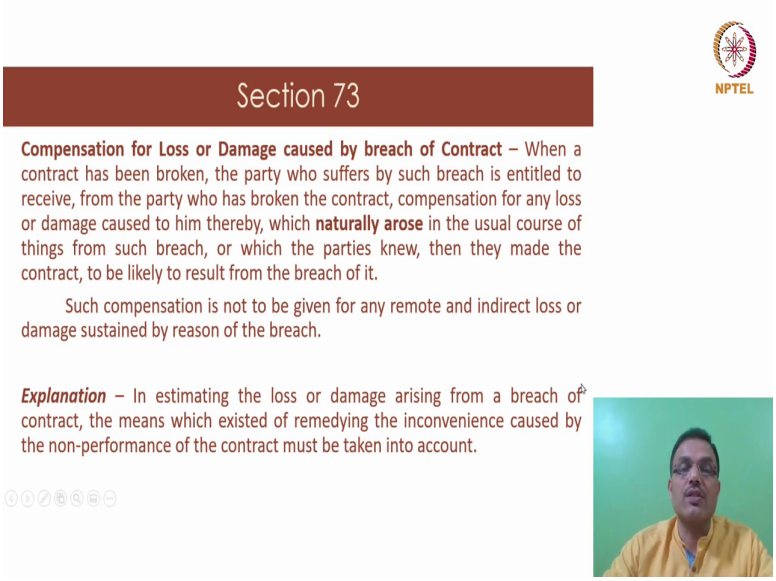
Advanced Contracts, Tendering and Public Procurement
Prof. (Dr.) Sairam Bhat
Professor of Law
National Law School of India University
Breach of Contracts – Part 2

(Refer Slide Time: 0:15)



If one looks at Section 73 of the Indian Contract Act, it clearly states that in compensation for loss or damage caused by the breach of contract, the party who has broken the contract is entitled to give that compensation to the party who suffers such loss or damage due to the broken contract.

However, Section 73 very clearly underlines the rule that the loss or damage that naturally arises in the usual course of things is the only kind of damages that are available. This brings you to the distinction between direct loss and indirect loss or what we call as direct damages or consequential damages.

Now, in India, in ordinary contracts, only direct damages are awarded. However, in cases regarding infringement of intellectual property rights, the courts may grant you some consequential loss. So, depending upon the kind of breach of the contract there could be some kind of variation.

But the ordinary rule which looks at the implementation of Section 73 of the Indian Contract Act 1872 clearly states that the loss should have naturally arisen from the breach and it is something that should occur in the usual course of things and that is all that is what entitles

you to get damages. So interestingly, if I can give a simple illustration of what can be such damages is let us assume that I have promised to sell something to you.

Say it could be a laptop, and the price of the laptop is around 60,000 rupees and I do not after making a contract supply this laptop to you. Now, what should be the damages in case I failed to supply this laptop to you? Now, it cannot be 60,000. Why? Because you must pay me 60,000 if I deliver that laptop to you.

So, I have saved that 60,000 for you. You have not incurred any kind of loss even though I have breached the promise and I have not delivered the laptop to you. Here, you cannot give proof of damages and that is not something you can be entitled to, though it can be considered as something that has naturally arisen but the loss is not naturally arisen.

What is the loss in the usual course of such a breach of contract if I do not supply the laptop? Let us assume that you need this laptop. Obviously, I agreed to 60,000 for the same laptop, but because of my breach, now you must go to the market and buy this laptop at 70,000 rupees.

Please note, this difference between the 60,000 that I promised and the actual price at which you bought is 10,000 rupees, the difference is 10,000 rupees and this difference has naturally arisen in the usual course of this contract and is a consequence of the breach that I committed. Had I performed, you would have just spent 60,000.

Now that I did not perform, you must buy it at 70,000, and the difference of 10,000 between what was agreed to, and how much you buy it for is the kind of loss or damage that is caused to you, and that is all you will be entitled to as the direct consequences of my breach of not selling that laptop.

