Damages for prolongation of contract

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The topic assumes great importance, particularly in Building and Engineering contracts, because of huge delays caused by the employer in fulfilling its contractual obligations. The contractor suffers gigantic losses on overheads (on-site and off-site), under-utilisation/non-deployment of very costly machinery, besides actual rise in cost of materials etc.

While assessing damages for various breaches of contract committed by the employer, the arbitral tribunal is generally inclined to award nominal damages since the contractor is not in a position to give an accurate account of the financial sufferings. Even otherwise the rules as to damages can only be approximately just.

It is a matter of fact that damages are quite difficult to assess which, in any case, does not mean that the contractor would not be entitled to compensation for loss resulting from the employer's breach of contract. Where it is clear that due to various breaches of contract on the part of the employer, the contractor has suffered heavy losses but fails to precisely quantify, the arbitral tribunal shall assess damages as best as it can on the available evidence.

Before a contractor qualifies for award of damages, it is imperative that he keeps the employer informed about the likely loss being suffered by him. In case, he does not reserve the right to claim damages from the employer on account of various breaches of contract, then the contractor would not be entitled to the award of damages.

In *Hadley v Baxendale* (1), law with regard to damages was laid as under:

> "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 considered either as arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both

> parties, at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiff to defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

Section 73 of the Indian Contract Act is based verbatim on the judgment of *Hadley v Baxendale*. A few principles which emerge from this section and which are settled by various judicial pronouncements are:

(1) The Breach of contract entitles the suffering party to claim compensation for any loss or damage caused to him by such breach and which naturally arose in the usual course of things from such breach or which the parties knew which they made the contract, to be likely to result from the breach of it;
(2) Such compensation would not take into account any remote and indirect loss or damages; and
(3) The party who suffers from breach cannot sit with folded hands in the good expectation of recovering the compensation; it must take steps for remedying the inconvenience caused by the non-performance of the contract. Such obligation, of the party not in breach, is called its duty to mitigate damages.

The theory of damages is that they are a compensation and satisfaction for the injury sustained, that is, that the sum of money to be given for reparation of the damages suffered should, as nearly as possible, be the sum which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is receiving damages. (2)

Breach – What is:- When a party fails or refuses to perform his part of the contract, it amounts to breach of a contract. Thus where a party gives the other party an immediate cause of action, it results into a right to damages as compensation for loss arising out of the breach. In other words, it is the violation of an obligation by one party, by which right accrues to the other party under the contract to obtain a remedy for the breach in an action for damages. However, this does not relieve the injured party from the obligation to perform his part of the contract except when breach goes to the root of the contract.

The breach of contract may occur even before the time fixed for performance has been reached, e.g. where one party to the contract renders himself incapable, by some positive act, of discharging his part of the contract.

In such a situation, the injured may treat the contract as at an end and seek remedy in claiming damages without performance his part of the contract. By conduct, if one of the parties shows that he has no intention of performing his part of the contract it needs to be shown that the offender has refused to perform something which goes to the root of the contract. Mere desires to delay performance of the contract for a short duration of time due to unavoidable or unforeseen reasons would not give any cause of action to claim damages for breach of contract.

Breach of contract: In case a plaintiff fails to take delivery of more than half the stipulated quantity of goods, the plaintiff would be clearly in breach of contract and the defendant was justified in refusing to abide by the terms of the contract and the plaintiff was not entitled to any compensation on account of breach of the defendant. (3)

Where a party to a contract refuses to proceed with the work unless the opposite party agreed to certain new conditions, he commits a breach of the contract. In such a case, the opposite party would be justified in rescinding the contract and recover from the contractor loss or damage which naturally arose out of the breach.

