CHAPTER-7
CONCLUSION AND SUGGESTIONS

GENERAL CONCLUSION
The core purpose of the contract is to make an agreement official in which two or more parties are involved with regard to a specific subject matter. Contracts often cover extremely wide range of matters such as terms of employment, independent contractor relationship, sale of real property, dispute settlement and ownership of intellectual property created as component of a work for hire etc. The development of Law of Contract in its modern form is mainly based on the Latin philosophy called ‘all pacts should be maintained’ (pacta sunt servanda) that started when trade first became a trend. As this law was created, the Indian legal system recognized the concept called breach of contract. Consequently, the Indian legal system also realized that remedies must be created to amend any misunderstanding associated with contracts. Remedies effectively ensure fairness within contractual relationships so that both parties would not be able to make business relationships taken for granted whenever they wanted. The law regarding damages for breach of contract has began its journey few centuries ago and after passing through tough time and confusions it has reached to the level where it stands today with reasonable good clarity but even these days the law of damages seems to be changing, and the whole development is for the better, all the time, every day, with each new challenge. Certainly, much more change has appeared between the positions which was prevailing few centuries ago and today and much more change, one can still apprehend which is prevailing today and in each and every tomorrow. A pointer to the shifts of emphasis and significance changes in the subject over the period of time is all that is required for the development of the law of damages for breach of contract.

Law of contract can be described as that branch of law which determines the circumstances in which a promise shall be legally binding on the person making it. Basically, it deals with self-imposed obligations, which bind the parties undertaking the same. An obligation to perform a contract also includes a duty to be answerable on the breach of contract. Usually, no legal obligations arise until the contract has been formally concluded. The breach of contract by any party creates a liability to pay damages for the consequences thereof to the other party.

By way of introduction, theoretically, in law, a distinction has been drawn between a right and a remedy. A right (in the sense of a cause of action) is observed as a
prerequisite to a remedy. Thus, it has been said, “for every right, there is a remedy”. Again, remedies are seen as the “ends” and procedure, the “means”, for achieving those ends.¹ In another words, the right is observed as the primary obligation, and the remedy, as the secondary one. In a contract the failure to perform the primary obligation is considered to be the breach of contract and the secondary obligation which arises is the liability to pay damages.² Actually, remedies for breach of a contract are intended to encourage people to enter into contracts freely and without hesitation.³ In modern era, damages are associated with compensation. However, some jurists have suggested that damages should simply be interpreted as a monetary award made in response to a wrong. In addition to compensatory awards, damages would then include awards aimed at restitution and punishment. This thesis argues that the realisation of such a concept of damages would produce inconsistency that would obstruct the progressive development of the law. That development requires, rather, the identification of the objectives of each remedy and the development of a law of remedies around those objectives. Analysis of the objectives of compensatory and exemplary damages suggests that ‘satisfaction’ should be recognised as an independent objective of the law of remedies.

Thus, in this research work, a practical discussion of the measure and assessment of damages and equitable compensation in a range of commercial contexts has been done in the light of leading cases as well as recent cases. The discussion basically includes:

- Different kinds of remedies available for breach of contract; especially Damages;
- The measure of damages in contract;
- The distinction between debt and damages and between damages and restitution and other related remedies;

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² Photo Production Ltd. v Securicor Transport Ltd. (1980) AC 827, at p.849; as per Lord Diplock.
³ E. Farnsworth, “Contract”, (1982), at p.812, Professor Farnsworth recounts: Our system of contract remedies is not directed at compulsion of promisors to prevent breach; it is aimed, instead, at relief to promisees to redress breach. The result may sometimes be to compel a promisor to keep his promise, but this is only the incidental effect of a system designed to serve other ends. Perhaps it is more consistent with free enterprise to promote the use of contract by encouraging promisees to rely on the promises of others instead of by compelling promisors to perform their promises. In any event, along with the celebrated freedom to make contracts goes a considerable freedom to break them as well.
• The rules in relation to causation, remoteness, mitigation of damages in contract;
• Liquidated damages and penalties;
• Damages for loss of money;
• Interest pursuant to statute;
• The proof of damages in different contexts.

In fact, breach of contract is considered as a civil wrong because it is a breach of the promisee’s legal right to have the promise performed. The crucial implication of this analysis is that there is no fixed measure of response to a breach of contract. This point requires emphasis because of the common assumption that compensatory damages are the one and only response to a breach of contract. Whereas, this assumption is considered as incorrect because the content of the remedial or secondary obligation triggered by a wrong and that is why it is for the courts to decide it as a matter of policy which can be constrained only by extrinsic considerations.

This thesis has revealed that there are numerous situations in which an award of compensatory damages may be deemed to be an inadequate remedy for breach of contract. This is often because the award fails to put the promisee ‘in a situation as beneficial to him as if the contract had specifically been performed’. A number of conclusions can be drawn with regard to this like:

• First, it follows that the obligation created by a contract is not disjunctive i.e. to perform or to pay damages. If the obligation had been disjunctive, damages would never be an inadequate remedy for breach.

• Secondly, the obligation created by a contract is an obligation to perform and breach of this obligation is considered as a wrong giving rise to remedial rights. The purpose of these remedial rights is the protection of the interest of the promisee in performance, which is important for both the promisee himself and for the institution of contracting.

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Thirdly, an award of compensatory damages will usually be adequate for this purpose (thus, it is observed as the primary remedy for breach of contract) because it enables the promisee to purchase substitute performance from an alternative source. However, in some situations, substitute performance will be unavailable or will be insufficient to protect the promisee’s bargained-for interest in performance. In such cases the courts will turn to specific relief or gain-based damages as alternative remedies. The purpose of these remedies, and indeed the purpose of all contract remedies, is the protection of the promisee’s bargained-for interest in performance. This purpose has been influential in the history of contract remedies and is sure to influence its future.

From this point of view, the first question which comes for consideration when one thinks about damages is why courts grant damages or any kind of damages at all? To grant damages for the breach of contract is the single possible outcome for a successful private law action, and in many cases they are a substitute for, alternative to, or supplement to other kinds of awards. Actually, the fundamental principle governing the award of damages, at common law is that they are compensatory in nature.

Precisely, it can be stated that the damages available in common law regimes will be fit in the present scenario. In every case where a civil wrong has been proven, plaintiffs have at a minimum a right to an award of damages equal to such pecuniary losses as can reasonably be attributed to the wrongful act. Thus, wrongdoers are required to compensate victims for actual and expected out-of-pocket expenses, lost profits, and so on. Such sums might reasonably be regarded as an attempt, so far as the pecuniary consequences of breach are concerned, to make the world of innocent party such as if the wrong had never happened. But sofar as these sums are given legal recognition in the form of liabilities imposed by the court, they can also be interpreted as an obvious and straightforward way to support the plaintiff’s rights. By holding the defendant liable for the substantial consequences of his wrongdoing, the law makes clear that these consequences should not have happened. By shifting the cost of the infringement of rights from the victim to the wrongdoer, the law holds the guilty party responsible for his wrongdoing. In addition to awarding damages for pecuniary harm, courts also frequently award what are sometimes described as “non
compensatory” damages or damages for “nonpecuniary” injuries. The general principle governing the assessment of compensatory damages in contract is that the plaintiff should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the wrongful conduct of the defendant.

