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Cooling off Period: - An Invention of the Business Practice and its effect on Traditional Commercial Law(s).

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Abstract

“Cooling off” is a term of business law, a new invention of craft, where parties are allowed to repudiate a contract even after the unconditional acceptance of the offer. This doctrine is generally limited to the “Direct sell” but not applicable to other types of contract. In this paper, the researcher tries to delve into a legislative and case law(s) analysis, and to find out the reach and limitations, advantages and dis-advantages of this unique legal concept.

Key Words: - “Cooling Off”, Indian Contract Act, Standard form of Contract, Fact, Law, Direct Sale.

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I. Introduction

According to the “Cambridge Dictionary”, the term “**Cooling off period**” means, “A period of time during which you can change your mind about an agreement that you have made or something that you have decided to buy”. This doctrine is invention of common business practice, and traditional, dogmatic legal doctrines must accommodate it, even the new invention is contrary to the fundamental legal concepts. As for example, as per the comment of the famous jurist Anson, after an acceptance of an offer, the contract becomes binding. It is like setting fire to the gunpowder. Such effect cannot be undone. Thus, the “Cooling off period” is contrary to settled contractual principles.

A Contract can be discharged by “Performance”², “Frustration”³, or by “Breach” or Novation. If a contract becomes void or voidable, the party who has gained unjust enrichment must return it to the other party.⁴ Breaches of a contract are two types, one “Actual breach” and the other is “Anticipatory breach”

As for example, “A” gives an offer to sell fifty kilos of rice to “B”, on the upcoming first January of 2026. “B” accepts it. Suddenly, “A” informs “B” on fifth March of 2025, that he will not be able to sell the rice. Now, “B” has two options, either he can wait, for filing a suit for damages against “A”, up to first January of 2026, for the actual breach or may sue “A” immediately anticipating the breach by “A”.

II. Case Law Analysis

Let us revisit the famous case law of **Hochester v De La Tour (1853)**⁵, the Plaintiff was a courier, and he was engaged by the defender to accompany him in an upcoming tour. Afterwards, the defendant cancelled the service of the Courier. The Plaintiff filed a suit for damages. The defence counsel strongly argued that, before the actual breach of a contract, no suit for damages is maintainable. Lord Campbell opined that no such rule is there, that Plaintiff has to wait for the actual date of breach. Thus, a man promising a woman to marry, change his mind or does

² See section 37, and 38 of the Indian Contract Act.

³ See section 56 of the Indian Contract Act.

⁴ See section 64, 65 of the Indian Contract Act and Section 33 of the Specific Relief Act.

⁵ (1853) 2 Ellis and Blackburn 678.

something, where the performance of marriage becomes impossible, then the woman can file a suit immediately for damages.

Thus, as per the traditional Contractual rules, once a Contract is complete by acceptance, it can be avoided only by paying damages or Specific performance. When damages are not enough, then defaulting party in the contract is asked to specifically perform his duty. As for example, contract to purchase a valuable diamond must be specifically performed. The damages in this case are not the proper alternative.⁶

III. Applicability of the concept under the Indian Law(s)

If we examine the definition of “service” under the Consumer Protection Act, it provides that any free service or service of personal nature does not come under the legal scheme of the Consumer Protection Act, 2019⁷. If we examine the section 2(13) of the Consumer Protection Act, we find that, "direct selling" means marketing, distribution and sale of goods or provision of services **through a network of sellers, other than through a permanent retail location;**

Section 2(16) of the Consumer Protection Act provides-commerce" means buying or selling of goods or services including digital products over digital or electronic network;”

Section 2 (17) of the Consumer Protection Act, provides, "electronic service provider" means a person who provides technologies or processes to enable a product seller to engage in advertising or selling goods or services to a consumer and includes any online market place or online auction sites;

Thus, delving into these legislative schemes of the Consumer Protection Act, we can say, digital market place or online auction sites, or “E-commerce” (If the On-line platform is not provided by the seller)is not direct selling.