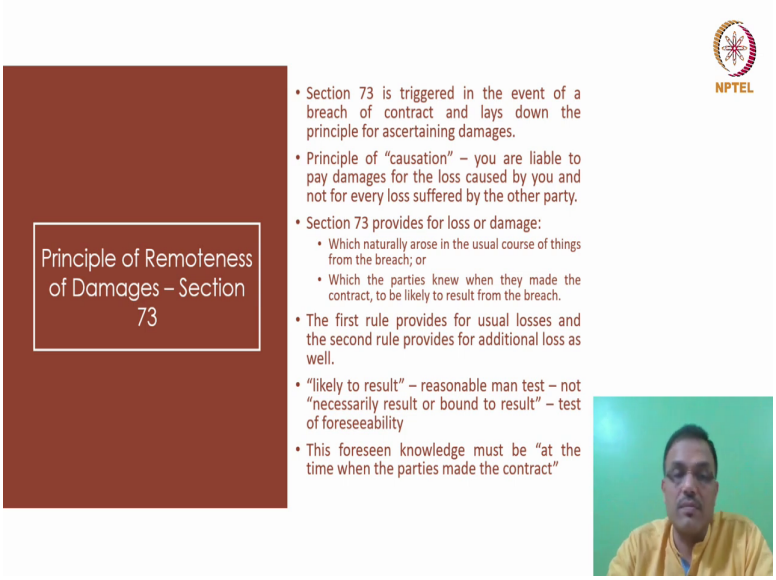
So now, if you look at the laptop example, we could argue that there are other kinds of losses that have occurred and why cannot we claim damages for that? For this, we must discuss the other kind of losses that you may have suffered. Now, let us say that the contract was supposed to be performed on the 1st of May and I did not perform and it took some time for you to understand that there is a breach, and by the 30th of May, you went and bought this laptop, though, at a difference of 10,000 rupees.

Now, these 30 days that unfortunately occurred because of a delay due to my breach, you lost, say, an opportunity to make a presentation and if you would have done that presentation using this new laptop, you would have gotten a new contract, and if you got that contract, you would have made profits. Now, can I, who had agreed to supply this laptop to you, be made responsible for all these events?

For the kind of losses that might be anticipated sometimes, you may say sometimes not known, something that was not foreseeable but something that you want to substantiate and say, "Look. these are the kind of losses that I could have incurred or that have already occurred to me."

So, everyone who supplies laptops must know that time is important to the buyer, they will use it, it is of business value and it can result in profits and anyone who fails to supply their laptop must also be responsible for the same, is something that people can argue and bring that discussion forward as well.

(Refer Slide Time: 5:22)



So, the principle of remoteness of damage clearly states that "Look, you are liable to pay damage for the loss caused by you not for every loss that the other parties suffer. So, when he was supposed to make a presentation, he was supposed to get a contract, and he was supposed to make a profit, I am not sure whether I have contributed to that kind of a loss.

How can I be sure that one laptop will result either in profits or losses? Is it something that I have contributed, is it due to a natural cause of my fault? This is something that people will

have to answer before they claim damages. So, one is what is the natural course of things in the usual contractual business? That is the pre-checker, and what is the realistic direct loss that is caused to the other party?

Second, it is important that sometimes you will notice that the parties if they knew that the consequence of the breach can be a, b, and c, and hence, I have already informed you that this could be the loss that I incur.

Then there is a possibility and a chance that look that is not remote because the party knew it, the party was told about it, and he was informed about it, very well in advance that this is required for the presentation. The presentation of this value, the contract is due, and hence if you do not give it this is the loss. So, if that is already known and the breach occurs then because of that kind of knowledge it is not remote to the contract breaker.

And he may be responsible to compensate for those kinds of losses that were brought to his knowledge that was brought to his information as well. So, though they may be consequential, they were something that was already informed to the other party. The second rule is that when you talk about additional losses, again when it comes to consequential or additional losses that are known, you must notice that there must be a direct cause and effect theory.