Thus, it can be considered that whenever the object of an award of damages is compensatory, it is presumed that there are no hard and fast rules. Sometimes a considerable difficulty is felt in determining the exact amount of loss suffered and some estimation and even impression must suffice. Indeed rigid rules must give way to solutions which give an injured plaintiff the quantum of damages which most fairly compensates for the loss suffered. A considerable limitation involves the recovery of consequential damages, where the established rule of Hadley v. Baxendale, provides to restrict the scope of consequential damages to those injuries that were within the contemplation of both parties at the time of formation of contract. In this case, (as has been analysed in previous chapters of this research work) the court pronounced the rule as follows: “Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Prior to this case, it had been held that only “natural” damages, those arising from the usual course of things, could be

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6 Robert Stevens, “Torts and Rights,” (2007), at pp.59-91; The distinctiveness, importance, and ubiquity of such awards is discussed.
7 Commonwealth v. Amann Aviation Pty Ltd., (1991) 174 CLR 64 at p.116; as per Deane J.
8 John K Arthur (Barrister and member of Victorian Bar) “Damages and Equitable Compensation in a Commercial Setting” June, 2010
9 W. Hirsch, “Law and Economics - An Introductory Analysis”, (1979), at p.107, “The law of contracts generally denies recovery for consequential damages, unless the risk of consequential damages was specifically bargained for between the parties. The consequences of the breach must be “proximate and natural”, yet “natural” in this context means “usual” or “foreseeable”.
10 (1854) EWHC Exch J70:156 Eng. Rep. 145:In Hadley, a miller hired a carrier to deliver a cracked shaft to engineers so that a duplicate could be made. Id. at 146. The delivery was a few days late and as a result the mill was closed longer than necessary, causing the miller to suffer a loss of profits. Id. The Hadley court held that the carrier was not liable for the lost profits of the miller resulting from the delay. Id. at 151. The court reasoned that although the delay caused the loss, the carrier did not bear the risk of such a loss since the risk was not within the contemplation of both parties at the time the contract was made. Id. “The only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of the mill.” Id.; see also D. Dobbs, “Handbook on the Law of Remedies”, § 12.3, at p.803 (1973) (commenting on Hadley case).
recovered. However, the jury was allowed considerable freedom in determining the extent of the actual injury, and this freedom often resulted in excessively large judgments. The Hadley guidelines arose amidst the confusion caused by the lack of any general principle directing juries on damages for breach. Consequently, “natural” damages were restricted to “usual” or “foreseeable” damages and the court allowed a new category of damages, when special circumstances are known to both parties, recovery may include those damages which circumstances make probable as well as those which would arise naturally.

A comprehensive analysis of the Hadley’s case, points out certain drawbacks of this judgment, which can be mentioned as follows:-

- No special liability will be attached to the breaching party, if such party has neither notice nor knowledge of consequences.
- Although the Hadley doctrine requires that both parties contemplate the injury, “no issue is ever raised as to whether the plaintiff did in fact have (the resulting damage) within his contemplation. The question has always turned on whether the defendant had reason to foresee the injury?”
- Moreover, the injury must have been within the contemplation of the breaching party at the time of contract formation. If the breaching party acquires knowledge of potential consequences after the formation of the contract, but before the breach, no liability attaches to those losses.
- Finally, the loss must be a foreseeable result of the breach, but the breaches itself need not to have been foreseen.

Inspite of all the above observations, it can be seen that the Hadley principle, although occasionally criticized, yet has been applied universally in our country. Actually, the driving force for the rule in Hadley’s case appears to lie in the concept of bargained-for risk allocation. This rule gives confidence to the parties to estimate the risks involved in a contract and to set the price accordingly. Thus, basically the principle is to allow the parties the freedom to allocate the risk as they deem fit in those circumstances.

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11 Supra note 3, at.p.874.
12 Ibid.
Again this rule can be criticised on the following grounds:

- In many transactions one of the parties will have little or no opportunity to change the terms of the contract and if the law allows recovery of unforeseen damages regardless of whether the injured party has informed the other parties to the contract, the law would have been discouraging such disclosure since if a party has disclosed unusual interests he wanted to protect, the other party could raise the price or exclude such damages explicitly.

- Moreover, there seems no logic to compel the party to perform if a party realizes that a contract is no longer profitable, rather he would lose more than the injured party can gain.

- If one goes back to the history, it can be seen that the courts (at that time) were particularly sceptical of awarding consequential damages for lost profits and allowed recovery relatively in a few cases only. Actually, one of the most confusing aspects in rendering awards or giving judgment is the assessment of damages for breach of contract for anything other than the most uncomplicated of losses resulting from a breach.

In current law of contract, damages are associated with compensation. However, damages have not always been associated with compensation. In the early period of common law development, judges and juries did not have the functions they now have, issues of fact and law were not clearly separated and judges were anxious to transfer to jurors as many difficult issues as possible. Damages were, basically, “an arcanum of the jury box into which judges hesitated to peer”. This reflects the way in which damages had been understood for many centuries. As late as the 17th century, Sir Edward Coke described damages as “the recompense that is given by the jury to the plaintiff or defendant, for the wrong, the defendant had done to him.” In the late 18th century the role of the jury was omitted and Joseph Sayer defined ‘damages’ in his book (which is considered as the first book written specifically on damages) in the

16 James Bradley Thayer, “A Preliminary Treatise on Evidence at the Common Law”, (1898) chs.2-3; the best account of the development of trial by jury and the changing functions of judge and jury.
17 Sir Frederick Pollock and Frederic Maitland, “The History of English Law”, ed.2nd, (1898) vol.2, at.pp.629-30, even though, from the beginning, it appears that jurors were to speak only about facts.
19 Cassell& Co Ltd. v. Broome, (1972) UKHL 3; (1972) AC 1027, at.p.1025; as per Lord Diplock.
following terms: “Damages are a pecuniary recompense for an injury”. This logical concept of damages as compensation was confirmed in 19th century’s two classical English authorities, i.e. Livingstone v. Rawyards Coal Co. and Robinson v. Harman.

In the first case, Lord Blackburn observed in the context of a tort: “A court should award ‘that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation’.

While in the second case also, Parke B observed and applied a similar measure in breach of contract cases, with the clarification that the injured party is, in such cases, restored to the position which would have been obtained had the contract been performed.

Actually, the ethical development of the law of damages only began in the course of the 19th and 20th centuries. This period corresponds with the emergence of the modern law of torts and contract, in which the basis of most civil liability was, and still is, found outside statute. The purpose of that liability is most frequently explained, instrumentally, in terms of deterrence and compensation.

