Chapter V

Contract based remedies available to consumers in India.

**Contract based remedies:**

**Introduction**

Before the enactment of the Sale of Goods Act, 1930, provisions relating to the sale of goods were contained in Chapter VI of the Indian Contract Act, 1872. These in turn codified mercantile custom as it had developed in Europe and incorporated in judgments of the British Courts. In 1893, the British Parliament enacted a comprehensive legislation on sale of goods, on the basis of the draft prepared by well-known jurist Chalmers. The Special Committee which drafted the Indian Sale of Goods Act relied on the British legislation. The Special Committee decided to adopt only those provisions of English law as were suitable to Indian conditions. Although the law has been detached from the Indian Contract Act, it has been expressly provided that the unrepealed provisions of that law shall continue to apply to contracts for sale of goods.¹

A statement made during negotiations may sometimes be classified as a contracted term. Men of full age and competent understanding shall have the utmost liberty of contracting and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.

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¹ Dr. N. Saraf "Law of Consumer Protection in India"

In the nineteenth century freedom of contract flourished in the west and in India it was used against the weak and the helpless segments of population for the purpose of providing regular flow of labour in agriculture and plantations. It was also exploited by the money lender against the debtor. Inspite of contractual arrangements being entered into freely, the person in dominant positions exploited those who were subservient. The seller by virtue of his command over resources, expertise and bargaining power, is in a position to avoid liability in respect of unfair trading transactions involving supply of defective and deficient goods and services to the consumers. The slogan, 'Caveat Emptor' operated to strengthen the buyer in the market place. Let the buyer beware was the cornerstone of the law of India. It was expected of the buyer to take all care at the time of inspection of the goods. But due to enactment of the consumer protection Act, 1986 and general awareness among the consumers and formation of various consumer organisations, the old age slogan of caveat emptor required to be modified and instead of that slogan, now seller should beware, is projecting slogan.

The aim of this Chapter is to enlighten the consumers while purchasing various goods and not to be the victims at the hands of the sellers.
Provisions: It contains the following provisions.

Conditions and Warranties

While negotiating a contract the parties make certain statements regarding the goods and services which are the subject matter of the contract. These assertions are an integral part of the contract. These assertions imputed by the law constitute conditions and warranties, under the Sale of Goods Act, 1930, it is provided that a stipulation in a contract of sale may be a condition or a warranty. A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated whereas a breach of warranty would not give rise to such a drastic remedy since a warranty is a stipulation collateral to the main purpose of the contract, its breach gives rise to an action for damages only. It is open for a party to treat breach of a condition as a breach of a warranty. In that event it may not repudiate the contract.

Implied Undertaking as to title

Under Section 14 of the Sale of Goods Act, 1970, the law imposes an implied condition on the seller that he has a right to sell the goods and implied warranties to the effect that the buyer would enjoy quiet possession and the goods would be free from any charge.

No one can transfer a title better than he possesses. If the seller has no title to the goods sold, the buyer is entitled to recover the money under Section 61 (1) of the Act.
The implied warranties of quiet possession and of the goods being free from charge are corollaries of the right to sell the goods. If in executing an sale deed of land the fact that the lands are charged is concealed, it will amount to fraud, and the buyer will have the right to treat the transaction as voidable.

**Implied Condition Relating to Description**

Under Section 15 of the Sale of Goods Act, 1930, there is the implied condition that the goods shall correspond with the description, and if the sale is by sample as well as by description, then, bulk of goods correspond with the sample and description, too. The right of the buyer to receive the goods strictly according to description is not only a statutory right but also a condition precedent to the obligation of the buyer to accept the goods. If the condition is not fulfilled, he may reject the goods and recover the money paid.

**Implied Condition as to Merchantable Quality.**

Under Section 16(1) of the Sale of Goods Act, 1930, it is provided that "When the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relied on the seller's skill or judgement and the goods are of a description which it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose."
The nature of goods generally reveals the purpose. Thus food articles are meant for consumption, a vehicle for transport of passengers and goods and a television set for amusement. If the goods can not be used for these obvious purposes, they are not fit to be sold. Once it is established that the seller was knowing the purpose, the onus falls on him to show that the goods are fit for that purpose.

**Fraud and Misrepresentation**

Under the provisions of the Indian Contract Act, a contract may be avoided if it has been entered into as a result of fraud or misrepresentation. Both involve making of statements which are false. Consumer must show "intention to deceive" in the case of "fraud" and the state of knowledge or establish causing of a mistake in misrepresentation.

(3) **Drawbacks:**

(1) Freedom of contract flourished in India but it is used against the weak and the helpless segments of population.

(2) It is exploited by the money lender against the debtor.

(3) Persons in dominant positions exploits subservient.

(4) The seller by virtue of his command over resources, expertise and bargaining power, is in a position to avoid liability in respect of supply of defective and deficient goods and services to the consumers.

(5) The doctrine of sanctity of contracts has been effectively used by traders to protect themselves from liability arising out of their negligent acts.
(6) There is no freedom for little man who take the ticket or order form or invoice. The big concern said, "Take it or leave it". The little man has no option but to take it.

(7) Consumers are lacking in knowledge, awareness and unity among themselves.

(8) Any restraint on the liberty of an individual is looked upon with disfavour by the society.

(9) The retailers are made the victim of the defective goods supplied by the manufacturers.
(4) **Suggestions** -

1) The Court should give effect to a contractual stipulation however disadvantageous it might to be to its author.