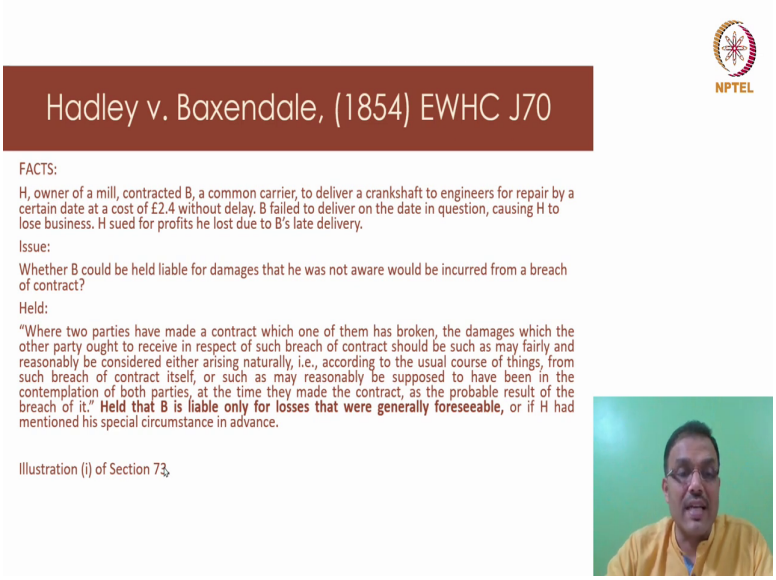
So, you cannot, even if I say something to you beyond what is the cause and effect, cause of the contract to the effect of the breach, then the courts are not going to give it to you just because you mentioned it. So, there must be a causation, there must be a link to the direct loss and it must be a result of the breach. It should be a kind of a chain of events that has occurred due to the breach and not beyond it most importantly the courts will apply the reasonable man test and they will probably give damages that are just necessary enough to compensate you that can in a reasonable man's expectation be something that can be awarded.

But again, the reason simply is that the principal rule of unjust enrichment applies to the law of damages in India. So, while you talk about equity, you talk about contracts in various stages, even in the stage of remedies the courts will apply unjust enrichment and say," Look, you cannot avoid damages that will make him rich unjustly, you must give damages that should be adequate to compensate him but not make him rich otherwise.

So, reasonability and unjust enrichment will tie the hands of the judge and make him do equity and not unnecessarily create some kind of profit or profitability for the one who seeks the same. And what is important is that this kind of foreseeability of the kind of losses that can be anticipated for the other party must be such that is made at the time of the contract, not at the time when the breach occurs.

So, when I made the contract, can I foresee that this is the loss that can happen to the other party, if, yes, or if it is not foreseeable and it is communicated, then I shall be liable for it, not otherwise.

(Refer Slide Time: 9:18)



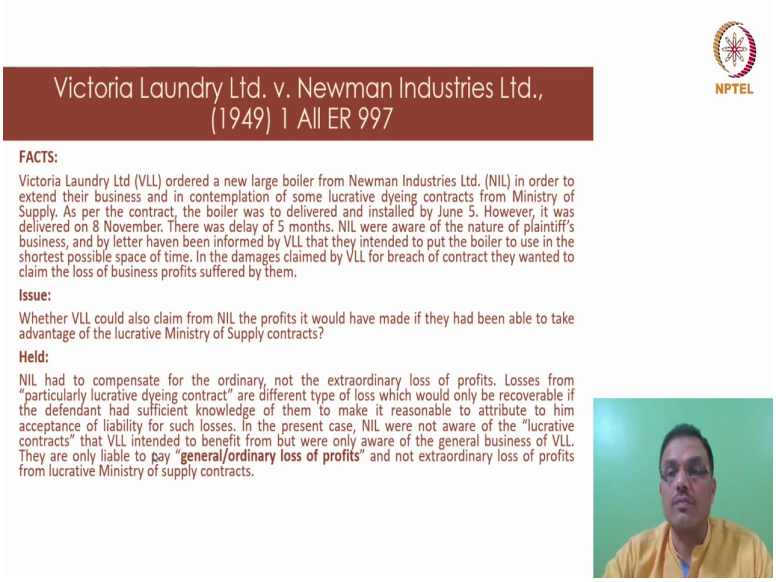
Now, a couple of cases that one would want to look at is the Hadley versus Baxendale rule. In this case, it was very clearly held and please note this was before the 1872 law. Illustration 1 of Section 73 says exactly what this case is about and this case very clearly says that "Look, if a common carrier delays in the delivery of a crankshaft to an engineer. Did the common carrier know that the delay will cause, losses apart from just being the delay of delivery?" So, I think the court here very clearly said that you can be liable for those kinds of losses that can be generally foreseeable by a reasonable man. So, if I am a carrier and I am delivering something to you and if there is a delay, for that delay, whatever is the kind of pro rata loss, I may be responsible.