Forms of breaches of contract: A breach of contract may take any of the following three forms:

(1) Where a party fails to perform his obligation upon the date fixed for the performance by the contract, e.g. where the seller does not deliver the goods on the appointed day;
(2) A breach may arise from express repudiation i.e. where a party states expressly that he will not perform his promise; and
(3) there is a breach if a party does some act which disables him from performing his obligation, e.g. where X has promised to marry Y, marries Z instead, such an act constitutes an implicit repudiation of the contract. (5)

Fundamental breach of contract: The dictionary meaning of ‘fundamental’ is basic, key, crucial, primary, vital, central, major, principal, main, chief, integral, indispensable. Hence, a ‘fundamental breach’, as the term itself suggests, is the breach of a basic, main term of the contract, so primary that upon such a breach, the other reciprocal promises cannot be performed by the other party to the contract. (6)

When there is a fundamental breach of contract, the aggrieved party has a right to treat the contract as at an end.

When there is a breach of the terms of a contract which is so serious in itself that it would be unreasonable to expect the other party to the contract. It is sometimes said of such term that they are fundamental, and that breach of them evinces an intention not to be bound by the contract, but this is at best a legal fiction, and the breach may well be involuntary and the guilty party may in fact be doing his best to perform, although simply unable to do so for whatever reason, such as financial stringency, lack of competence or for outside events for which he is contractually responsible. These breaches of 'fundamental' terms are also sometimes said by lawyers to be breaches of a 'condition as opposed to 'warranty'. (7)

While the defendant was carrying out the work, the defendant abandoned the original contract all of a sudden and wanted the plaintiff to executed the work by entering into a new supplementary agreement on the same rates, terms and conditions as contained in the original contract. However, the plaintiff did not sign the new contract. Subsequently, the plaintiff terminated the contract. It was found from evidence on record that extensions had been granted to the defendants from time to time and the plaintiff had executed the work as per new supplementary agreement. It was held that the defendants had committed breach of the original contract and they were liable to pay amount due to the plaintiff for work done. (8)

Breach by employer:- Where prevention by the employer is a defendant to do something which is a condition precedent to the contractor's obligation to do the work, the contractor may treat the prevention as a repudiation of the contract, but in other cases where prevention is only partial, the contractor must complete the work and seek his remedy in damages. (9)

If the employer does not provide the site at an appropriate time, or does not appoint an architect, or otherwise does not observe some condition precedent to the contractor's liability to commence the work, the contractor can at once throw up the contract and bring an action for damages for breach by the employer. If, however, the contractor elects to proceed with the work, he may, according to circumstances, be relieved from the stipulation in the contract as to compilation to time, liquidated damages etc. and still have an action for damages. (10)

In the case of partial prevention i.e. where the breach by the employer is not fundamental and does not entitle the contractor to cease work, or, being fundamental is not treated as a repudiation by the builder, the measure of damage is the loss of profit arising from the reduced profitability or added expense of the work carried out, since the builder may not immediately elect to treat the contract as at an end, and then give rise to a claim for loss of profit on the uncompleted work when he does so. (11)

If the employer by his own act renders himself incapable of carrying out the contract he has made, e.g. by selling the land on which the works are to be constructed, the contractor at once ceases to be bound by the contract, and can bring his action without any previous request to the employer to perform his part of the contract. (12)

It was open to the contractor to avoid the contract on account of the Government's breach of contract to deliver the site at a particular time, but he did not do so but accepted delivery of site at a time other than agreed upon earlier. In such a case, he is precluded from claiming compensation for any loss occasioned by such delay unless he had given notice to the Government of his intention to claim compensation on that account.

Courts will give damages for breach of contract only by way of compensation for loss suffered and not by way of punishment. Compensation claimed for the delay in the completion of the work under a contract will not be allowed in the absence of the evidence to show that any loss was suffered by the plaintiff on account of delay because the claim for such compensation is clearly a claim for penalty. (14)

Measure of damages: Where delay occurs not on account of contractor but on account of the employer, the contractor would be entitled to be paid on the rates in the new schedule of rates, which are updated from time to time keeping in view the escalation of market price in the State. (15)

When it is not possible to calculate accurately the actual amount of loss incurred or when the plaintiff has not been able to prove the actual loss suffered, he will be, entitled to recover nominal damages for breach of contract.