2) Each individual is the best judge of his interests.

3) It is suggested that men of full age and competent understanding shall have the utmost liberty of contracting and their contracts when entered into freely and voluntarily shall be held sacred and be enforced by courts of justice.

4) Freedom of contracts should not be allowed to use against the weak and helpless segments of population.

5) It is suggested that government should provide incentives to encourage manufacturers.

6) Section 14 of the consumer protection Act, 1986 gives the power to the consumer forum to order the replacement of goods "with new goods of similar description which shall be free from any defect. " It is suggested that the buyer should have the right to claim damages in addition to his right of rejecting the goods.

7) It is suggested that manufacturer should exercises due care and caution by adopting the highest standards in the process of manufacture.

8) The retailer should not be the victor of the defective goods supplied by the manufacturer.
CONCLUSION:-

The identification, amplification and clarification of the relevant provisions of the contract Act are for the better protection of the consumers at large. It strengthen the consumer sovereignty and enables the consumer to form union and strength.

Starting with the age old rule of caveat emptor, the law and the judges are in favour of the seller. The nineteenth century provisions are quite inadequate to deal with the twentieth century methods of buying and selling.

With the development of new commercial practices, new methods of trade transactions, varieties of hire purchase systems, self-service shops with sophisticated articles including those with scientific intricacies, the buyer is found to be in a difficult situation. The law came to his rescue. Uniform Exemption Clauses have either been controlled or modified or completely disallowed by the intervention of law.
Introduction:

"Ubi jus ibi remedium", the law of torts is based on this maxim, means, "there is no wrong without remedy".

The law of Torts is the branch of law governing actions for damages for injuries to certain kinds of rights, such as the rights to personal security, property and reputation. This branch of law has acquired great amounts of attractions of litigation in England and in the United States, and meagre extent in India. The invention of motor car, aircraft, TV. and the Wireless, the development of industry and commerce, the growth of population have brought many advantages to the citizen which do not minimise the chances of injury to his private rights enumerating in the Section 6 of the Consumer Protection Act 1986.

In this Chapter, I have attempted to examine analytically the Law of Torts to keep the same in consonance with the rights enumerated in the consumer Protection Acts 1986 to enable the consumer to take the maximum benefit of his rights and keep eyes on the rights for betterment. It is a live and growing branch of law.
There is no Indian law governing torts. The Laws of Torts as applied in India are the English laws as modified by Acts of the Indian Legislature and administered in accordance with the principles of justice, equity and good conscience. The expression "equity and good conscience" means the rules of English law so far as they are applicable to Indian society and circumstances. Its main theme is the definition of the individual's rights and duties in conformity with prevalent standards of reasonable conduct and public good and convenience.

To constitute a tort, there must be a wrongful act committed by a person, the wrongful act must result in a legal damage to another and the wrongful act must be of such a nature as to give rise to a legal remedy in the form of an action for damages.

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Definitions:

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Dr. Winfield has made a critical examination of many possible or current definitions and the one suggested by him is as follows:
"Tortious liability arises from the breach of a duty primarily fixed by the law, such duty is towards reasons generally and its breach is redressible by action for unliquidated damages."¹

The term "tort" is the French equivalent of the English word "Wrong" and of the Roman Law term "delict". The word 'tort' is derived from the Latin term tortum to twist and implies conduct which is twisted or tortious.

Salmond defines a tort as "a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."²

According to Fraser "Tort is an infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party."³

In every tort there must be a wrongful act and legal damage or injury, and that every injury imports damage.

Tort consists of when, there are:

1. Wrongs to the person - Death, assault and battery, false imprisonment, trespass of the person, injuries affecting family relations.

2. Wrongs to reputation - Defamation.

3. Wrongs to property - Trespass to land, conversion and other wrongs to chattels.

4. Wrongs to person or to property - Deceit, negligence, nuisance, conspiracy, breach of strict duties.

5. Wrongs to interference with freedom of conduct or of business.

6. Abuse of legal procedure - Malicious prosecution, maintenance and champerty.

7. Miscellaneous torts.
Contents of Tort Law:

The following are the contents of Tort Law:

Violation of Right: A tort occurs where there is a violation of a right or breach of duty. Some of the most important of them are rights to the security of his person, domestic relations, property, reputation, protection from pecuniary loss caused by perversion of judicial machinery, fraud, interference with contractual relations, trade, business and employment, infringement of patent, copyright and trade mark.

The constitution enumerates certain rights known as Fundamental Rights which has a remedy against it in a court of law. Some others such as the right of access to public places, hotels, restaurants, tanks and wells and religious, cultural and educational rights are new. The Indian law of torts has now to take note of these constitutional rights.

Extension of rights:

The categories of rights are not closed and may expand with new needs and conditions. The development of Tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all. In the United States, courts have found it necessary to protect certain rights not recognised in England. The Right of privacy e.g. the right of a person that his photograph should not be published without his permission for commercial advertisement, or that his private affairs should not be given publicity without any justifiable purpose.
Basic rules about right and remedy

If there is a right, there is a remedy, in law, for its violation. Injury without damage is actionable, but damage without infringement of legal right is not. The proper remedy for a tort is pecuniary compensation in the form of damages. The right to recover unliquidated damages is the distinctive feature of a tort. There are other remedies e.g. injunction or specific restitution which are available in certain cases of tort in addition to damages, provided in such cases the wrongs concerned are closed as tort only because the right to damages exists. There is no wrong without remedy. It is a vain thing to imagine a right without remedy. There is no right without a remedy.