Deterrence is the more problematic explanation, because all monetary awards are deterrent in a very weak sense i.e. they act as a sanction on conduct. This does not depend on their function as compensatory, restitutionary or punitive. But the deterrent effect of any particular award on the future conduct of either the defendant or others is debatable normatively, and there is no practical evidence to suggest that damages have a deterrent effect, even where the court expressly intends this by awarding exemplary damages.

22 (1880) 5 App Cas 25, at.p.39.
23 (1848) Eng R 135: (1848) 1 Exch. 850, at.p.855, as per Parke B.
24 Supra note 22.
25 Supra note 23.
27 Notwithstanding the courts’ routine acceptance of deterrence as a goal of monetary relief: see, e.g., Lamb v. Cotogno, (1987) HCA 47; (1987) 164 CLR 1, at.p.9 (as per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) in the context of exemplary damages. See also, Royal Bank of Canada v. W Got & Associates Electric Ltd., (1999) 3 SCR 408, at.p.421 (as per McLachlan and Bastarache JJ), deciding that compensatory awards are usually sufficient to achieve deterrence in breach of contract cases.
Consequently, compensation has come to be generally preferred as the aim of civil liability. Compensation was considered as the dominant remedy that could be applied with equal force to the law of contract, whose purpose is “to satisfy the expectations of the party entitled to performance”.\textsuperscript{30} Thus, Compensation effects that objective where specific performance is unavailable, as it is often in common law systems where it is a remedy of equitable origin and is available, theoretically at least, only where damages are inadequate, and that is also in the discretion of the court only.\textsuperscript{31} In the 20th century, unsurprisingly, the development of the law of damages is characterised by the restatement and refinement of the compensation principle.

It can visibly be observed that the common threads running up to Hadley and on are the double considerations of foreseeability and communication which can be explained as follows :-

I. Where consequential damages are foreseeable, they are more likely to be granted;

II. Where the injured party communicates his special needs to the opposite party at the time of entering into the contract, consequential damages can become part of the undertaking.

Eventually, it is a question of evidence. Where the consequential loss alleged is remote or prospective, then the courts clearly tend to require a delicate level of proof both as to foreseeability and quantum. Assumptions should have little, if any, place in the evaluation, and preconceived notions about what a party “ought to know” should be set aside while considering the quality of the proofs of the claimant.

But the modern trend has been changing towards relaxing the Hadley’s rule by phrasing it in terms of foreseeability. And in recent years, the judicial trend has been to make recovery of lost profits available in a wider variety of cases.\textsuperscript{32} Thus, in modern terms, it is considered that harm will be foreseeable either because it is a natural consequence of the breach or because special circumstances bring the harm within the contemplation of the parties.

\textsuperscript{30}Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd., (1997) UKHL 17; (1998) AC 1, at.p.15 (as per Lord Hoffman). This statement is neutral on whether the satisfaction of the principle is achieved by requiring actual performance or allowing the defendant to pay damages for failure to perform- the Holmesian view of contract that finds expression in the theory of efficient breach: see Richard Posner, Economic Analysis of Law ed. 5\textsuperscript{th} (1998), at.p.103.


\textsuperscript{32}\textit{Supra} note 3, at.p.876.
From the classical case of law of contract i.e. Hadley v. Baxendale, the principle which came into light was that the consequential damages can be recovered only if, at the time the contract was made, the breaching party had reason to foresee that consequential damages would be the probable result of breach. As conventionally formulated, the standard of the principle of foreseeability has been strict and inflexible. This formulation differs from both the general principle of expectation damages in contract law and the principle of proximate cause outside the law of contract. Professor Eisenberg argues that neither least-cost theory, the theory of efficient breach, nor information-forcing incentives justify the principle of Hadley v. Baxendale. He recommends that “the principle be replaced by a regime of proximate cause, contractual allocation of loss, and fair disclosure. The new regime would adjust the standard of foreseeability according to the nature of the interest and the wrong, and would apply the standard at the time of breach.”

In modern business practice and modern law of contract the metamorphosis into a regime of proximate cause, contractual allocation of loss, and fair disclosure has already begun; and it is considered that discarding the principle of Hadley v. Baxendale, would serve the interests of both efficiency and justice.

The two important features of the principle of Hadley v. Baxendale can be briefly stated as: The principle of ‘default rule’ and the principle of ‘foreseeability’.

Basically, the first principle serves as a device to limit the liability of sellers. If this principle were dropped from the law, sellers could still limit liability by contractual provisions that exclude consequential damages, set a formula limit on liability, offer varying liability limits in exchange for higher or lower prices, or substitute for formula limit on liability, some other obligation, such as replacement or repair. Whereas, the second feature can best be understood by distinguishing among three levels of foreseeability, which are as follows:

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34 Ibid.
1. In the first level, it is used in the sense of term that almost any damage that actually occurs was likely to have been foreseeable.

2. In the second level, the term “reasonably foreseeable” can be referred to those damages that are foreseeable at this level.

3. The third and most demanding level of foreseeability requires that it should be probable or highly probable that the damage would result.

Therefore, if practically taken into account, the benefits of the principle of Hadley v. Baxendale appears to be extremely limited. Whereas theoretically, the principle provides motivation to buyers to reveal information concerning their special circumstances at the time when the contract is made, and thereby allows a seller to either determine a balance price and level of precaution that appropriately reflects its overall liability risk or to stratify precautions according to varying liability risks. However, actually this benefit is hardly ever likely to be attained.

Recently, it has been observed that many or most buyers do not communicate information concerning their special circumstances. Moreover, it is reasonable on the part of a layman not to know the intricacies of the law of damages. Buyers, who reasonably do not know the principle of Hadley v. Baxendale, will not communicate information about their reasonably foreseeable damages because they will deem it unreasonable and unnecessary to incur the costs of doing so. Buyers who know the principle may also reasonably fail to communicate such information, because, e.g., the cost of setting up systems and communicating information will exceed the expected value of communication; the buyer knows the seller will not use the information; communication of information will cause the loss of some or all of the value of the information to the buyer; or the information does not arise until after the contract has been made.  

Although, nearly three-quarters of century ago, it was observed that “the question of the measure of damages is one that has produced more difficulty than perhaps any branch of the law” and forty years later Lord Halsbury, L.C., has also hit the same note when he stated that “the whole region of inquiry into damages is one of extreme difficulty”. And yet the concept of damages under Law of Contract is least studied and hence the least understood in India. Basically, this is not due to the

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37 Supra note 33, at p. 596.
38 Gee and others v. Lancashire and Yorkshire Rly. Co., (1860) 6 H. & N. 211; 30 L.J. Ex. 11; 3 L.T. 328; 9 W.R. 103; as per Baron Wilde.
uncommonness of actions for damages in our Courts but due to an adversedelusion of the real scope and importance of the subject.

Actually in India, any type of litigation which is brought before the Court of law under the heading “damages for breach of contract” is usually considered as a lavish litigation and not a litigation arising out of necessity.

