

“Effects and Implications of Repudiation of Contract”

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Abstract

“Contract” has been described as legally binding relationship in the laws related to contract in almost all countries across the globe. In present time, everyone use to do the transaction related activities through signing a contract with the other party. There are so many instances in our daily life where we do a contract with so many persons like purchasing the house, availing the service of electricity and hiring an auto. And as described above that it is a legally binding relationship which means both the parties have to fulfil the contractual obligations which they have decided for each other. Otherwise the party in default has to face the legal consequences such as providing the compensation.¹

*But what will happen when one of the parties to the contract declares that he would not continue the performance under the contract because of some reason before the date of performance like buyer rejects to buy the goods on some erroneous reason where he placed an order in advance to purchase those goods. What action can be taken by the aggrieved party? Whether he can claim damages before the date of performance? And so many other doubts related to this concept have been made in this research paper. This concept of refusal of continuing the performance is known as **Repudiation of Contract** which is the main focus of researcher.²*

In this research paper, Researcher has tried to provide the clarity on this concept because it is an uncertain type of concept of law of contract where judges has to pay attention to so many aspects such words, intention, conduct, ability of party etc. to decide such cases. Till today, courts and legal experts could not able to provide a fixed and logical method to decide that whether refusal to continue the performance constitutes repudiation or not.³

Researcher has described the repudiation of contract, consequences on accepting or not accepting the repudiation and the validity of reason provided for the repudiation by the party to the contract in this research paper to put forward a simple and broaden view of this concept.

Introduction

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¹Anson's Law of Contract, 570 (J. Beatson ed., 28thedn. 2000).

²Trietel on Law of Contracts, 835 (Edwin Peal ed., 12thedn. 2007).

³T. S. VenkateshIyer, TREATISE ON LAW OF CONTRACTS, 241 (6thedn. 1995).

availing the service of electricity and hiring an auto. And as described above that it is a legally binding relationship which means both the parties have to fulfil the contractual obligations which they have decided for each other. Otherwise the party in default has to face the legal consequences such as providing the compensation.⁴

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Repudiation of Contract: An Overview

What is contract?

Whenever someone wants to create a legal relationship i.e. contract with the other party, it will have to follow certain steps. First, it has to make a proposal to get the assent of other person or party with the intention to create a legally binding relationship. And when the other party will give its assent to the proposal, it would be deemed that he had accepted the proposal.⁷

The acceptance of proposal will be considered as promise. Then both parties will promise to each other for certain consideration to fulfil their enrichment, which will give rise to an agreement. There will be promises from both the parties if it would be Bilateral agreement i.e. promise v. promise and if there would be promise from one party and other party will just act then it would be Unilateral agreement i.e. promise v. act.⁸

⁴ *Anson's Law of Contract*, 570 (J. Beatson ed., 28th edn. 2000).

⁵ *Trietal on Law of Contracts*, 835 (Edwin Peal ed., 12th edn. 2007).

⁶ T. S. VenkateshIyer, *TREATISE ON LAW OF CONTRACTS*, 241 (6th edn. 1995).

⁷ Sec. 2(a) & (b), Indian Contract Act, 1872.

⁸ Sec. 2(b) & (e), Indian Contract Act, 1872.

Finally, when the agreement will be enforceable by law, under certain conditions like free consent, competency of parties, lawful consideration and lawful object, it will constitute the Contract.⁹

What is Repudiation of contract?

When one party to the contract signifies by words or conduct that he does not intend to fulfil the obligations due in future, it will be deemed as repudiation of the contract. In repudiation of the contract one party denies to continue the performance. It should be clear, absolute, unconditional and unqualified refusal to perform the contractual obligations although the party is capable of performing his obligations. The repudiation should be total means repudiate the whole contract otherwise it would be not considered as repudiation.¹⁰

The courts have prescribed the two basic principles to find whether the words or conducts are giving rise to the repudiation or not¹¹:

- (1) There should be an intention to repudiate the contract.
- (2) The intention should be clear and unequivocal so that other party (a reasonable thinking person) can get it correctly by the conduct of guilty party.