IV. Some Practical Examples

⁶ See Specific Relief Act.

⁷Section 2(42) of the Consumer Protection Act, "service” means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, **but does not include the rendering of any service free of charge or under a contract of personal service;**

Thus, in a direct sale, there is contractual absence of the third parties, other than purchaser or seller. As for example, “YONO App” of the State Bank of India, provides direct service to the customers of the State Bank of India. The “G-Pay App” provides indirect service to the State Bank of India Customers. The “Amazon”, “Flip-Cart”, “Zomato”, “Swiggy” “99 Acre” can be called as online market place, but these services are not direct sell. Thus, there is no express legal provision for Cooling off period in these Contract Act, Consumer Protection Act, Sale of Goods Act. But the Buyer and Seller can include the Contractual term and duration of “Cooling Off” period, between/among them, if these terms do not violate the “Public policy” as mentioned in the section 23 of the Contract Act.

There is a clear difference of the fact from law. A positive, prescriptive law comes from the “Authority”, where as in a Contract, parties include the relevant terms and conditions/facts(s) and the consequences to some extent.⁸

Indian Contract Act, was enacted during 1872, and without presence of present on-line network, advance technology, there was probably no presence of the concept of “Cooling off period”. Chapter-VI of the Indian Contract Act provides, “**OF THE CONSEQUENCES OF BREACH OF CONTRACT**”.

Section 73 of the Indian Contract Act provides for compensation for loss or damages, caused by breach of contract, in two situations.

1. Compensation for any loss and damages, which naturally arose in the course of thing from such breach, which the parties knew or which likely to arise in the course of thing.
2. In case of special damages in extra-ordinary situation.
3. However there is a limit of damages, depending upon the remoteness of damage.

This statutory provision arose from the famous **Hadley v Baxendale (1854)** case law.⁹ “The Plaintiff carried on a business of miller. The crankshaft of the miller broke down and the work of the mill stopped. The crankshaft was sent to the manufacturer for repair. The servant of the mill informed the defendant that, the mill has stopped working and they need it urgently. The defendant neglected to send back the crankshaft immediately. The Plaintiff claimed for profit

⁸ Amount of damages or the place of dispute settlement forum. Also see section 73, 74, 75 of the Indian Contract Act.

⁹ (1843-60)ALL ER Rep 46.

which could not be earned, due to the absence of repaired crankshaft. The Court ruled against the Plaintiff on the ground that, in most of the ordinary cases, the mills do not stop for breaking of crankshaft.

Special damages can be recovered from the parties in extra-ordinary situations. It was held in *Simpson v North Western Railway Company*¹⁰, that, when special circumstances are in the knowledge of the defendant, no formality of communication is required.

Relationship between the two rules: -In the case law of *Heron v C. Czarnikow Ltd.*¹¹, it was laid down that, “Any damage actually caused by a breach of any kind of contract is recoverable provided that when the contract was made such damage was reasonably foreseeable as liable to result from breach”.

Thus, in the **Hadley v Baxendale (1854)**,¹² **there are no two rules, but two instances or situations, where one rule is implemented.**

Section 74 of the Indian Contract provides, if a penalty/ or any stipulation is mentioned for the breach of contract, the Plaintiff can claim such damages, whether he suffered the loss or not.

Section 75 of the contract provides that, if a party rightly rescinds a contract, he will get the damages he suffered or lost.

Novation: -Section 62 of the Indian Contract Act provides that, if the parties agree, a contract can be replaced by another contract.

(a) “A” owes money to “B” under a contract. It is agreed between “A”, “B” and “C” that “B” shall thenceforth accept “C” as his debtor, instead of “A”. The old debt of “A” to “B” is at an end, and a new debt from “C” to “B” has been contracted.

Thus, as we examine the legislative scheme of the Contract Act, the “Cooling off” option in the Indian Contract Act seems to be not present.