The general notion is that if a case is instituted for claiming damages for breach of contract, then it is considered as a matter of choice only. But, now the Indian legal system can no more avoid those cases which are filed under this branch of law. And if from a practical point of view, it is considered, it can really open a new and extensive field for exploration. Due to the changing circumstances of commercial life and widening self-consciousness of our civil rights, it has become mandatory to have thorough and detail knowledge and involvement in the said subject. The requirement of time is that there must be mastery not only of the principles of liability, but also of the principles upon which damages have to be measured. Nevertheless, it is regrettable that our legal literature which is recently growing in enormous schemes, has not up to now equipped us with a comprehensive work on the subject of damages for breach of contract.

In the first chapter of this research, analysis of history of law of damages in India has made it clear that the difficulty with the Indian legal system was that the law of damages had remained in an extremely uncertain, ambiguous and confused state for number of decades. Actually, it can be said that it was a mixed bag. It consisted of partly Hindu Law, partly Mohammedan and partly English Law. The most confusing question which the court had to decide was that which principle of which law would be applied to solve the dispute, till the judicial pronouncement was made.

So far as the law related to breach of contract and damages arising out of such breach are concerned, the Indian legal system was not equipped with codified law till the day the Britishers came to India for trading and in the process of trading became the rulers of India. Being rulers of India, Britishers gave legislations, precedent and authority of the crown. Law of damages was completely developed under the shadows of the British regime. However, the word “Damage” has nowhere been defined in either English Law or in the Indian Contract Act, 1872. But with the gradual development of constant and organized legal system we are now able to arrive at clear meaning of damages under various heads in which it can be claimed, and all these heads are being discussed and analysed in the second chapter of this research in detail. From this
discussion, now it is crystal-clear that any aggrieved or injured party can claim damages under any of the above-mentioned heads of damages for breach of contract, and get compensation only if he proves to suffer injury because of the breach committed by the defendant. To put it in simple words, one may say that before a person can get any damages, he must prove that he had suffered an injury, because law never takes into account all harms suffered by a person, which caused no legal injury. But if the party succeed in proving such legal injury, it becomes the duty of the court to do justice to the injured party and while doing so the Judges have to enumerate the damages in order to calculate the interest. This does not mean that the total award is necessarily to go up higher on that count. The total award is still to be one, which can provide him fair compensation in money for his injury.

The best example of it is the landmark decision of Hadley v. Baxendale, which defines the kind of damage i.e. appropriate subject of damages and excluded all other kinds as being too remote. The decision was concerned solely with what is correctly called remoteness of damages. In the third chapter of this research, this landmark case has been discussed in detail, from which now it is clear that what is awarded under heading of damages for breach of contract is, what are to be the loss which the plaintiff has suffered and not the profit which the defendant has made.

As the researcher has done analysis of both the English Law and Indian Law on the subject of damages for breach of contract, and a necessary comparison has been made on the topic of mitigation of damages also. While comparing the legal position of both these countries it is found that no remarkable difference is there between English Law and Indian Law so far as the rule relating to mitigation of damages is concerned. The only thin line difference, which has been noticed during this research, is that, the rule in the explanation to Section 73 of the Indian Contract Act is applied with great care and caution one can say in more strict and rigid manner than that is in England. Thus, from the above discussion on the topic of quantum and mitigation of damages, it is clear that a plaintiff cannot claim as damages any sum, which is due to his own negligent act. In other words, one can say that a party is not entitled to damages if, by the use of reasonable precautions, he might not have avoided the loss.

With regard to anticipatory breach of contract, the date when the repudiation of breach of contract is accepted is the real date of breach of contract and the damages are assessed on that date. Moreover, the plaintiff owes a duty of taking all reasonable
steps to mitigate the loss consequent upon such breach and cannot claim as damages the sum which is due to his own negligence.

The rationale to undertake the entire research exercise lies in a question i.e. what can be the reasonable amount of damages, which can be awarded in the circumstances when the breach of contract is proved.

The damages claimed by the parties, according to English law, may be either “liquidated damages” or “penalty”. If the damages fixed by the parties, are the genuine pre-estimate of the loss which has arisen on the breach of contract, such damages are called “liquidated damages”. Whereas on the other hand, if compensation agreed to be paid in the event of breach is excessive and highly disproportionate to the likely loss i.e., the amount is fixed in terrorem, by way of security to the promisee, so that the contract can be performed, it is known as “penalty”. In chapter four of this study, Section 74 of the Indian contract act is being discussed and Indian position in this regard has been explained. As per this provision, when the amount of compensation is to be paid is mentioned in the agreement, reasonable compensation subject to the maximum limit of what has been mentioned in the contract, is payable. Under Indian law, no distinction has been drawn between liquidated damages and penalty. Thus, the court may award lower damages than the sum mentioned in the agreement, but an amount higher than that cannot be awarded.  

But a distinction has been drawn between earnest money and security deposit in this chapter for the purpose of considering the question of forfeiture of the amount paid in advance. Categorically, it has been mentioned that drawing a distinction between deposit by way of earnest money and security deposit for the purpose of determining, whether the sum is liquidated damages or penalty under Sec. 74 of the Indian contract act. But it does not seem very convincing because such a distinction can obviously lead to contradictions. Thus, it has been suggested that to determine, whether any deposit and the forfeiture thereof is liquidated damages or penalty, the test should not be whether it can be termed as earnest money, which is subject to adjustment on the completion of the contract, or a penalty. The proper test to be applied should be whether the sum is as a genuine pre-estimate of damages payable, or it is by way of punishment to discourage the breach of contract.

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So far as damages and compensation to be claimed under the doctrine of *quantum meruit* is concerned, this aspect has been discussed at length in the present research under chapter five. According to the common law of England, no remuneration claim for work involuntarily or without quest, even though the defendant accepted the benefit arising therefrom, and even though they did subsequent promise to pay, because of the fact that in England past consideration is no consideration. Whereas in India, the common law rule has been departed from, and the legislature under Sec.70 of the Indian contract act as provided for the recovery of compensation in certain cases, where a person lawfully does anything for another without intending to do so gratuitously and such other person enjoys the benefit thereof. The question, how far the strict rules of English law in this regard are applicable in India in view of the provisions of the Indian contract act has not so far been raised and decided. Moreover, the claim by of *quantum meruit*, which can only arise out of liability by implication, not by express contract and therefore, the plaintiff cannot claim on quantum meruit, if he had chosen to bind himself down with the express terms of the contract.