In giving damages for breach of contract the plaintiff should be placed in the same position as he would have been if the contract had been performed. In case of breach of contract of carriage of goods, the plaintiff would be entitled to recover as damages the value at the time when the goods should have been delivered to him.

The rules applicable for determining the amount of damages for the breach of a contract to perform a specified work is that the damages are to be assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, although in particular cases the result of either mode of calculation may be the same. (16)

Measure of damages normally is the difference between contract price and market price on the date of breach. But parties to contract can create for themselves special rights and obligations such as providing measure for damages for breach and specifically exclude conditions which law generally attaches to contract for sale of goods.

Proof of damages: The claim for damages would not be admissible if there is a total absence of specific particulars of the loss allegedly suffered by the plaintiff. In a suit for quantified damages based on an actionable claim, it is the obligation of the plaintiff to specify the damages with respect to the individual claims and to point out precisely the extent of damage, with reference to all material particulars and the manner in which it was caused. (17)

Where due to various breaches on the part of the employer, the contractor had to employ labour on overtime basis so as to complete the work within the time allowed under the contract, and the work was actually completed within the contractual period, it was held that under the circumstances the contractor was entitled to be paid the overtime which he had paid to the labour. (18)

When the machinery, tools, plants and establishment of the contractor remained idle for a certain period, both in the original as well as extended period of contract, on account of non-supply of drawings and designs, an award on this account would be fair and equitable. (19)

Sections 55 and 73 of the Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian Law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India and thus the Supreme Court allowed damages based on Emden's formula. (20)

The arbitrator is entitled to award damages on account of increase in the cost of construction material or extra expenditure on overheads and establishment charges because there are damages which the contractor suffers because of breach of contract by the employer due to which the period of performance is lengthened beyond the time originally fixed in the contract. (21)

Where in a works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim damages for loss of profit which he expected to earn by undertaking the contract. Claim of expected profits is legally admissible on proof of the breach of contract. What would be the measure of profit would depend upon the facts and circumstances of each

case. The fact that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages. (22)

1. (1854) 146 ER 145.
2. B.R. Herman & Mohatta v Asiatic Steam Navigation Co. Ltd., AIR 1941 Sind 146.
3. Sriram Agarwalla v Sagarmal Modi, AIR 1957 Ori 8.
4. Bank of Idia Ltd. v Jamsetji AH Chinoy, AIR 1950 PC 90.
5. Heyman v Darwins Ltd., (1942) AC 550.
6. Maharashtra State Electriity Distribution Co. Ltd. v DSL Enterprises Ltd., 2010(1) RAJ 281 (Bom).
7. Hudson's Building and Engineering Contracts, 11th ed., Vol. 1, para 4.025, pp. 612-613.
8. State of Tamil Nadu v Thankiah, AIR 2007 NOC 1857 (Mad).
9. Holme v Guppy (1838) 3 M&W 387.
10. Halsbury's Laws of England, 2nd ed., Vol. 3, p. 274.
11. Hudson's Building and Engineering Contracts, 10th ed., pp. 596-597.
12. Halsbury's Laws of England, 2nd ed., vol. 3., p. 229.
13. State of A.P. v Associated Engg. Enterprises, 1989(2) ALT 372 (AP).
14. Dhulipudi Nammayya v Union of India, AIR 1958 AP 533.
15. Sirimal Marbaniang v State of Meghalaya, 2004(3) RAJ 349 (Gau).
16. Wigsellv School for Indigent Blind, (1882) 8 QBD 357.
17. Indian Oil Corp. v Tara Properties Pvt. Ltd. 1998(2) ICC 255 (Cal)(DB).
18. Ravindra and Associates v Union of India, (2010)1 SCC 80.
19. Krishna Bhagaya Jala Nigam Ltd. v G. Hrishchandra Reddy, (2007)2 SCC 720.
20. McDermott Int'l Inc. v Burn Standard Co. Ltd., (2006) 11 SCC 181.
21. Puran Chand Nangia v DDA, 2006(2) Arb LR 456 (Del).
22. M.S.K. Projects India (JV) Ltd. v State of Rajasthan, (2011) 10 SCC 573.