QUANTUM AND MITIGATION OF DAMAGES UNDER INDIAN CONTRACT ACT, 1872

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INTRODUCTION:

To understand the exact meaning of word "Quantum of Damages", one has to first understand the meaning of word "Measure of Damages". The expression "Measure of Damages" is a technical phrase, which signifies the basis the footing, or the standard upon which the amount of damages in any given case is calculated. There are several factors, which influence Judges, Juries or any other decision making authority in determining the quantum of damages, which is to be awarded to a plaintiff who is complaining of an injury at the hands of the defendant.

FUNDAMENTAL PRINCIPLE TO DETERMINE THE QUANTUM OF DAMAGES:

There are three fundamental principles upon which the entire law proceeds to determine the quantum of damages. Those three fundamental principles are listed as below:

(I) Restitutio in integrum;

(II) Remoteness of damage; and

(III) Mitigation of damage.

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RESTITUTIO IN INTEGRUM:

The first and foremost principle to determine the quantum of damages is restitution in integrum. It has already been observed, in all cases of wrongful acts, which are arising out of breach of contract, the law only adopts the principle of restitution in integrum subject to the qualification that the damages must not be too remote. In other words, that they must be such damages as flow directly and in the usual course of things from the wrongful act.[1] Therefore, where an injury is to be compensated by damages, in settling the sum of money to be given in reparation of the damage, one should as nearly as possible get at least 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 or reparation.[2]

Remoteness of damage:

The next principle in determining the quantum of damages is the rule of the concept of remoteness of damage in case of breach of contract.

THE CONCEPT OF "MITIGATION":

The expression "mitigation of damage" is an umbrella term applied to a number of matters some of which are related and some of which are completely unconnected. Surprisingly, in view of the importance of the subject, these differences have not been fully analyzed in English law; yet it is vital to an understanding of the issues to separate the various meanings of the term. There are subsidiary or residual meanings of the term "mitigation". These have no connection with the three rules comprised in the principal meaning, because they are not concerned with the avoiding of the consequences of the defendant's wrong but come into play at an earlier stage in the matter. The first appears in cases where the conduct, character and circumstances of the plaintiff and the defendant affect the assessment of the damages; the second appears in cases where both the plaintiff and the defendant are in breach of contract.

The meaning of the term "mitigation" deals with the manner in which damages resulting from a breach of contract by the plaintiff can be deducted from the claim made by the plaintiff in respect of that contract. It is analogous to cases of contributory negligence in that both parties are at fault and a subtraction is made: nevertheless a reduction of damages on the ground of contributory negligence is not referred to as "mitigation". The only question that arises in these contract cases is a mater of procedure and of pleading, namely whether the defendant

[1] The Argentino, (1888) 13 P.D. 191.
[2] Livingstone v. Rawyards Coal Co., (1880) 5 A.C. 25; Hermanand Mohatta v. Asiatic S.N. Co., AIR 1941 Sind 146 at p. 150.

can claim the damages for the plaintiff's breach in full or in part with or without pleading the matter as set-off or counterclaim. This question is not germane to a textbook on damages and does not call for treatment. Whether, where such a reduction is allowed, the measure of reduction could have recovered in a separate action against the plaintiff.

THE RULES AS TO AVOIDABLE LOSS:

The extent of the damage resulting from a wrongful act can often be considerably lessened by well-advised action on the part of the person wronged. In such circumstances the law requires him to take all reasonable steps to mitigate the loss consequent on the defendant's wrong, and refuses to allow him damages in respect of any part of the loss, which is due to his neglect to take such steps. Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss, which could be avoided by reasonable efforts, or to continue an activity unreasonably so as to increase the loss. This well-established rule finds its most authoritative expression in the speech of Viscount Haldane L.C. in the leading case of *British Westinghouse* Co. v. *Underground Ry*[3] where he said:

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."[4]

THE QUESTION OF ONUS:

The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has been long settled, ever since the decision in Roper v. Johnson,[5] and was confirmed by the House of Lords in Garnac Grain Co. v. Faure & Fairclough[6]. Yet in Selvanayagam v. University of the West Indies[7] the Judicial Committee of the Privy Council held that, where a physically injured plaintiff had refused to undergo medical treatment to alleviate his injury, the burden was on him to prove that he had acted reasonably, a burden, which he was found to have discharged. Any suggestion that personal injury may differ from the commercial context which gave the rule as to onus its nemesis comes up against the two authoritative decisions of the House of Lords in which it was laid down that the burden of proof remains with the defendant in the particular case of the refusal of medical treatment,