As far as *quasi-contracts* are concerned, these are also discussed in chapter five of this research. Under Indian Law of Contract, Section 68 permits reimbursement for necessaries supplied to the person incompetent to contract or anyone dependent on him. Actually these kinds of contracts are not contracts in its true sense. Thus, it may be noted that the persons supplying necessaries of life to the incapable person is only entitled to be reimbursed “from the property of such incapable person”. If such person does not have any property, but he has otherwise the other means of paying, still the person supplying necessaries of life is without a remedy. English law has more logical approach in this regard i.e. in case of sale and delivery of goods to an incompetent person, the law is that such a person must pay a reasonable price for them. Thus, it is submitted that there should be an amendment in Sec.68, which may substitute the words “is entitled to be reimbursed by such incapable person or from the property” in place of the words “is entitled to be reimbursed from the property of such incapable person”. In the countries like USA also, and infant may be held liable under *quasi-contractual* relations for the reasonable value of necessities furnished to him. Thus, the requirement of amendment can be seen in India.
Recently, Lord Scott while speaking extra-judicially lamented the inconsistency of the current law of damages.\textsuperscript{41} In the perspective of contractual damages, any inconsistency would seem to arise from those cases where extensive damages are awarded but where the claimant has not suffered any loss within the conservative meaning of the term. While some preserves that such awards comprise restitutionary damages, it has been argued that such an explanation is unacceptable. In chapter five it is also observed that restitution is better confined to a remedy whereby the defendant is ordered to restore to the claimant property or value belonging to the claimant, i.e. where the defendant’s gain equates to the loss of the claimant. The main objective of the research in this chapter is to understand the emerging trends of the judiciary in present Indian scenario on different doctrines like doctrine of \textit{quasi-contract}, doctrine of \textit{quantum meruit} and doctrine of unjust enrichment. Various remedies are available for all these concepts in Indian Contract Act, 1872. Section 68-72 deals with these remedies, like when necessary goods are provided to one person, obligation of a person enjoying benefit of a non gratuitous act, responsibility of the finder of goods, thing delivered to another person by mistake or coercion. The courts also in most of the cases have always tried to give decision in favour of plaintiff in the case of injustice caused to him. Whenever the court feels that the defendant has taken benefit from the plaintiff and has not compensated him, then court directs the defendants to either compensate him or to restore back the benefits received by the defendant. This is known as restitution under Indian contract act, 1872. In section 72 of Indian Contract Act, only thing delivered by mistake or coercion is taken into consideration. Like coercion and mistake there are other ways also like undue influence, misrepresentation, fraud which can be used by a person to take benefit out of another person. So, the provisions related to misrepresentation, fraud and undue influence should also be included so far as restitution is concerned under Indian Contract Act, 1872.

In the era of globalisation and modernisation, persons are not bound to do business in their own country, but they are free to enter into the contract with the citizens of other countries also. This phenomenon may sometime give rise to conflictual problems relating to contractual liability, which is discussed at length in the sixth chapter of this

\textsuperscript{41}Lord Scott “Damages and Incoherence”, University of Liverpool Law School Annual Public Law Lecture, 23 February 2007.
study. It has been observed in this chapter that if some foreign element is found to be involved in a case, there can be conflicts related to the contractual liability. Furthermore, it generally happens when two contracting parties may be residing into different countries, or when a contract entered into in one country which may have to be performed, in some other country. Actually, till now there is no single rigid test describing that either the place of contracting for the place of performance that can determines, which law should be applied in such situations. In this chapter, the English and Indian private international law with regard to these situations is being discussed as under the law of these two countries, the autonomy of the parties is being recognised and they are deemed to be free to choose any law which will govern their contract. An ordinary prudence person in his choice is deemed to have opted for that system of law “with which the transaction has the closest and most real connection”. But in a particular case, it is not necessary that all the facts have a close connection with only one system of law, some facts may have a close connection with one system; whereas certain other facts with another system, and in such a case, the court has to evaluate the totality of the two to reach at the right conclusion. This may have been the reason that the Supreme Court in a case,\(^{42}\) has held that the “proper law” is the “law of the country in which elements were most densely grouped and with which factually the contract has most closely connected”. In the matter of performance of the contract, sometimes there may be difference between the proper law and the *lex loci solutionis*. In such a case, generally, the problem arises is, as to which of the laws should govern the question of performance. As per the rules of conflict of laws, it may be considered that the law of the place of performance should be applied to the question of performance of the contract, as it sounds reasonable. But if this rule is followed rigidly, it can lead to incongruity in those cases where the proper law and the law of the place of performance are different. It has been observed that the proper law determines the substance of the contract, including the question “what performance will discharge the promise from his contractual obligations”? If the liability of the promises gets reduced by applying *lex loci solutionis*, this simply means that the extent of obligation, which has already arisen, is affected. By taking into consideration this problem, it is now settled that the proper law controls the

\(^{42}\)Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh, AIR 1955, SC 590.
performance of obligation and such obligations cannot be varied by the *lex loci solutionis*.

In recent years, the basic features of the conflict of laws, its methodology, and its governing ideologies have been seriously questioned. No scholarly or judicial consensus is found on the choice of law rules. Particularly, the conventional ideas of seeking uniformity of result and of establishing equality between domestic and foreign laws have been criticized on the grounds that such ideas are not pragmatic and appropriate, since the domestic courts actually do and in fact, should be inclined to domestic law in a situation where it is one of the applicable legal systems.

To conclude, it can be said that due to the increasing interdependence of human activity, the need for predictable outcomes in the legal disputes is also growing. These outcomes should have a more substantial pace than the national affiliation of the forum.

**JUSTIFICATION OF HYPOTHESIS**

The theory is put forward by making analytical study of judicial trends prevailing and emerging in England, India and some other countries on the subject of damages for breach of contract. The impact of court involvement is both qualitative and quantitative with the help of legislations. In the light of the research work, the researcher is free to commence from the principles of breach of contract to construct an argument, which is more in line with facility of exposition and application, while at the same time consonant with the economic reality in modern era of commercialisation. The starting point of the said research is the nature of the opinion, which is said to arise on breach of contract, i.e. whenever there is breach which will cause considerable deficiency of the expected profit of the contract to the innocent party, the innocent party has the choice to ascertain his right to sue for damages amongst the other remedies available. But by ascertaining this right, the innocent party will have to move on with certain distressing situations, such as:-

- The Lack of Cooperation of the current Legal System in certain situations;
- Complexity of Assessment of Damages;
- Intricacy of Mitigation;
- The Difficulty of Mitigation even if there is Duty to Mitigate.

**The lack of cooperation in the current legal system in certain situations**

The legal rules mentioned under any law must be so well equipped with clear definitions and explanations, if they are to be used appropriately. Any type of be
deficiency in the clarity of statutory provision is also responsible for creating helplessness situation. In certain situations the continued performance by the party who is committing breach seems to be possible but as the legislation provides for remedies for breach of contract, the innocent party feels helplessness in maintaining the implementation of a contract in strict jacket approach. In certain situations, it is found that continued performance is most favourably advantageous but somehow the position is that the lacking of co-operation in the current legal system has also massed up the relationship and ultimately resulted into breach of contract.

**Complexity of assessment of damages**

Till today, this has remained one of the most challengeable concepts of English law which can be equated only with the “floodgates of litigation” and the “unruly horse of public policy” but damages for breach of contract to negotiate for fare and reasonable sum would be excessively so. It can be argued here that the factor of difficulty in assessing the damages gives a party a sufficiently legitimate interest to continue performance which appears dangerous. It places in the hands of the innocent party a passport to specific performance of the contract. Here arise certain questions like:-

- Who is to determine the sufficiently difficult standard?
- What about an honest though unreasonable mistaken belief that damages would be difficult to assess?
- Why should a layman be called upon to decide a question that may stump the court, as it has?
- Are the damages difficult to assess? Or too difficult?

