of a negative contract or of a negative stipulation in a contract. A mandatory injunction compels the positive performance of an act and may be used to restore the situation to what it was before the breach of contract.

203 (1852) 1 De G.M. & G. 604.
204 (1995) 1 W.L.R. 269.
Law of Injunction in England

A) Anton Piller Order.

B) Mareva Injunction.

Anton Piller Order

It is an ex-parte court injunction. By this order the plaintiff is allowed to enter into the premises of the defendant so that he can search for and take away any material evidence and force the defendant to answer some questions. Basically, the main objective of this injunction is to prevent removal or destruction of evidences. In Anton Piller KG v. Manufacturing Processes Ltd. & Ors. The defendants, an English company and their two directors, were the United Kingdom agents of the plaintiffs, German manufacturers of frequency converters for computers. The plaintiffs claimed that the defendants were in secret communication with other German manufacturers and were giving them confidential information about the power units of the plaintiff and details of a new converter, the disclosure of which could be most damaging to the plaintiffs. In order to prevent the disposal by the defendants, before discovery in an action, of documents in their possession relating to the machines of the plaintiff or designs, the plaintiffs applied ex parte for an interim injunction to restrain the defendants from infringing their copyrights and disclosing confidential information and for an order for permission to enter into the premises of the defendant to inspect all such documents and to remove them from the custody of the solicitors of the plaintiff. On the undertaking of the plaintiffs, to issue a writ forthwith Brightman J. granted the interim injunction but refused to order inspection or removal of documents. However, the first reported such order was granted by Templeman J in EMI Ltd. v. Pandit. Mareva Injunction

It is generally known as a freezing or freeze injunction. It is a kind of temporary injunction that freezes the assets of a party till the further order or final resolution by the Court, so named after the case which allowed the remedy. In India, it is known as

205 (1976) Ch 55; (1976) 1 All ER 779 (CA). In Victoria University of Technology v Wilson & Ors. (2004) VSC 33; the fact that the court was willing to grant Anton Piller orders ex parte six months later suggests that Australian courts may be more liberal in granting these orders than envisaged by Lord Denning MR in Anton Piller KG v Manufacturing Processes Ltd.

206 (1975) 1 All ER 418.
interim order. Often used to prevent a defendant from secreting assets out of the jurisdiction of the Court as soon as the claim is served, to frustrate enforcement of the judgment. It is usually aimed at a specific defendant, and not attached to assets themselves. The named defendant is so restrained in regards to specified assets. The contempt powers are used by the court to enforce this injunction.

In Mareva Compania Naviera SA v. International Bulk Carriers SA, the Mareva The plaintiffs, Mareva Compania Naviera SA (“the ship owners”), issued a writ on 25 June 1975 claiming against the defendants, International Bulk Carriers SA (“the charterers”), unpaid hire and damages for repudiation of a charter party. On an ex parte application Donaldson J granted an injunction until 17.00 hours on 23 June restraining the charterers from removing or disposing out of the jurisdiction moneys standing to the credit of the account of charterer at a London bank.

*Quantum Meruit:*-

Ordinarily, if a person, having agreed to do some work or render some services, has done only a part of what he was required to do, he cannot claim anything for what he has done. But the law recognizes an important exception to this rule by way of an action for ‘quantum meruit’. It actually determines the amount to be paid for services when no contract exists or when there is doubt as to the amount due for the work performed but done under circumstances when payment could be expected.

It is important to note here that the action for ‘quantum meruit’ is not an action for compensation for the breach of contract by the other side. It is an action which is alternative to an action for the breach of contract. In De Bernardy v. Harding, it was held by the court that the action for ‘quantum meruit’ in essence is one of restitution, putting the injured party in a position in which he would have been had he not entered into the contract. It merely entitles the injured party to be compensated for whatever works he may have already done or whatever expenses he may have incurred.

In Morrison Knudsen & Co. v. B.C.Hydro & Power Authority, it was held by the court that where the injured party, despite a breach of contract on the part of the other party, continued to work under the contract and completed it, then he had adequate

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207 (1980) 1 All ER 213.
208 (1853) 3 Ex.822.
209 (1978) 85 DLR (3rd) 186 Br Col CA.
remedy under the contract and there was no need for law to fashion a restitutionary remedy.

The remedy of ‘quantum meruit’ is discussed in detail in the fourth chapter of this thesis, so this much of discussion on this topic is sufficient here.