Standard form of Contract: -Standard form of Contract is a special form of contract, where for a lack of time and huge volume of business, individual negotiation is impossible. As for

¹⁰ (1876) 1 QBD 274

¹¹ (1966) 2 QB 695

¹² Supra Note 9.

example, purchasing a railway ticket is a standard form of contract. Here there is a strong party and weak individual. The Court(s) in case of dispute read the contract in favour of the weaker party.¹³ It seems the “Cooling off period” is not applicable in this standard form of contract. Otherwise, Airlines, Railways will face catastrophic result. The Railway or other entity may be allowed to recover reasonable cancellation charges.

Consumer Protection and Direct Selling Rules, 2021, is a delegated legislation ¹⁴:-Section 3(c) of the Rule provides, **“cooling off period” shall mean a period of time during which one can change his mind about an agreement that he/she has made, not resulting in breach of contract and or levy of penalty;”**

Section 3 (d) of the Rule provides that,(d) “direct seller” means a person appointed or authorized, by a direct selling entity through a legally enforceable written contract with the Principal entity to undertake direct selling business on principal to principal basis;”

Section 2 of the Rule provides that, “Scope and Applicability. – (1) Save as otherwise expressly provided by the Central Government by notification, these rules shall apply to: (a) all goods and services bought or sold through **direct selling**; (b) **all models of direct selling**; (c) all **direct selling entities offering goods and services to consumers in India**; and (d) **all forms of unfair trade practices across all models of direct selling**. (2) Notwithstanding anything contained in sub-rule (1), these rules shall apply to a direct selling entity which is not established in India, but offers goods or services to consumers in India. (3) The existing direct selling entities shall comply with these rules within 90 days of its publication in the official gazette.”

Section 3(g) (v) of the Rules provides the cooling off period will be not less than 30 days.

Section 4 of the Rules provide that, to do the business of direct sell, the entity must be incorporated under the Companies Act,2013 or Partnership Act, Limited Liability Partnership Act, one physical office in India, own, hold, Licencee of a trade-mark etc.¹⁵

¹³ Reasonable notice, Notice should be contemporaneous with contract, Theory of fundamental breach, Breach of unfair contract terms etc.

¹⁴See section 94 of the Consumer Protection Act, “for the purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers, the Central Government may take such measures in the manner as may be prescribed. The Head-note of the section 94 of the Consumer Protection Act, provides, “Measures to prevent unfair trade practices in e-commerce, direct selling, etc.” Thus, direct selling is a different concept, though it may be achieved through “e-commerce”.

¹⁵ See section 4 of the Consumer Protection and Direct Selling Rules, 2021

V. Conclusion

Enforceability of contract regime is totally dependent on good-faith. Thus, if “Cooling off” period is extended to the all types of statutory contracts, then seller will be at the mercy of purchasers. Already, we know the Consumer is the King, but if such doctrine is applied to an unnatural extent, the smooth functioning of business will be hindered. However, parties may include a “Cooling off period” as they desire, in a contract, provided it does not violate the commercial good practices and basic tenets of commercial law(s).

VI. Suggestions

1. Business law(s) must accommodate unique business inventions; good commercial practices, rather than harping on dogmatic legal doctrines which may inhibit commercial growth of a country.
2. Constitution of a country must be **interpreted purposively** to promote business growth. Thus, unique concepts like “Cooling off” must be encouraged to promote over all welfare of the common people.
3. International Conventions like GATT (General Agreement on Tariff and Trade) GATS (General Agreement on Trade and Service) should be interpreted harmoniously with Indian Constitution and law(s) to avoid unnecessary conflict.
4. This object can be achieved by the Indian judiciary and Indian Parliament by applying Article 51(d) of the Indian Constitution through innovative interpretation and Article 253 by implementing international Conventions, agreements, treaties through legislations.
5. We must acknowledge that **good business practices** are recognized through the term “law” as mentioned in the Article 13 of the Indian Constitution **including** unique precedent(s), legislations, Customs and Usages or decisions of a Competent Authority.