It may be submitted that this aspect of the legitimate interest theory serves only to becloud the issue further. Actually, the fundamental aim of the court should be to prevent unnecessary waste. To permit a superfluous continued performance on the ground that the innocent party finds the resultant damage too difficult to assess in monetary terms strikes that exactly.

**Intricacy of mitigation**

An innocent party cannot recover for loss that he could have avoided by taking reasonable steps. This is sometimes expressed as the duty to mitigate. This does not apply to actions for the price of goods delivered. Such an action is an action for an agreed sum and not an action for damages. Although there is no duty to mitigate

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43 Courtney and Fairbarn Ltd. v. Tolaini Bros (Hotels) Ltd., (1975) 1 All ER 716; Mallozzi v. Carpelli, (1976) 1 LLR 407.
before actual breach occurs, the innocent party should not aggravate his loss. It is for the defendant to prove that the plaintiff has failed to mitigate his loss.44 Therefore, the submission of difficulty of mitigation ought not to be relevant in determining whether or not a legitimate interest exists. The submission therefore, is that the limitations on the right to continue performance are both unhelpful and dubious legal validity.

Actually, there are two principles regarding compensation that flow from section 73 of Indian contract act, 1872. Firstly, where money can substitute the loss incurred, the aggrieved party is to be put in the same situation, as it would have been in had the contract been performed. This is qualified by the second principle, which imposes a duty upon the defaulting party to take reasonable steps to mitigate the consequences which arise as a result of the breach.

This means that once he is aware of the breach, he must take all reasonable steps to minimise his loss and must forbear from taking unreasonable steps that increase it.45 The plaintiff is required to act reasonably, but the standard of reasonableness is not high in view of the fact that the defendant has committed a wrong.46 Moreover reasonableness is a question of fact and it depends on the facts and circumstances of each case.47 Although most cases involving mitigation concerned a deliberate act or omission on the part of plaintiff,48 negligent action by the plaintiff is relevant and contributory negligence can constitute a failure to mitigate.49 The obligation to mitigate does not, however, arise until the plaintiff has actual knowledge of his loss or of the wrongful act of the defendant.50 Thus, the plaintiff may recover in full or damages to which he contributed if his contributory act took place before he become aware of his loss or the breach of contract by the defendant.

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48 Ibid.
50 Schering Agrochemical Ltd. v. Resibel N.V.S.A., 26 Nov. 1992, (Unreported, C.A.), as per Scott L.J. and Nolan L.J. in the court of Appeal who said that knowledge of the facts that constitute the breach is enough: the plaintiff does not have to be aware that those facts actually constitute an actionable breach. C.f. also Chitty on Contract, General Principles, ed.26th, (1989), para.1820.
The difficulty of mitigation even if there is duty to mitigate

Whenever loss is foreseen, mitigation would be relevant. It means that the probable sufferer should do all that is reasonably feasible to lessen it. In the final analysis, just as a breach of contract may lead to one fear i.e. an imminent loss too, may even unretreated repudiation. Until it is retracted the innocent party ought reasonably to foresee that he will be disappointed in his expectations and will suffer a loss. At such a stage the duty to mitigate would arise in both its aspects. Thus, one can readily acknowledged that mitigation involves the taking of reasonable steps to reduce the loss seemingly less emphasized is that the mitigator must also refrain from taking steps which would reasonably increase the loss.

The duty to mitigate is not a mere attachment to a breach of contract but it must be observed in the context of loss allocation. There are certain principles which govern the allocation of loss and one of these is that the loss will be borne by the person who caused it i.e. by the party at fault, basically, who is responsible for committing breach. But there are certain difficulties in this principle. These are as follows:-

- Why avoidable loss is not recoverable? and
- Why one should take reasonable steps to reduce loss?

Analysis made under chapter three shows that where a loss to occur as result of these steps not having been taken, it would be held that the loss would have been legally caused by the omission of the person who could have very well avoided it.\footnote{Brace v. Calder , (1895) 2 KB 253; British Westing house Electric Co. v. Underground Electric Rly Co. , (1912) AC 673; Jamal and MoolaDawood Sons & Co. , (1916) AC 175; Payzu Ltd. v. Saunders, (1919) 2 KB 581.} Actually, Section 73 imposes a duty on the party seeking damages to mitigate its loss. In MurlidharChiranjiLal v. Harish Chandra Dwarka Das,\footnote{(1962) 1 SCR 653.} the Supreme Court of India has set out two principles on which damages are calculated in case of breach of contract of sale of goods. The first is that the injured party has to be placed in as good a situation as if the contract has been performed. He who has proved a breach of a bargain to supply what he has contracted to get, is to be placed so far as money can do it in as good a situation as if the contract has been performed. This is qualified by a second principle i.e. the injured party is debarred from claiming any part of damages arising out of his neglect. The onus is on him to mitigate losses consequent to the breach of contract. The Supreme Court of India has decided that the principle of...
mitigation does not give any right to a party in breach of contract but it is a circumstance to be borne in mind in assessing damages.\textsuperscript{53}

It will be relevant here, to emphasize that Section 73 of the Act very clearly provides that compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach on the contract. However, it also states that the non-defaulting party is entitled to receive from the defaulting party the compensation for any loss or damage caused thereby, which the parties knew, when they made the contract, to be likely to result from the breach of it. It is also apparent from the above discussion that the principles laid down in aforesaid case of Hadley v. Baxendale have been adopted by the draftsmen within the language of Section 73 of the Act and the same has also been applied in various Indian cases.

It may be concluded that the general principle with respect to claiming the consequential damages by non-defaulting party is that the non-defaulting party is only entitled to recover claim such part of the damages or losses resulting from the breach by the defaulting party, as was at the time of execution of the contract reasonably foreseeable as liable to result from the breach. Further, the damage or loss “reasonably foreseeable” would \textit{inter-alia} depend on the knowledge possessed or shared between the parties. It is expected out of a reasonable person to understand and foresee the damage which may be suffered by the non-defaulting party and resulting from the breach by the defaulting party in the “ordinary course”. However, in case of existence of “special circumstances”, which are outside the purview of the “ordinary course” what is of utmost importance, so as to be able to claim the consequential damages, is that the defaulting party should be aware of the said “special circumstances” which would result into consequential losses for the non-defaulting party, at the time of executing the contract.

**RECENT JUDICIAL TREND IN INDIA**

A few important cases are required to be discussed here to know the recent trend of Indian courts. These are as follows:-

- **Mahanagar Telephone Nigam Ltd. v. Haryana Telecom Ltd.**\textsuperscript{54}

In this case, the question before the court was whether the court can interfere in a matter where an arbitrator has given an award while interpreting a contractual clause? The court held that it can interfere with such award and the award given in this case

\textsuperscript{53}M. LachiaShetty& Sons Ltd. v. Coffee Board Bangalore, AIR 1981 SC 162.