Repudiation is a matter which is not easily found because to constitute repudiation, it should be checked objectively whether there was any repudiation of contract or not. It should be unequivocal and clear with an intention to not to further the obligations under contract. The importance of the intention was emphasised in the case of *Freeth v. Burr*¹². In this case the buyer had done a contract with the seller of iron on monthly deliveries and he promised to pay him. But once, he failed to pay money for one delivery after receiving so many deliveries due to certain financial constraints and he requested also to the seller to decrease the price of instalment but he didn't pay attention towards it and consequently seller declared it as a repudiation of contract and started demanding the compensation from buyer.

But in final verdict, Keating J. held that it was not the absolute and clear repudiation of buyer and there was no intention on the part of buyer to not to continue the performance under contract. He also said that if he would have failed to pay 3-4 deliveries' payment then it could be inferred from his conduct that he wanted to repudiate the contract. Therefore, buyer was declared innocent.

According to researcher this decision was correct because there was no intention on the part of buyer to repudiate the contract and here buyer was also not in position to pay the money because of some problem which must be understood by the seller so that they can negotiate and settle the issue outside the court.

⁹ Sec. 2(h) & sec. 10, Indian Contract Act, 1872.

¹⁰ *Pollock and Mulla: Mulla Indian Contracts and Specific Relief Acts*, Vol. 1, 1086 (R.G. Padia ed., 13th edn. 2006).

¹¹ Joseph H. Beale Jr., *Damages upon Repudiation of a Contract*, 17(6) *THE YALE LAW JOURNAL* 443, 448 (1908).

¹² *Freeth v. Burr*, (1874) L.R. 9 C.P.

The aspect of 'intention' was also used in other complicated cases also such as *Maple Flock Company Ltd. v. Universal Furniture Products Private Ltd.*¹³, in this case also there was mistake on the part of seller that he sent one low standard goods delivery and buyer declared it as repudiation but there was no intention on the part of seller to repudiate the contract because before this delivery he had already supplied 15 high standard goods delivery.

The repudiation of contract gives ultimately the right to innocent party to decide whether to continue the contract by not accepting the repudiation or discharge him from all obligations by accepting the repudiation.¹⁴

Non-acceptance of Repudiation of Contract

When the party to the contract chose to not to accept the repudiation then it would be considered as 'affirmation' which party has signified by his action or some unequivocal conduct that he wants to continue the contract and he himself remain ready, willing and able to perform his part of the performance under contract and ultimately contract remains in full effect. Affirmation should be total. A contracting party can't affirm some part of the contract and disaffirm the rest because if he would do so then there would be a new contract. Whenever a party to the contract decides to disregard the repudiation, it can't claim the damages under breach of contract because contract is still alive and remains in effect.¹⁵

In this case, both parties are usually deemed to be in benefit because innocent party is waiting for the guilty party to change its decision and continue the contractual obligations because there might be some different conditions at the time of his refusal to continue his performance under contract like financial constraint, deflation in market etc.¹⁶

Sometimes, it also proved beneficial for guilty party who has declared not to continue the contract because he is still entitled to perform his obligation before the last date of completing the contract. And sometimes, he is also entitled to take advantage of some supervening conditions which would justify his denial to further the contract.¹⁷

This rule was established in *Forceomelat SARL v. Mediterranean Shipping Company SA The Simona*.¹⁸ In this case, there was a contract (a type charterparty contract) between two parties (charter and ship-owner) of to carry a cargo of steel coils at Bilbao and carry it to Durban. There was a cancellation clause in the contract that if the vessel would not be ready on or before 9 July, contract can be cancelled without any compensation. The ship owner requested to charterers that he had to load other ship before their one which was not accepted by them and they declare it as repudiation by the ship-owner.

Luckily, ship arrived in Durban on 8 July and gave a notice to charterers of their readiness to load the cargo. But ship was not ready to load either on 8 July or 9 July. Consequently, ship-

¹³*Maple Flock Company Ltd. v. Universal Furniture Products Private Ltd.*, (1934) 1 KB 148.

¹⁴T. S. Venkatesh Iyer, *Law of Contracts*, 333 (4th edn. 1983).