Breach of Duty: - Right and duty are correlative and a violation of the plaintiff's right is a breach of the defendant's duty to him. Peculiarity of a tort is that a person may be liable also for another's breach of duty and not his own, where he has to pay damages for his servant's wrong.

Means of Liability: - Liability for a tort may arise in one of the following ways: - intentional wrongdoing, negligence, absolute liability i.e. liability without fault, vicarious liability, breach of duty under statute. There are cases in which a person may be held liable absolutely, without any fault. A common carrier is liable for the loss of goods due to robbery. An instance of vicarious liability is that of a master to pay damages to the person injured by the tort of his servant. Breach of duty under statute
is illustrated by an employer's failure to observe the duties imposed on him by the Factories Act for the benefit of his workman.

Extension of Liability: As rights are being extended or added to, similarly the bounds of liability are being widened to meet new needs and situations. If, in spite of this, it is held in a particular case that the injury suffered by the plaintiff is not due to any negligent conduct of the defendant, the plaintiff can not claim compensation from the defendant for what is in law only an accident, nor can he do so merely on the ground that somebody ought to pay for the injury suffered by him. The law is extending the bounds of liability in another direction by enlarging the sphere of absolute liability.

Statutory extension of right and liability:

The legislature has been adding to tort law by enactments recognising rights of action and modes of liability not recognised by the courts. For example the Fatal Accidents Act which encourages the relatives of a person killed by the wrongful act of another to sue and recover compensation from the wrongdoer. An instance of the wrongdoer is the Factories Act which imposes absolute liability on the employer for injuries to his employees in his factory, though not due to any intentional or negligent conduct on his part.
Defences and Remedies:

Besides right and liability two other things are important in an action for tort. They are defences and remedies. The remedy by way of damages which a plaintiff has a right to cover in an action for a tort belong to the category known as "unliquidated damages." The right to recover unliquidated damages is an essential and distinctive feature of a tort. The phrase 'damages' in a collision clause in a marine insurance policy was held to apply only to a claim in tort.

Injuries to Person:

The security of the human person comes first in importance among civil rights. The law of crimes prescribes punishment for the violation of this right, whereas the law of tort is concerned with the award of damages to the aggrieved. An action for damages lies for causing bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In an action for damages for bodily harm the plaintiff must show that the defendant is liable in one of the five ways, intentional wrongdoing, negligence, absolute liability, vicarious liability and breach of duty under statute.

The division of torts into groups one of which bears the title of injuries to the person, is in accordance with a juristic classification of rights and wrong in relation to different interests of citizen such as the security of his person, property and reputation. The arrangement here adopted makes it possible to regard personal injury as a generic and comprehensive group of wrongs of which bodily harm is a species and to classify modes of liability.
for such harm. The category of personal wrongs included torts of negligence causing personal injuries. Bodily harm can be conveniently divided in two separate categories viz. first trespass or intentional injuries such as battery, assault, false imprisonment and secondly what can be termed as non-trespassory injuries such as physical injuries, nervous shock, injury to child before its birth and death which are actions of negligence.

Battery:

This is the name given to the intentional application of force to a person without lawful consideration, known as 'the use of criminal force' in the Indian Penal Code. Battery need not be accompanied by any bodily harm. In an action for battery, the plaintiff must prove, the use of force to him. It may be directly to his body e.g. slapping or pushing, bringing an object into contact with him like setting a dog or throwing a stone on him. It may also be some object in contact with him e.g. touching his coat, upsetting the carriage on which he is seated or a ladder on which he is standing, whipping the horse on which he is riding and making it throw him off.

Secondly, the use of force must be intentional and without lawful justification. For example, a parent chastising a child, a policeman laying hands on a person for arrest under a warrant.

Assault:- It means an attempt or threat to commit a battery. An assault is a tort and crime for the same reason as battery viz its tendency to provoke a breach of the peace. In order to make out the tort of assault, the plaintiff must prove that there was some gesture or preparation which constituted a threat of force. More words are not enough, nor possibly conduct, like standing in
a doorway to obstruct an entrance. Secondly, the gesture or other action must cause reasonable apprehension of force. Assault must be intentional. A mere threat or menace not showing an intention to use instant force is not an assault.

False imprisonment:

False imprisonment means the total restraint of a person’s liberty without lawful justification. Every restraint of the liberty of one person by another is in law an imprisonment and, if imposed without lawful cause, a false imprisonment which is both a criminal offence and an actionable tort. False imprisonment is a tort and as it was usually accompanied with force or threat of force was regarded at a very early time as an assault or trespass. Assault is known as wrongful confinement in the Indian Penal Code Section 340. In an action for damages for the tort, the plaintiff should prove, his imprisonment and that was caused by the defendant or his servants acting in the course of their employment. On proof of these facts, the plaintiff's case is complete and for the defendant to prove a lawful justification. It is unnecessary for the plaintiff to prove malice or an improper motive.

Imprisonment means a total restraint. A mere restraint of movement in one direction is not an imprisonment. It is an offence under the Indian Penal Code Section 339, and actionable by reason of damage resulting from it.
Where a Superintendent of Police sent a letter illegally directing the plaintiff to present himself before a magistrate and sent two constables to prevent his speaking to anyone, he was held liable for false imprisonment. A prison official who detains a prisoner beyond his term, acts in excess of his authority, is liable for false imprisonment.