But suppose you do not get this crankshaft into your engine and because of that, you lost customers, profitability, and business, how will a common carrier or a delivery person ever

knows what is this used for, how valuable it is, how many customers or profit you are making, this is not something that people will know, especially if you are a common carrier.

So, yes, a delay is to be made actionable and accountable, but you cannot expect them to foresee your business, and your loss and expect them to cover those kinds of losses as well.

(Refer Slide Time: 10:54)



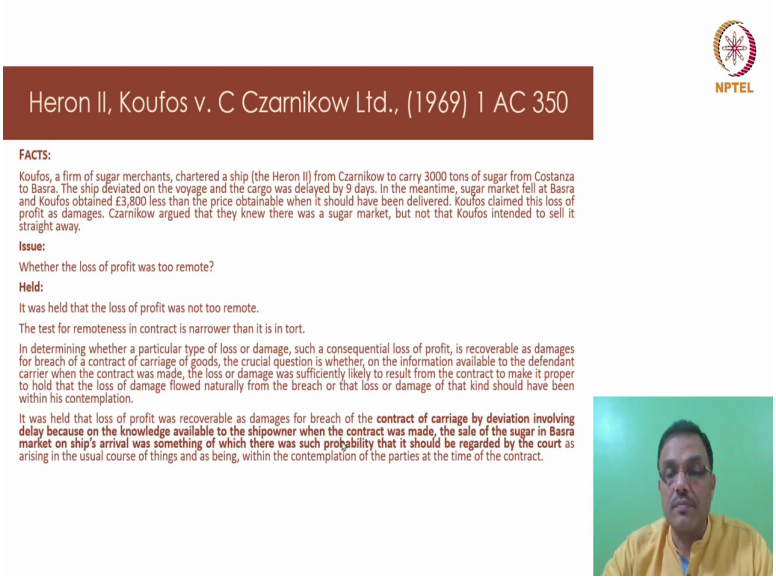
The second case is the Victoria Laundry case, this is also a very interesting case that mentions profits. Because what this case clearly says is that you can be made liable for loss of profit, but in profit, it is the general and ordinary profits that are lost that can be covered, and not extraordinary loss of profits.

So, when damages are awarded to you, you are not going to be lucratively rewarded for the breach that is committed by the other party. If you decide that yes, profits must also be granted or what we call interest must be granted, for example, under Section 74 we say interest on damages can also be awarded as a penalty.

And the courts have consistently held that penalty in Indian Contract Law can also be given over and above damages, but in the form of a penalty if it so required in that context. So, profits, that too ordinary profits are an expected loss due to the kind of lucrative business that you are running and because of the breach, or that lucrative business is no longer lucrative.

So, to that extent, what is the benefit that has been lost in the business can be covered, but it is not extraordinary loss of profit that will be covered in the contract.

(Refer Slide Time: 12:25)



This is also a similar case of whether the loss of profit was too remote. Again, it was a case of cargo that was delayed by 9 days. It was sugar that had to be delivered between two destinations. Interestingly because of the delay of 9 days the sugar market fell at Basra and they had to sell the sugar at a loss.

If it had arrived on time, they would have made a lot of profit. So, for this, they asked the carrier to compensate them. So, can a carrier that deliberately deviates on its voyage, knowing that a delay may cost loss be held responsible or liable was the question in this case.

Now, interestingly, the ship owner, in this case, knew what he was carrying and he was aware that it was an essential commodity, that it was meant to be sold at Basra on a particular date and there was a high probability that had the ship arrived on that day it would have been sold for some profit and the captain of the ship, and it was a chartered ship in any sense.

Charter ships cannot have deviation. This is one important rule and the entire ship had to only serve one customer. So, deviations cannot be justified in any manner and if suppose the delay was of 9 days due to some other events that were not within the control of parties, probably the court would have taken a lenient view, but not otherwise.

So, in this case, I think because of the rule of probability, I think profits were also granted in this case because that was something that can be easily anticipated and should have been granted to the parties.