\textsuperscript{54}2010(5) RCR (Civil) 406 ; 2010(5) AD(Delhi) 447 ; 2010(2) ALR 60 ; 2010(6) RAJ 437.
has been set aside by the court. The court further stated that award denying liquidated damages to party on ground that party failed to prove any loss caused to it, is also not justified because it is not necessary that there should be proof of actual loss and the nature of contract can show that loss has been caused. Moreover, onus of proof is on guilty party to show that no actual loss was caused. Only if he is able to establish so, then the aggrieved party will not be entitled to any amount towards liquidated damages under a contractual clause. And on the question how much damages can be awarded, the court has made it very clear that the figure of liquidated damages given in the contract is only an upper limit of damages and lower reasonable sum instead of stipulated amount of liquidated damages, can also be awarded.

- **B.S.N.L. v. Reliance Communication Ltd.**

  It has been held by the Apex Court in this case that Section 74, Indian Contract Act, 1872 is not violated, because the terms of the contract itself shows that the amount stipulated in the contract contemplated pre-estimation of reasonable damages rather than penalty. The Court further keeping in view the desirability of providing of liquidated damages in the commercial contracts, particularly where commercial activities are subject to regulatory regimes, held that the courts should generally not categorize liquidated damages as penalties because provision of liquidated damages reduce uncertainty and resultantly help in reducing litigations. Thus, the terminology used for these damages, whether penal or liquidated, is not the decisive factor though it is one of the factors to be taken into consideration while determining real nature of these damages whether they are penal or liquidated.

- **Tower Vision India (P.) Ltd. v. Procall (P.) Ltd. CO.**

  In this case, the observations made by the court are worth-mentioning here. These are as follows:

  A “Debt” is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the *sine qua non* of a debt. “Damages” is money claimed by, or ordered to be paid to; a person as compensation for loss or injury. It merely remains a claim till adjudication by a court and becomes a “debt” when a court awards it.

  In regard to a claim for damages (whether liquidated or unliquidated), there is no “existing obligation” to pay any amount. No pecuniary liability in regard to a claim.

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55 2011(1) SCC 394; 2011 AIR (SCW) 525; 2010(12) Scale 586; 2011(1) SCC (Civil) 192.

for damages arises till a court adjudicates upon the claim for damages and holds that
the defendant has committed breach and has incurred a liability to compensate the
plaintiff for the loss and then assesses the quantum of such liability. An alleged
default or breach gives rise only to a right to sue for damages and not to claim any
“debt”. A claim for damages becomes a “debt due”, not when the loss is quantified by
the party complaining of breach, but when a competent court holds on enquiry, that
the person against whom the claim for damages is made, has committed breach and
incurred a pecuniary liability towards the party complaining of breach and assesses
the quantum of loss and awards damages. Damages are payable on account of
discretion of the court and not on account of quantification by the person alleging
breach.

When the contract does not stipulate the quantum of damages, the court will assess
and award compensation in accordance with the principles laid down in Section 73.
Where the contract stipulates the quantum of damages or amounts to be recovered as
damages, then the party complaining of breach can recover reasonable compensation,
the stipulated amount being merely the outside limit.

Even if the loss is ascertainable and the amount claimed as damages has been
calculated and ascertained in the manner stipulated in the contract, by the party
claiming damages, which will not convert a claim for damages into a claim for an
ascertained sum due. Liability to pay damages arises only when a party is found to
have committed breach. Ascertainment of the amount awardable as damages is only
consequential.

➢ Gian Chand v. M/s. York Exports Ltd.\(^{57}\)

Although this case is related to Sec.56 of the Indian Contract Act, which is related to
doctrine of frustration. The question before the court was whether the contract
frustrated or not? Another question before the court was whether the payment of
interest awarded by the High court on decreetal amount which was from the date of
institution of the civil suit till the payment to be made by the defendants to the
plaintiffs is justifiable? The said aspect of the matter has also examined by adverting
to the provisions of Sections73, 74 and 75 in Chapter VI of the Indian ContractAct
and also taken into consideration the decisions of various High Courts and this court

has held that the defendants have not proved that they sustained losses on account of the non performance of the contract by the plaintiffs. And after proper evaluation of the pleadings and evidence on record has rightly rejected the contentions and decreed the suit for sum of Rs. 39, 20,000/- with 6% interest per annum from the date of institution of the suit till the date of payment of money after holding that there is no frustration of contract in which the parties has entered into. And finally the Apex Court has held that the award of interest on the principal amount and decreetal amount in the impugned judgment is perfectly justifiable on the basis of the facts and circumstances of the case.

➢ M/s Construction & Design Services v. Delhi Development Authority

In this case, the question for the consideration of the court was when and to what extent can the stipulated liquidated damages for breach of a contract be held to be in the nature of penalty in absence of evidence of actual loss and to what extent the stipulation be taken to be the measure of compensation for the loss suffered even in absence of specific evidence. Further question was whether burden of proving that the amount stipulated as damages for breach of contract was penalty is on the person committing breach. In this case, the Apex Court has found that the High court failed to consider Sections 73 and 74 of the Indian Contract Act, P. D’Souza v. Shondrillo Naidu,\textsuperscript{59} Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.,\textsuperscript{60} and the ratio laid down in Fateh Chand’s case\textsuperscript{61} wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable

\textsuperscript{58} 2015(42) SCD 354.
\textsuperscript{59} 2004(6) SCC 649.
\textsuperscript{60} 2003(5) SCC 705.
\textsuperscript{61} 1964(1) SCR 515.
compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. The Court stated that by applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the Court has to proceed on guess work as to the quantum of compensation to be allowed in the given circumstances. Since the respondent could also have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, the Court was of the view that it would be fair to award half of the amount claimed as reasonable compensation. The Court held that out of the amount deposited in this Court, the respondent will be entitled to withdraw the said decreetal amount and the appellant will be entitled to take back the remaining.

After going through the recent judicial trend in India, the researcher would like to give some suggestion which may be very helpful in making the law related to this subject more resonance, stringent and useful.

**SUGGESTIONS FOR FUTURE ACTION**

- One cannot deny the fact that the people who are involved in commercial transaction have their own working style and limitations while dealing with the contractual matters like breach arising out of contract and the compromise to be made in the situation of breach of contract. In fact, it is true that damages can never be a precise science; it is more or less a compromise or an adjustment only. Moreover, the business people still have hesitation or rather one can say fear of a lengthy court proceeding and the deadly technicalities of the proceedings. From
the analytical research on judicial trend prevailing in India and some other countries like England, Australia and Canada on the subject of damages for breach of contract, the researcher found that in India, the concept of nominal damages is yet to be developed to the extent in which it is developed in other countries. Even in those cases, where legal breach of contract is proved but if the party that is suffering from such breach has not suffered any monetary loss out of it, still required to face certain hassles in the litigation. Therefore, the researcher strongly submitted that there is a dire need to recognise nominal damages in India also and in such situations the courts in India should also come up seriously on the party responsible for committing breach after the contract is being made and breach is being proved, even if the nature of damages (which is required to be awarded) is nominal damages.