**Constitutional Safeguards for Personal Liberty:**

Part III of the Constitution of India sets out the safeguards for certain rights, and secures these rights from invasion by the state itself. Therefore even a law passed by the State's legislative organs, viz. Parliament and the State Legislatures, in contravention of this part is void of law. These rights are called Fundamental Rights. One of them is the right to freedom. Article 21 of the Constitution that "No person shall be deprived of his life or personal liberty except according to procedure established by law". The aim of this provision is to protect the individual from any injury to life or liberty by the will of the Executive Government.

Article 22 provides more safeguards in regard of arrest and imprisonment. A person who is arrested and detained should be informed the grounds for arrest and should, and should be allowed the right to consult and be defended by a lawyer of his choice. Every such person should be produced before the nearest magistrate within 24 hours of his arrest and should not be detained longer without the authority of a magistrate.

In cases of the false imprisonment there is a remedy by way of an application for a writ of habeas corpus for ending the imprisonment.
Injuries to domestic relations:

Action by master for loss of service of his servant.

The rules on this subject relate to the relationships on master and servant, parent and child, husband and wife. The relationship of master and servant is contractual. A master can sue a person who takes away by force, entices, harbours, injures, or imprisons his servant and causes loss of service to the master, thereby, the cause of action is the loss of service.

The measure of damages is not to be ascertained at the actual loss which the plaintiff sustained at the time of enticing away of his servants, but for the injury done him by causing them to leave his employment.

Action by parent for loss of service of his child.

A parent has a right to sue a person who takes away by force, entices, harbours, injures or imprisons his child and thereby causes loss of service to the parent. The usual action of enticement is the action for seduction of a daughter. The loss of service must be proved and constitutes the cause of action.

Action by husband for loss of society of his wife.

A husband has an action for loss of the society or consistium of his wife caused by enticement, harbouring, inducing her to live away from him, physical injury or imprisonment.

A husband can claim compensation for loss of service and consortium or other damage resulting from physical injury to his wife, taking leave without pay in order to be near his wife for treatment for her injury.
In all these cases the action lies only on proof of loss of service. The service may be actual or constructive. In actions for these injuries damages would primarily represent compensation for loss of service and consequential damage.

Wrongs to immovable property:

Trespass: Trespass means some disturbance of a person's possession of corporeal immovable property. Like a land or house. In its etymological sense it means passing beyond, transgression or wrong.

The action for a direct injury to the person is called trespass in assault and battery; the action for a direct injury to the possession of land or premises was known as trespass 'Squander clausum fregit', "why defendant broke into the close of the plaintiff and the action for injury to goods as trespass de bonis asportatis.

In an action for trespass the plaintiff should prove, that he was in possession of immovable property and defendant disturbed his possession. It is a trespass to cause physical injury to another's land or to place things on it. The injury must be direct. Indirect or consequential injury is not a trespass but a nuisance.

Cattle trespass:

The trespass of cattle may give rise to other causes of action than trespass. It may be regarded as a nuisance as it is a violation of the maxim, "so use your own property as not to injure another's." It served as the foundation for an extended form of liability for cattle trespass. If the trespassing animal is known to its owner
to have a dangerous propensity, he is liable 'cattle' here includes horses, oxen, sheep, swine, asses, goats, fowls, geese, ducks, probably peacocks and turkeys and possibly also tame deer, but not cats and dogs. The right to distrain cattle which do damage and to detain them till compensation is paid is recognised in India in a modified form by the cattle trespass Act 1871.

The owner of the trespassing cattle is liable to pay damages for the mere trespass and also for any consequential damage e.g., damage to crops or infection of the plaintiff's sheep by the diseased sheeps of the defendant's injury to the plaintiff's mare by the defendant's horse kicking or biting it or injury to the plaintiff himself. But injury to a man by the defendant's horse is not a natural consequence unless the defendant knew that his horse had a tendency to attack men. When the element of trespass on land in the plaintiff's possession is wanting a person complaining of injury to himself or to his animals by the defendant's cattle cannot recover merely on proof of the injury and without proof of the defendant's fault.

The trespass will amount to the crime of theft or Larceny if a dishonest intent is present. A dishonest servant who walks away with his master's goods is however liable in trespass as he has no possession but only the custody.
Nuisance:—
The word 'nuisance' like the word 'tort' is a French word which means harm. Nuisance is an injury to the right of a person in possession of property to undisturbed enjoyment of it and results from an improper use by another person of his own property. Nuisance is actionable only if it causes both damage and injury. A right of way or of light is an incorporeal right over property not amounting to possession of it and a disturbance of it is a nuisance. The nuisance requires some continuity in the state of affairs which produces it, though it may be temporary. An isolated event can not be a nuisance, but a trespass.

Rights of easements form an important class and a disturbance of them is spoken of as a nuisance. As the law relating to natural rights and easements is developed through the action on the case of "nuisance". Pollution of a stream is a nuisance, but if an easement to pollute it has been acquired, the disturbance of the easement is also technically a nuisance. The modern law of nuisance is concerned with defining the measure of natural rights to the enjoyment of property without disturbance by others. The right to light can only be acquired as an easement, but a disturbance of it has been assimilated to the category of nuisance and its historical connection with the old remedy maintained by a decision of modern times. An injury to a right to purity is not merely an injury to a riparian right but would amount to a nuisance. Rendering the water noxious or unfit for use, an action lies for pollution of water. Altering the natural quality of water whereby it is rendered less fit for any purpose for which in its natural state it is capable of being used gives cause of action in nuisance. It is actionable without proof of actual damage, as it is per se an injury to his right of user.
Nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property and in the exercise of a common right. Public nuisance is a criminal offence and the remedy by indictment as per Section 268 of I.P.C.