¹⁵P.M. Bakshi, *Anticipatory Breach of Contract*, 17(2) *LAWYERS COLLECTIVE* 13, 13 (2002).

¹⁶*Chitty on Contracts*, Vol. 1, 185 (H.G. Beale ed., 30th edn. 2008).

¹⁷*Id.*, at 189.

¹⁸*Forceomelat SARL v. Mediterranean Shipping Company SA The Simona*, (1988) 2 All ER 742.

owners chose to load the cargo on other ship and the ship-owners brought the action for dead-freight (Money payable by shipper or charterer to ship-owner or shipping line for failing to load the amount of cargo stipulated in contract).

In the final verdict, House of Lords held that the action of ship-owner against the charters is not maintainable because by refusing to accept the repudiation by charters and keep the contract alive gave charters a second chance to cancel the contract due to unavailability of cargo on 9 July. By not accepting the repudiation of charters, ship-owner kept the whole contract alive including their right to cancel the contract without paying any damages.

The facts in this case were somewhat complicated but judges reached at the correct conclusion because after three years you cannot take the support of any other reasons. This concept of reason for repudiation has been dealt by the researcher in detail in the last section. This rule of keeping the contract alive was used in further similar cases also such as *Phul Chand Fateh Chand v. Jugal Kishore Gulab Singh*¹⁹, where innocent party kept the contract alive and guilty party has completed the performance before last date and court also gave order that he can do it until and unless contract is alive.

In this case, guilty party contracted with the innocent party to deliver some goods through train but it has refused to perform due to deflation in prices but innocent party didn't accept his repudiation and kept the contract alive. After some time, prices increased again and he supplied the goods before the last date of performance under the contract. Innocent party refused to accept that and demanded compensation.

In final verdict, court held that it was the right of guilty party to perform the contractual obligations if innocent party has not accepted the repudiation. Innocent party has to accept his performance and have to pay him for his service. Acc. to researcher, it is beneficial for both the parties by keeping the contract alive where guilty party can perform his obligations which he could not able to perform earlier due to certain difficulties.

On the other hand, the refusal of accepting the repudiation of contract might be proved as a disadvantageous for guilty party also. It was established in the landmark judgement of House of Lords in *Tai Hing Cotton Mill Ltd. v. Kamsing Knitting Factory*.²⁰

In this case, there was a contract between two parties for the sale of goods to be delivered in May. Guilty party announced in February that he will not supply the goods (cotton) and not continue the contract. It was a repudiation of contract. The innocent party didn't accept the repudiation and kept the contract alive for both the parties to fulfil their contractual obligations.

Innocent party filed the complaint against the repudiation of contract by the guilty party to claim damages on the last date of performance of contract. In the final verdict, judges held guilty party liable and passed the order for providing damages to the innocent party. It was considered as landmark judgement because damages were given according to the price of

¹⁹Phul Chand Fateh Chand v. Jugal Kishore Gulab Singh, AIR 1927 Lah 693.

²⁰Tai Hing Cotton Mill Ltd. v. Kamsing Knitting Factory , (1979) 1 All ER 515.

cotton in market in May and not in February which means that if price of goods is higher in May than in February then it is a great loss to guilty party to make him realise that by repudiation of contract innocent party can also be in advantageous position.

After observing so many these types of conditions in cases *Asquith LJ*, said that according to him an unaccepted repudiation is a thing writ in water and of no value to anybody. He also said that it does not afford any type of legal rights. But it is not absolutely correct because in some cases like *Hasham v. Zenab*²¹, where innocent party was allowed to file a complaint against the guilty party who repudiate the contract inspite of disregarding the repudiation in past.

In this case Hasham and Zenab signed a contract on 19 February for the transfer of property from Zenab(vendor) to Hasham(purchaser). The vendor agreed under the contract to sell the property to purchaser on 19 August. But after a few minutes of signing the contract, vendor refused to sell the property due to some personal reasons.

He didn't accept the repudiation of contract and keep the contract alive so that vendor could change his decision but he saw that vendor is not interested in selling the property he sued him for completing the performance under contract. Consequently, House of Lords came with another milestone judgement and allowed the compensation to innocent party in spite of disregarding the repudiation earlier.

