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Author:

Bhaavya Singh

Symbiosis Law School, Noida

1st Year, BBA LL.B.

**AN ANALYSIS ON THE EFFECT OF CONSENT OBTAINED BY
MISREPRESENTATION ON VALIDITY OF CONTRACT**

Abstract:

India is striving to become an International Arbitration Hub. In order to achieve this, it is important that contract enforcement is strengthened in India; and in cases of breach, the remedies should be made readily available to the affected parties. In light of this, the article seeks to define misrepresentation as under the Indian Contract Act, 1872. It explores the elements of misrepresentation, the modes through which misrepresentation can be committed and the remedies available to the affected party. The article also analyses the effect misrepresentation has on the validity of the contract. It also gives an analysis of the provisions of misrepresentation under the Misrepresentation Act, 1967 of the United Kingdom and concludes the differences between the Indian and the English legal systems.

Keywords: *Misrepresentation, Indian Contract Act, 1872, Misrepresentation Act, 1967, remedies, the validity of a contract, etc.*

Introduction:

Consent in the Indian Contract Act, 1872 is defined under section 13. Consent is defined as an agreement “upon the same thing in the same sense” (consensus ad idem). Consent under

the Indian Contract Law is said to be vitiated if it is obtained under undue influence, coercion, misrepresentation, fraud or mistake. This provision is given under section 14 of the Indian Contract Act, 1872.

Misrepresentation is defined as the presentation of a statement that does not prove to be true, by one party to the other, without the intention of deceiving the other party to enter into the contract. The effect of consent so obtained is that the contract is voidable, i.e. it is a valid contract but can be revoked or cancelled at the option of the party whose consent was vitiated.

Misrepresentation under Indian Contract Act, 1872:

Misrepresentation, as defined under section 18 of the Indian contract Act, includes:

“(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of anyone claiming under him;
(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.”¹

A close analysis of the definition reveals three modes through which section 18 can be invoked for a party's consent to be vitiated by misrepresentation:

1. Unwarranted statements- an unwarranted statement is said to be made when a person makes a statement without any real backing to it. Such a statement is made without any reliable source of information. The person offering such a statement believes its validity and does not crosscheck the information. Such a statement is made to stimulate the other party to contract without any motive to defraud them.
2. Breach of duty- a duty is a legal obligation bestowed upon a person. When a person fails to perform the said obligation, he is said to breach it. In case of breach of duty, the person causing the breach has gained some advantages from its occurrence and has put the other party at a disadvantage. Again, in such a case, there is no intention to deceive the party.

¹ Indian Contract Act, 1872 § 18, No. 9, Acts of Parliament, 1872 (India), (Feb, 14, 2022, 7:46 AM), <https://legislative.gov.in/sites/default/files/A1872-09.pdf>

3. Mistake- mistake is dealt with separately in the Contract Act under sections 21 and 22. Mistake as mentioned in clause 3 of section 18 refers to a mistake of fact. A party innocently causes another party to make a mistake as to the subject matter (quality, quantity, price, existence, etc of the subject matter) of the contract and induces the other party to contract with them.

Misrepresentation in a Principal-Agent Relationship:

The Indian Contract Act also recognizes misrepresentation in a principal-agent relationship. Section 238 of the act states that misrepresentations made in the course of business of the principal shall be deemed as misrepresentations made by the principal himself. The principal-agent relationship is based on the maxim "*qui facit per alium facit per se*" which means that when a person authorizes another person to do an act, the act so done is deemed to be done by the person who authorized the act.

Prerequisites of Misrepresentation:

- a. Misrepresentation should be made of a material fact as to the subject matter.
- b. Misrepresentation should be made to provoke the other party to enter into the contract without an intention to deceive.
- c. Misrepresentation should be made prior to the conclusion and finalization of the contract.
- d. Misrepresentation is made by the party who believes the statement to be valid.
- e. The other party whose consent is affected should believe it and act upon it.

Material Facts as to Subject Matter:

Material facts in law generally refer to the facts which are relevant to the case, that have the tendency to affect the court's decision. Material facts as to subject matter include any of the following:

- Presence of the subject matter.
- Cost of the subject matter.
- Amount of subject matter.
- Nature of subject matter.
- Title of the subject matter.