- The important question which is arising on and often before the courts of Law in India is regarding “Exemplary damages”. These damages are intended to make an example of the defendant; they are punitive and not intended to compensate the plaintiff for any loss, but rather to punish the defendant. The main difficulty which the courts of Law in India is facing is that the courts are unable to understand whether there is any need to award exemplary damages, once the litigation gets over and the verdict being given by the competent court regarding the particular issue of damages arising out of breach of contract or not? After analysing a large number of judicial pronouncements, it may be stated that even today, courts in India are so liberal that they are hesitant while exercising its power of awarding compensation or damage under the head of ‘exemplary damages’ or ‘punitive damages’. This is the reason that time and again the liberal approach of the Hon’ble courts in India has always been misused and underestimated by the party who is responsible for breach of contract. That is why the researcher feels that there is a need to make the laws strict and quite enough regarding the grant of ‘exemplary damages’ and moreover the courts in India should adopt a little bit more harsh attitude in this regard like the courts in other countries like in England.

- ‘Aggravated damages’, which are (basically compensatory in nature) awarded to compensate the victim of a wrong for mental distress, or injury, in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong, or by the conduct of the defendant subsequent to the wrong. The basic problem with the concept of such aggravated damages is that
it is not developed at its fullest as far as the contractual obligation is concerned in India. The rules regarding calculation of damages should be more clear and strict in India.

- Sometimes, the court award damages for mental pain and suffering caused by the breach of contract. These damages are considered as an exception to the general rule that the damages are awarded only for financial losses caused by the breach of contract. The amount of money awarded to the claimant in civil litigation to punish the wrongdoer and to deter the wrongdoer and others from engaging in unlawful conduct in the future is known as vindictive damages. Generally, in the following types of cases, mental suffering and pain of the aggrieved party have been taken into account to award exemplary or vindictive damages:-
  1. Unjustified dishonour of a cheque;
  2. Breach of promise of marriage.

The problem in this regard is that the analysis of judgments itself shows that the concept of vindictive damages or retributory damages is also not found place in the judgments delivered by the Indian courts. It clearly means that Indian legal system is still lacking in awarding damages under this head. Therefore, it may be submitted that now the time has come when for the proper utilization and implementation of law of damages for breach of contract the Hon’ble Courts of India should be strict enough in awarding damages under this head also.

- The irony of law of damages in India is that on one hand under Sec.73, it is provided that special circumstances must be within the contemplation of both the parties at the time of making the contract, whereas on the other hand while awarding damages, it is considered that the special circumstances attached to the contract must be known to the promisor only, at the time of making the contract, and not later. Thus, even after suffering with the heavy losses due to the breach committed by the other party, it is only the plaintiff, who has to prove that he has suffered losses. This seems to be one of the most agonizing and feeble situations for the litigant who is knocking the doors of the courts of law with folded hands and with great faith in the system. A zigzag between two judgments\textsuperscript{62} of the Hon’ble Delhi High Court triggered off a controversy, unfolded hitherto such extent: whether, on breach of contract by the defendant -seller, the plaintiff -buyer

is liable to prove his loss on actual purchase of similar (substituted) goods to enable him to justify his claim for damages in a court of law? In other words, it can be said that there are no specific rules which can govern those situations where the courts can award damages without there being an actual loss due to no purchase? If this theory is relied on, will not this theory knock the bottom out of the law of damages, because it will wipe out the notional assumption of loss, based upon the difference between market price and contract price? Thus all doubts in this regard must be cleared by framing some specific rules by parliament as well as by the courts of Law in India.

- So far as the law related to damages for breach of contract is concerned, it seems still unsatisfactory as there is no system, which provides some sort of penal consequences for committing breach. Perhaps this is one of the strongest reasons that the promise, which is given voluntarily by the party at time of entering into contract, is taken so casually by the same party at the time of committing breach of it.

- In modern era, keeping in view the complexity of commercial transactions, the researcher strongly feels that the Indian legal system unsatisfactory to the extent that it is not well equipped with any sort of alternate dispute redressal machinery. It is not always true that the parties are willing to commit breach of contract because sometimes it happens that the parties may not really intend to commit a breach, rather the party who is committing breach also has the strong eagerness to perform the contract, but due to the lack of proper and authentic legal advice regarding the advantages of performing his part of obligation, and the consequences arising out of non-fulfilment of the obligation, the party commit blunder to discontinue with the contract and by that makes himself guilty for the breach of contract. Therefore, there must be some sort of alternate dispute redressal machinery.

- The emphasis of classical law of contract on certainty, liability-limiting devices, and standardized rules led to the embrace of a variety of artificial limits on expectation damages in general, and lost profits in particular. This trend can be seen as part of a wider recognition that damages for breach of contract have a tendency to be under compensatory, and that under compensation is at least as inefficient as over-compensation. As business conditions have changed, as profits have come to be recognized as central to business value, and as economic analysis
has shown that expectation damages are both fair and efficient, the artificial limits classical law of contract placed on expectation damages and lost profits have gradually been falling away, and law of contract has been moving toward the goal of full compensation. The principle of Hadley v. Baxendale\textsuperscript{63} might have served an important function in an era in which small firms were very important and in which the courts often thought that fairness issues could not be directly addressed in law of contract. The survival of the principle might also have been due in part to an incorrect observation that the principle of Hadley v. Baxendale\textsuperscript{64} merely requires foreseeability and that dropping the principle would therefore lead to dropping foreseeability as a limitation on damages under law of contract. But now the time has come to change the law related to damages for breach of contract and the alternative for the principle settled under the above mentioned case can be a regime of proximate cause, contractual allocations of loss, and fair disclosure. Although, it would not mark a radical break with existing law, but it would rather complete a transformation that modern business practice and modern law of contract have already been undergoing.

\begin{itemize}
    \item The standard of foreseeability under the principle of Hadley v. Baxendale should also be relaxed now because due to the changing scenario of commercial transaction, an economic shift from small firms to high-volume sellers has come, who have the capacity to deal with liability by the use of probabilistic techniques, and to the everyday use of contractual allocations of loss to limit their liability. Perhaps, this may be the reason of increasing intricacies in modern era and in the awareness and assessment of probabilities, the risks that would at one time have been considered to be too remote are now considered to be at least likely.
    \item Moreover, the standard of foreseeability required for the calculation of damages should vary according to the nature of the interest occupied and the wrong involved and where lost profits or missed opportunities are involved, the baseline standard of reasonable foreseeability should be applied; and the relevant standard should be applied at the time of the breach.
\end{itemize}

If adoption of suggested regime seems too radical to the Indian legal system, they should at least follow emerging judicial trends not only of India but they should consider the trends of least look at other countries because commercial transactions

\textsuperscript{63} Supra note 10.

\textsuperscript{64} Ibid.
are not only a matter of interest of one country, but these are prevailing all over the world and there is nothing wrong to learn from others if one can learn.