It was the good decision because if guilty party don't want to perform his part then aggrieved party should be provided with the compensation so that it could make a contract with any other party. Otherwise, he has to wait till the final date for suing the guilty party for repudiation will come and he might suffer the loss also.

Acceptance of Repudiation of Contract

If the innocent party decides to accept the repudiation, then it would discharge both the parties from furthering contractual obligations due in future but for this he must make his point by communication in clear and unambiguous manner to the other party. This type of acceptance of repudiation is also known as 'rescinding' the contract. It should not be confused with the Anticipatory Breach, because there, parties can signify the repudiation by their conduct also.²²

Once he accepts the repudiation, he can't take back his decision. In these types of situations, guilty party is freed from all primary obligations i.e. to fulfil the contractual obligations which were prescribed by parties for each other for their enrichment, but he has to perform the secondary obligations i.e. to pay damages to innocent party.

This point was clearly made by the House of Lords in *Moschi v. Lep Air Services Ltd.*²³ In this case, Moschi (appellant) and Lep Air Services Ltd. (respondent) have signed a contract under

²¹*Hasham v. Zenab*, (1960) AC 316.

²²Avatar Singh, *LAW OF CONTRACTS AND SPECIFIC RELIEF*, 455 (10th edn. 2008)

²³*Moschi v. Lep Air Services Ltd*, (1973) A.C. 331.

which appellant has taken the guarantee of owing money to the respondent from third party i.e. £ 40,000. It has been agreed that respondent would pay it back at the rate of £6,000 interest per week.

But just after three weeks respondent defaulted in his performance of paying money back and he paid just £ 10,000 instead of £ 18,000 as interest. Consequently, third party considered it as repudiation of contract and it was accepted by them. When respondent get the knowledge about the repudiation they went into settlement with the third party. Third party sued appellant for future instalments with interests.

Appellant argued on his side that the moment third party accepted the repudiation he was ultimately freed from his role of guarantor. Court held that he would be liable but not under the law of contracts but for giving the guarantee only. As a result he sued the respondent and they paid nominal damages to the third party on behalf of appellant i.e. Moschi.

It was also established in one Indian judgment, *Asthing v. L. S. John*²⁴, where SC has held that by repudiation party can free himself from doing further performance but it has to pay the compensation to aggrieved party. Researcher's point of view also would be the same because the party which has finished some part of the contract should be compensated to minimise his loss. After accepting the repudiation aggrieved party can get only nominal damages because he freed the other party from continue the contractual obligations.²⁵

One more effect of repudiation was established in case *Hochster v. De La Tour*²⁶. It was established that an innocent party can also treat the repudiation as immediate breach of the contract and can claim damages immediately after the declaration of refusal to continue the contract by the guilty party.

In this case, a courier company appointed a courier in advance on foreign tour for three months. Consequently, he didn't join any other job. After sometime he received a letter that company has no requirement of his service and repudiated the contract. He sued them in House of Lords for restraining him from taking any other job and financial loss due to his unemployment.

In final verdict, Cockburn C.J. held that where a party repudiate the contract or make it impossible for other party to fulfil the contractual obligations then the aggrieved party can consider the repudiation as breach and can sue immediately for breach instead of repudiation.

The Rule of immediate breach was also held in *Jhander Mal JaganNath v. Phul Chand Fateh Chand*²⁷, where the court held that repudiation can be treated as breach and innocent party can sue for the damages immediately. It was the reasonable decision because if one of the party maliciously repudiate the contract, so that the innocent party has to suffer damages.

²⁴Asthing v. L. S. John, (1984) 1 SCC 417.

²⁵Richard Craswell, *Insecurity, Repudiation and Cure*, 19(2) THE JOURNAL OF LEGAL STUDIES 399, 414 (1990).

²⁶Hochster v. De La Tour, (1853) E.R. 922.

²⁷Jhander Mal JaganNath v. Phul Chand FatehChand , AIR 1925 Lah 497.

This rule can be proved worthy to stop such persons from repudiating the contract with an intention to keep the other party in loss.