Defamation:

The law has sought to protect the individual in his reputation as in his person and property. The right to an absolute right in rem and anybody who touches the reputation of another is said to do so at his peril. The essence of defamation is publication. A statement is said to be defamatory when it has a tendency to injure the reputation of the person to whom it refers. Defamation is a criminal offence as defined in Section 499 of the Indian Penal Code.

An action for defamation will be for any statement, whether it is published by words of mouth, writing, photograph, picture, film, broadcasting or television, signs or visible representation. It is an actionable wrong. In every action for defamation the plaintiff must prove that the statement refers to him.

An action for defamation is an action for damages for injury to the reputation of the plaintiff. Reputation is a thing which is not capable of scientific measurement.

A statement is said to be defamatory if it conveys concerning a person any imputation tending to bring him into hatred, contempt or ridicule or being concerning him in the way of his office, profession or calling, tends to injure him in respect thereof. Defamation constitutes a civil wrong as well as a criminal offence.
Tort based remedies:

The usual remedy is a civil action for damages. The plaintiff can ask for relief by way of an injunction to prevent or threatened publication of defamating statements. The remedy of criminal prosecution is also available.

Damages:

Damages are of two kinds, (a) general damages by way of pecuniary reparation or solatium to the plaintiff for the annoyance, mental pain, insult etc, (b) compensation for the special damage that he has sustained as a direct consequence of the publication.

General Damages:

The assessment of such damages is really arbitrary and not amenable to any standard of measurement. The amount will depend on the language, form and other circumstances of the publication and rank and social position of the parties. A defamatory statement made by a man of influence with presumably do more harm than by an insignificant person. The damages may be punitive, exemplary, nominal or contemptuous. The damages will depend on the violence of the defendant's language, the nature of the imputation conveyed, and the fact that the defamation is deliberate and malicious. This will enhance the damages.
In an action for malicious prosecution, as in one for false imprisonment, damages represent, first, general damages, a solatium for injured feelings and reputation, physical detention and consequent suffering, and second special damages, actual damages by way of pecuniary loss. In assessing damages the court will have to consider the nature of offence, inconvenience to the plaintiff, monetary loss and the status and position of the plaintiff. Damages awarded for loss of reputation are in the nature of solatium. Exemplary damages may be awarded in a fit case. In an action for the tort of maintenance, the plaintiff should prove special damage.

"Legal damage" means damage in the eye of law. Legal damage is not identical with actual damage, nor is it necessarily pecuniary damage. Infringement of legal right without actual damage, the person whose right has been infringed, can bring a suit under the provisions of Section 42 of the specific Relief Act. Legal remedy means that the wrongful act complained of must come under the category of wrongs for which the remedy is a civil action.

**The Tort of Deceit:**

The tort known as deceit in the modern law comprehends any false representation made by one with intent to derive another and resulting in damage to the latter. The writ of deceit was in origin a remedy for fraud committed in the course of legal proceedings e.g. by false personation of a party or witness. An action on the case in the nature of deceit is used as a remedy in certain cases of breach of contract e.g. fraudulent representation by a vendor of good about their quality or his title, resulting in loss to the vendee. Action of deceit has been identified for a long time with the law of contract.
The wrong of deceit consists in leading a man into damage by wilfully causing him to believe and act upon a false representation. The gist of the action is fraud and injury resulting therefrom. Thus in an action of deceit the plaintiff must prove (i) false representation, (ii) the defendant made it fraudulently, (iii) the defendant made it with the intent that the plaintiff should act on it and (iv) the plaintiff by acting on it sustained damage.

The tort of deceit enables a consumer to recover damages for the fraud practised on him by the other. A false or reckless statement with a view to deceiving the plaintiff so as to cause him some loss pecuniary or otherwise. So a consumer who suffers by any such means, the law of Torts permits relief in the form of damages.

In the present age of advertisement, every manufacturer, supplier, trader, distributor and even retailers believe that, "there is no business like show business". The law of Torts tolerates this 'advertisement gimmick' - under the name of puffing of goods.

Remedy:

The remedy is an action for damages for deceit. The plaintiff may sue to rescinded a contract to which his assent is procured by fraud. The measure of damages is the loss caused by the deceit. Where a person is induced by a false prospectus to take shares in a company, the loss is the difference between the money he paid for them and their actual value on the date of allotment.
Passing-Off Goods:

The action for passing off goods is the remedy for a false representation tending to deceive purchases into believing that the goods which the defendant is selling are really the plaintiff's. The representation may be by a direct statement to that effect, or as is more usually the case, by conduct, by way of using the distinctive mark, name, number, design, get-up or appearance of another's goods. In an action for passing off, it is enough if the plaintiff shows that the conduct of the defendant is calculated or likely to deceive or mislead the public or intelligent purchaser. On proof of this fact the plaintiff is entitled to an injunction and even to nominal damages.