[3] British Westinghouse Co. v. Underground Ry, [1912] A.C. 673.
[4] Dunkirk Colliery Co. V. Lever (1978) 9 Ch.D. 20, C.A., Jamal, v. Molla Dawood (1961) 1 A.C. 175
[5] Roper v. Johnson, (1973) L.R. 8 C.P. 167.
[6] Garnac Grain Co. v. Faure & Fairclough, [1968] A.C. 1130
[7] Selvanayagam v. University of the West Indies, [1983] 1 W.L.R. 585, P.C.

namely Steele v. Robert George & Co. and Richardson v. Redpath[8], Brown & Co.[9] the latter case was indeed cited by their Lordships in Selvanayagam but without any appreciation of what it had to say on the burden of proof, and their suggestion that the Australian case of Fazlic v. Milingimbi Community Inc.[10] places the burden of proof on the plaintiff does not survive an examination of that decision. The Guildford, the remaining authority cited by Their Lordships, was more explicitly misrepresented. While a passage from Lord Merriman's judgment there was prayed in aid in support of their Lordships' confident assertion that they "had no doubt" that the plaintiff had the burden of proof and that this was "well established", Lord Merriman was dealing not with mitigation at all but with remoteness, where there has been a substantial degree of controversy on burden of proof with the better view favouring a plaintiff's burden. One can only conclude that the decision of the Privy Council, being against the entire weight of authority, was arrived at per incuriam.

RECOVERY FOR LOSS INCURRED IN ATTEMPTS TO MITIGATE THE DAMAGE:

The plaint if f , during his efforts to mitigate the damage, may incur further loss, which will of ten be a loss which is not in addition to, but in place of and less than, the loss which he is attempting to mitigate. This is particularly so in the case of expenses. The expenses incurred by the plaint if f as the result of the breach of contract for which recover is al lowed in the cases are generally expenses incurred to avoid or minimize a loss. This is so where money is laid out in acquiring or hi ring a substitute where the plaintiff's property is damaged, destroyed or misappropriated; where medical expenses are incurred to ameliorate the plaintiff's physical injury caused by the defendant; where there is expenditure upon advertisements to counteract the effect of the defendant's infringement of the plaintiff's trade mark, or upon extensive inquires to detect the extent of the defendant 's unlawful machinations in inducing breaches of contract and in conspiracy. These various examples may be considered as examples of steps taken in mitigation of damage, but some of them are so common, such as medical expenses in personal injury cases, that they tend not to be thought of specifically from this angle. Whether regarded specifically as mitigation or not , the rule al lowing recovery for such expenses is at base the corollary of the rule refusing recovery for loss that could reasonably have been mitigated.

[8] Steele v. Robert George & Co., [1942] A.C. 497.
[9] Richardson v. Redpath, Brown & Co., [1944] A.C. 62.
[10] Fazlic v. Milingimbi Community Inc., (1982) 38 A.L.R. 424.

CONCLUSION AND SUGGESTIONS

The simplest way of frustration is where the event interfering with performance is totally, unexpected and such as the parties could not reasonably have foreseen, but the doctrine is wider in scope that it is clear that prima facie a contract may be discharged by frustration even though the parties foresaw or ought to have foreseen the frustrating event; but where, by reason of special knowledge, one party foresees the possibility of the event and conceals this from the other, the party with the special knowledge will not be discharged. Where the parties have made provision for the foreseen event the doctrine of frustration will as a rule have no application, except in cases of frustration by supervening illegality; but in certain cases the parties may not be taken to have envisaged the extent of the circumstances which in fact interfered with performance, and in such cases the doctrine of frustration, and not the express provision, will govern their position.

It is not unknown that modern business, particularly in international sphere by multinational concerns, is conducted after due consultation with the agencies which specialize in furnishing advice about predictable pattern of the future events in any particular country in any special sphere based on available information and by applying their latest methods to that information. This end is achieved not only by using human talent but computers also. Day is not far off when even in domestic contracts, business house may take advice of consultants regarding future conditions that may be prevalent not only in financial market but commodity market, labour and regarding all other factors which would go into the decision making process. As the area of foreseeability increases, correspondingly the area of frustration of contract would diminish.