There is another important effect of repudiation for claiming the damages under the principle of repudiation of contract. It was established in *Murlidhar Chatterjee v. International Film Co.*²⁸ that if the aggrieved party has already performed all that the contract required of him, there can be no doubt that he may sue the other party when the time comes for the defendant's and one more important aspect is that if aggrieved party has received any profit from guilty party before the repudiation then it has to return those profit to get the compensation.

No or bad reason for claiming to be discharged

Whenever the party to the contract discharges it by providing an inadequate reason, it can be justified if the facts present a good and valid reason for his decision. It can be unknown to that party also. For example, a seller makes deliveries of goods to the other party, where the buyer didn't accept the delivery by saying an incorrect reason, which will be lawful and justified if the goods turn out to be not with confirmation provided in the contract.²⁹

This rule was criticised by so many judges in decisions because it was providing the other parties to the contract that other party wants to repudiate the contract. There might be the case when there is no intention on the part of that party to not continue the obligations under contract. This rule was giving an unjustifiable privilege to the party that it can discharge the contract at any time by providing any reason which could be inadequate also.³⁰

As the law developed, this principle was also developed that if the innocent party believed that the reason provided by the guilty party was not reliable because the conditions at that time were different. The guilty party would be stopped from changing his reason and would not be allowed to discharge of the contract.³¹

This rule was established in *Panchaud Frères S.A. v. Establishment General Grain Co.*³² In this case, the plaintiff had contracted with the defendant of selling 5,300 metric tons of maize by the help of shipment in June/July 1965. The bill of lading was sent by the plaintiff to the defendant with the goods in ship dated 31 July 1965. There was another document of quality where the date of loading was mentioned i.e. 10th August 1965 which could entitle the defendant to reject the contract. They could not find that due to some confusion and rejected the goods on the basis of erroneous quality. Court declared their reason insufficient. Somewhat after three years they could able to find the wrong date and said that as their reason to reject the goods.

In final verdict, once again an important decision was declared by the court that no one can blow hot and cold simultaneously by changing reasons for rejection again and again. They

²⁸*Murlidhar Chatterjee v. International Film Co.*, AIR 1943 PC 34.

²⁹Samuel Williston, Repudiation of Contracts, 14(6) HARVARD LAW REVIEW 317, 323 (1901).

³⁰Qiao Liu, Inferring Future Breach: Towards a Unifying Test of Anticipatory Breach of Contract, 66(3), CAMBRIDGE LAW JOURNAL 580, 584 (2007).

³¹*Cheshire, Fifoot and Furmston's Law of Contract*, 545 (M. P. Furmston ed., 15th edn. 2006).

³²*Panchaud Frères S.A. v. Establishment General Grain Co.*, (1970) 1 Lloyd.Rep. 53.

followed the above mentioned principle of estopping the party and gave the decision in favour of plaintiff. This rule was also applied in

Conclusion

After doing the whole research on repudiation of contract, researcher had reached at a conclusion that there is no straight forward methodology to decide whether the refusal of continuing the performance by opposite party is constituting repudiation of contract or not.

It mainly depends on the fact that the party who is denying performing his part under contractual obligations, he should repudiate it totally, unconditionally and unequivocally. Otherwise its verdict depends on case to case basis by observing the facts and comparing them with the precedent by the judges.

One more important aspect observed by the researcher is that there must be a clear and unambiguous intention on the part of the repudiating party that can inferred from his words and conduct that he has no interest in continuation of contractual obligations. Researcher also inferred that keeping the contract alive by not accepting the repudiation could be turned in favour of any party but by accepting the repudiation the whole contract is discharged which is futile.

It might happen that the party repudiating the contract is not in position to perform his part at that time due to certain difficulties and can recover before the time of performance of contractual obligations. This shows that keeping the contract alive is more beneficial than discharging it by accepting it.

There might be other case also where party wants to repudiate the contract although he is capable of doing the part of his performance. Here he can be discharged from his obligations but he has to pay the damages according to the damages which have been suffered by innocent party at the time of repudiation.

Finally researcher would like to conclude with the last suggestion that the parties to the contract should communicate with each other time to time, so that if anyone of them face any problem it can be sorted out between them. It can be proved beneficial for both the parties and time of the court, which is very important in present time because of so many other important cases and issues, could be saved.

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