Remedy:

The civil remedy is an action for passing-off. Besides, a criminal prosecution is also available for the offence of using a false trade mark. The plaintiff can ask for damages, injunction and other appropriate relief like delivering up of the counterfeited articles.
Interference with Contractual and Business Relations

Procuring a Breach of a Contract:

In this form of tort, wrong is the direct interference with an existing contractual relation, interference with the making of a contract, abuse of the right of trade competition and improper refusal to deal with another. In this type of tort an action is allowed against the defendant who induces a singer to break off her engagement to sing in the plaintiff's theatre. The invasion of such rights has become an independent tort. The doctrine of "Lunley V. Gye"¹, can be explained on the ground that a person who procures an illegal act i.e. an act which is illegal on the part of the immediate actor, is liable whether that act is a tort or a breach of contract. In an action for this tort, the plaintiff must prove, (i) that there was a contract between himself and third person, (ii) that the defendant procured a breach of it knowingly and (iii) that damage was likely to result thereby. This principles have been followed in India, in Rattayya V. Venkataramayya, and Gangaiah V. Gangadharan.²

The procurement of a breach of contract may be by physical violence or threat of it, or other harm like pecuniary loss, social or commercial boycott, advice or inducement. The breach of contract must be the direct consequence of the defendant's words or acts.

¹ (1853) 2 E & B 216.
An actionable interference with contractual relations was committed if a third party with the knowledge of a contract between two other parties and with the intention of causing or preventing its performance induced or procured the employees of one of those parties on whose services that party relied for the performance of his contract to break their contracts of employment with him. The procurement of breach of contract may be achieved either by a direct approach to the person concerned or indirectly by an appeal to others.

If a person by unlawful means interferes with the plaintiff entering into contractual relation with another then the plaintiff has a right of action against that person. A person may cause damage to another as when he induces the latter's customers, employer or employees to cease to deal with the latter. Where he has conspired with others with the motive of causing damage it is the tort of conspiracy. Two or more persons who cause damage to another by a conspiracy among them will become liable to him where their conduct amounts to the offence of criminal conspiracy, where the conspiracy is malicious. This principle has long been recognised and accounts for the origin of torts like libel, public nuisance and breach of statutory duty.

**Negligence:**

Negligence implies absence of intention to cause the harm complained of. It may be defined as unreasonable conduct which a reasonable man would avoid on the ground that it involves undue risk of harm to another. Such conduct followed by harm gives rise to liability for negligence. The word negligence signifies the tort of actionable negligence and the elements that constitute
the tort. It connotes the concept of duty, breach and damage suffered by the person to whom the duty is owing.

Negligence is a type of conduct in contrast with intentional wrongdoing and when it does not fail within the framework of one of the specific torts like trespass or nuisance, the plaintiff can make out a cause of action for the damage resulting from it only on proof of a breach of duty and its causal relation to the damage.

The plaintiff has to prove in action for negligence -

(i) that the defendant was under a duty to take reasonable care towards the plaintiff to avoid the damage complained of,
(ii) that there was a breach of duty on the part of the defendant,
(iii) that the breach of duty was the legal cause of the damage complained of.

The duty is "threefold" the provision of a competent staff of men, adequate material and proper system and effective supervision.
Injuries to miscellaneous rights

**Patent:** A patent is an exclusive right granted by the State to make, use or sell an invention for a limited time i.e. the 14 years. A patentee may sue for infringement of his patent and get damages as well as an injunction, damages can not be recovered against a person who was not aware of the existence of the patent but an injunction can be obtained against an innocent infringer.

**Copyright:** Copyright is the exclusive right in a work of literature or art, a cinema film, a record, to do certain things, such as in the case of literary, dramatic or musical work, to reproduce it, to publish it, or to perform it in public, to make a cinema film of it or a translation of it. The work must be original in the sense that it originates from the another and it not a copy of another's work.

In an action for infringement, the plaintiff may ask for damage or an account of profits or for injunction.

Right to an office or dignity, rights to the membership of a club, right of worship, rights conferred by the constitution, right conferred by statute, these rights are protected by laws. The general principle of tort law is that the plaintiff in an action for damages should make out the violation of a right recognised by the law. Merely to prove damage caused by intentional conduct will not make out a cause of action unless such conduct falls within the scope of one of the torts recognised by the law and discussed as above.
Remedies: The plaintiff may in appropriate cases ask for an injunction e.g. to stop infringement of a copyright or disturbance of a right to hold an office or to worship or may ask for a declaration of his right.

Absolute Liability:

In modern law of torts absolute liability means liability without fault i.e. without intention or negligence. A person who keeps cattle may not be able with reasonable care to prevent their staying and doing damage occasionally to his neighbour's crops, but it is just and conducive to the interests of agriculture that he should pay for the damage.

The rule of absolute liability under Rylands v. Fletcher for harm due to the escape of dangerous things brought by a person on his land is a modern extension of the old rule as to cattle trespass.

The legislature is free to invent new rules in order to meet new needs. Imposing on owners of factories duties of a stringent character which transcend the ordinary duty of reasonable care and make them liable for the acts and defaults of others resulting in injury to their workmen. In this respect there has been a revolution in legal concepts of liability.

The principle of insurance against harm is in accordance with ideas of social justice that now prevail and has now become the avowed feature of modern legislation such as the workmen's compensation Act.
Vicarious Liability

Vicarious liability means the liability of a person for the tort of another in which he had no part. It may arise under the common law or under statute.

(a) Under the common law

The leading instance is the liability of a master for his servant's tort and arising from the relationship of master and servant between them. A principal would be liable for his agent's tort committed under his authority, express or implied. Similarly, a partner is liable for his fellow partner's tort committed in the course of the business of the firm.

(b) Under statute law

The following are the instances of vicarious liability under statute:

- The liability of an employer under the Workmen's Compensation Act of authorities owing the railways under Railways Act, of the owner of aircraft under the carriage by Air Acts, and of police authorities for damage to property caused by a riotous mob.

A person may become liable by authorising another to commit a tort. The liability of a master for torts committed by his servant without his authority has assumed great proportions in the modern law.

The rule is usually stated thus: a master is liable for a tort committed by his servant in the course of the latter's employment. It must be committed in the course of that business so as to form a part of it and not be merely coincident with it.
**Malicious Prosecution**

The wrongs known as malicious prosecution and maintenance consist in causing damage by means of an abuse of the process of courts of law. Malicious prosecution is the name of the wrong for which the remedy is an action of the same name, i.e., forgery, perjury, conspiracy, deceit, and maintenance. The gist of the tort of malicious prosecution is in the damage, damage to a man's fame, damage to the person and damage to his property, damage is the gist of the action, it need not be proved but may be presumed. Damage is presumed and need not be proved.

Malice means, any motive, other than that of simply instituting a prosecution for the purpose of bringing a person to justice. Malice means an improper or indirect motive i.e., some motive other than a desire to vindicate public justice or private right.

Malice may be proved by previous strained relations, unreasonable or improper conduct like advertising the charge or getting up false evidence. More carelessness is not proof of malice, unreasonable conduct like haste, recklessness or failure to make enquiries would be some evidence.

In an action for malicious prosecution, the plaintiff has to prove absence of reasonable cause. The plaintiff has to prove malice. Damage is the gist of malice, in an action for malicious prosecution, as in one for false imprisonment, damages represent, first, general damages, a solatium for injured feelings and reputation, physical detention and consequent suffering and
second, special damages, actual damage by way of pecuniary loss.

(3) **Drawbacks:**

1. In spite of continued validity has been ensured by virtue of Act 372 of the constitution, tort litigation is sporadic, and meagre, due to congestion of courts with heavy arrears.

2. Litigant of tort receives less share in damages than his Advocate. This contingent fee system is against the professional ethics.

3. Under the law of torts duties are imposed on people generally to take care with a view to prevent some injury or harm taking place to person or property of others, but peoples are not vigilant of their duties.

4. Persons with superior skills such as doctors, engineers, architects and lawyers are supposed to maintain professional standards, but they do not exer excersize such standards and therefore consumers have to suffer.

5. As established in "Donoghue V. Stevenson" and Tort Law that manufacturer of a product owed a duty of care to the ultimate consumer but that duty is not maintained by the manufacturer.

6. Courts are reluctant to hold that a careless statement causing economic loss give rise to legal liability.
(7) There is no Indian Law governing torts. The laws of torts as applied in India are the English laws as modified by Acts of the Indian Legislature and administered in accordance with the principles of justice, equity and good conscience.

(8) It is the general law that a person is liable not only for torts committed by himself, but also by persons acting or purporting to act on his behalf. Thus master is responsible for the wrong of the servant committed in course of the service.

(9) Damage which is too trivial or indefinite for effective legal recognition, is not actionable. Mental pain or anxiety, the law can not value and does not pretend to redress. No action lies for mere mental suffering unaccompanied by physical harm.

(10) Only civil prosecution is actionable in Tort and not Criminal prosecution.

(11) Most consumers of industrial products have little knowledge of the complexities of modern technology.

(12) Consumers are afraid to get entangled in litigation with giant business organisations with unlimited resources.

(13) Consumers are not educated on reliability and durability of various kinds of products by voluntary organisations.
(14) No vesting of products takes place on a systematic basis and no consumer organisation has been able to set-up a product testing laboratory.

(15) Though ISI (Now BSI) standards exist, most of them are not mandatory, cases in which these are binding, the enforcement machinery is ineffective.

(16) Due to lowest economic class and illiteracy, the aggrieved party can not claim compensation on the basis of negligence.

(17) Manufacture certificate for the appliance is not obtained from the appropriate authority and administration connive at such requirement by receiving heavy periodical payments as illegal qualification.

(18) Suits regarding negligence are complex and are avoided wherever possible.

(19) To claim compensation for loss or injury suffered by the consumer, to prove negligence of the manufacturer, distributor or supplier of the goods. The factum of defect alone is not sufficient to claim damages under the consumer protection Act, 1986 with reference to Tort Act.

(20) If the court is convinced that prima facie case is established, even then court insists on the detailed evidence.

(21) The Indian public is very allergic to litigation.
Irreversible damage was caused to the eyes of patients in an "eye camp" because of medical misadventure. The victims rendered blind by an operation performed at an eye-camp at Khurja. The operation was done under the auspices of the Lion's Club. Mr. Ranganath Misra (as he then was) and M.N. Venkatachalaih JJ of the Supreme Court, on humanitarian considerations, directed the government to pay Rs.12000/- (in addition to the Rs.5000/- already paid by it) as interim relief to each blinded person. The court held that guidelines issued on 9-2-88 by the Union government were quite comprehensive as to eye camps. The court directed the union government to consider some of the prescriptions that are stressed in the report of the Sub-Committee of the Indian Medical Council, being prescriptions which are generally covered in government guidelines on the subject.  

1 AIR 1989 SC 1570.
(2) The Andhra Pradesh case of Sampath Reddy v. G.M.S. Venkataramma, is of importance on the subject of the employer's liability in tort. In this case, the driver, an employee of a corporation, left the bus in the bus station without making proper arrangements for guarding the vehicle by a duty licensed person as required by Section 84, Motor Vehicles Act, 1939. As a result, a stranger drove away the vehicle in an unauthorized manner, hit a cyclist and killed him. The heirs of the cyclist sued the corporation, which was held to be liable. The argument advanced by the corporation that this was a case of theft of the vehicle was held to be immaterial by the court. The crucial question was, whether the servant was acting during the course of employment. In the present case, according to the court, that test was satisfied. The contention that there was no nexus of employment between the corporation and the person who caused the accident, was also held to be irrelevant. Agreeing with the reasoning in Venkatachalam v. Sundarambal, the court came to the conclusion that the driver himself was negligent, and therefore, his employer, the corporation, was responsible.  

1. AIR 1989 AP 337.
In this case, the High Court of Punjab and Haryana held that breach of duty of care owed by the counsel was an actionable tort. If the counsel engaged by a party for conducting an appeal never intimated to the client the further progress of the case, and the appeal was dismissed for default, the court could direct the counsel to return the fee and to pay the costs of rehearing.

The Court observed:— The law is thus well settled that if counsel, by his acts or omissions causes the interest of the party engaging him, in any legal proceedings to be prejudicially affected, he does so at his peril.¹

¹ AIR 1989 P & H.
Once more, the question of unmanned level railway crossings figured before the courts. In Union of India V. Hanuman Prasad, there was a collision between a truck and a railway engine resulting in damage to the vehicle. The plaintiff sued the railway (Union of India) for damage. The defendant denied that it was negligent and further submitted the plea that there was contributory negligence by the truck driver (the plaintiff's employee). The trial court decreed the suit for a sum of Rs.33,000/-, holding that the railway administration was negligent in not making provision for manning the level crossing at that juncture. On appeal by Union of India, the High Court held that there was no negligence on the part of the railway administration. It was the duty of the driver of a motor vehicle to look around at the point of level-crossing, before proceeding further through the crossing. The railway, had put up a warning board, depicting the picture of an engine and cautioning the passers by. There was whistling from the engine at the level-crossing and there was no obstruction of vision at the site. Even if there was negligence by the railway, the truck driver was guilty of contributory negligence, as he had the last chance.¹

¹ AIR 1989 Cal. 207.

In this case the conductor invited passengers to take position on the roof when the bus was overloaded. On its way a passenger was struck by the branch of a tree when the bus was overtaking a cart. As a result of this a passenger received serious injuries. A few days later he died. The court held that the defendant was liable.¹

¹ AIR 1980 Cal. 155.
Suggestions:

(1) The Act must contain provisions which are favourable to the consumers.

(2) If the Court is convinced or if there is prima facie case established the court should not insist on the detailed evidence.

(3) Persons belonging to learned professions are under a duty to exercise reasonable degree of care and skill in performance of their professional activities.

(4) It is suggested that a manufacturer should not only engage competent persons but also establish a system of quality control to check products and their performance on a systematic basis.

(5) It is suggested that it is better to prevent unsafe goods entering the market.

(6) It is suggested to take all preventive measures in respect of a hazardous product to save life and property.

(7) The consumers are to be educated to understand the nature and magnitude of defects of industrial products which cause accidents.

(8) It is suggested that in case of hazardous products, the manufacturers are required to exhibit a high degree of care.
(9) It is suggested that industrially advanced countries have taken drastic steps to protect consumers in respect of inherently dangerous products reaching the market.

(10) It is suggested that in case the product is likely to react with certain substance or is likely to cause injury in some situations, the manufacturer must issue instructions in printed leaflets or otherwise accompanying the product at the time of marketing.

(11) It is suggested that consumers should be encouraged to file suits for compensation against the delinquent manufacturers and providers of services.

(12) For defective constructions which give rise to loss or injury to life and property, it is suggested that no builder should be allowed to commence business unless he is granted licence for the purpose. There should be an automatic suspension of the licence if the builder is found to be indulging in unfair trade practices.

(13) It is suggested that the consumers and producers must realise their responsibility to each other, as all production is meant for consumption. The government in a mixed economy has to play the role of a provider and an entrepreneur.

(14) It is suggested that Court should allow damages for tort in respect of distress and disappointment in addition for breach of contract, physical injury and financial loss.

...
Conclusions:

Decisions definitely show that on Government liability, courts are taking a wide view, that the tort of negligence now figures more frequently than before in Indian Courts. Many malpractices which have been a source of loss to consumers include use of sub-standard material, delay in handling over possession, change in specifications, extorting payment on various pretexts and making constructions unsafe. Legislation has been enacted by several states on safeguarding property rights to follow a procedure from time to time.

Where, there is an infringement of legal right without actual damage, the person whose right has been infringed, can bring a suit under the provisions of Section 42 of the Specific Relief Act.

Compensation suits are to be encouraged against wrong doers to uphold the Tort law and their provisions in relation to the Consumer Protection Act, 1986. Consumer awareness should be encouraged forming more and more consumer organisations; without which the voice of consumers will not be heard.

The duty of care should be extended from wrong doers to cover manufacturers, repairers, assemblers and retail dealers etc. The courts seem now to be willing to allow damages for tort or for breach of contract not only in respect of physical injury or damage and financial loss but also for distress and disappointment.
The Legislation, the Courts, the Government, the press, the consumer organisations, Fair Price Shops, Legal Aid Committee, Manufacturers and sellers in combination of all should thrive to uphold the provisions of Tort law to benefit the consumers in relation to consumer protect Act 1986.