Silence as Misrepresentation:

Under section 17 of the Indian Contract Act, it can be implied that mere silence does not amount to misrepresentation. Nevertheless, there are certain exceptions to this rule. These exceptions are contracts of *ubberimae fidei* (contract of utmost good faith), where the parties stand in a fiduciary relationship i.e. one based on mutual trust, when the circumstances based on which the contract was formed have changed and when silence itself amounts to misrepresentation. In all these cases, there arises a duty to speak and if such duty is breached, it amounts to misrepresentation.

Effect of Misrepresentation:

After the misrepresentation is discovered, the victimized party has the option to remedies as specified under section 19 of the Contract Act. Section 19 of the act specifies that the victimized party has the option to rescind the contract or to accept it and insist on its specific performance. The party can also claim to be placed in a position that they would have been in had the misrepresentation been true. The party, however, cannot claim damages if the consent was granted under misrepresentation.

The exception under section 19 states that misrepresentation by silence will not make the contract voidable if the party had sufficient means to crosscheck the facts through the ordinary diligence of a reasonable man.

Explanation under section 19 states that misrepresentation that does not affect the consent to contract with the other party will not make the contract voidable.

Another remedy available to parties whose consent is caused by misrepresentation is rescission of contract under section 27 of the Specific Relief Act, 1963. Section 27 of the Specific Relief Act states that the remedy of rescission of contract is awarded in cases where the contract is terminable by the plaintiff who sues for the said remedy.

To summarize, the remedies available to the affected party are:

- Rescission of contract- means to cancel and terminate the contract where the parties abandon their rights and obligations under the contract. The object behind rescission is to restore the parties into a position that they were before the contract was entered into i.e. *status quo ante*.

- Specific performance- the affected party can insist on the performance of contractual obligations and restoration of the object of the contract to how it was prior to the contract.

It should be noted that when a person is suing for misrepresentation, specific pleading should be present in the case to prove misrepresentation as mandated under Order VI Rule 4 of the Civil Procedure Code, 1908. This was affirmed by the Supreme Court in *Placido Francisco Pinto (D) by LRs & ANR v. Jose Francisco Pinto & ANR*.

Misrepresentation under English Law (United Kingdom):

Misrepresentation under English law is governed by the Misrepresentation Act of 1967. It defines misrepresentation as to a misleading fact that causes a party to enter into a contract based on false information. Essential elements of misrepresentation include a false statement made before the formation of a contract, a party who has a motive to enter into a contract and the party's belief in such a false statement.

Types of Misrepresentation:

There are three types of misrepresentations that the Misrepresentation Act recognizes. They are:

1. Innocent misrepresentation- when the representation made is false but the maker legitimately believes it to be true then, the misrepresentation is regarded as an innocent one. The maker of the said statement has not been negligent in making the statement.
2. Negligent misrepresentation- arises in a situation where a party accounts for a statement without due verification undertaken through reasonable care. The party acts negligently while presenting the statement and breaches the duty of care it owes to the other party concerning the statement made.
3. Fraudulent misrepresentation- when representation is made *knowingly or without belief in its truth or recklessly, careless as to whether it be true or false*,² it is termed as fraudulent misrepresentation. The intention is present in the party's mind to trick the other party into contracting with them.

² *Misrepresentation in Contract Law: Negligent, Innocent and Fraudulent Statements (and the Remedies)*, HALL ELLIS SOLICITORS, (Feb 14, 2022, 7:47 AM), <https://hallellis.co.uk/misrepresentation-negligent-innocent-fraud/>

Modes of Misrepresentation:

Misrepresentation, like communication, can be expressed or implied. Expressed misrepresentation involves actual usage of words, oral or written; whereas implied misrepresentation is not made through usage of words or through conduct. Misrepresentation can be made verbally, may end up in the terms of the contract, made through gestures, etc.

Different Kinds of Statements and do they qualify for Misrepresentation?

Generally, statements of facts are the kinds of statements that qualify for misrepresentation. Such statements are made in regards to a present or past event. However, in certain cases other statements may also amount to misrepresentation:

- Statement related Future: statements relating to a future event or conduct, where the person making the representation does not have the intention as is being claimed by them, amount to misrepresentation.
- Statements of opinion- commonly, these do not qualify for misrepresentation. It is only when the person making such a statement knows that the statement so made is false or they possess extraordinary knowledge or they are in a better position to know the truth, does statements of opinion amount to misrepresentation.

Silence as misrepresentation:

It is a common-law rule that silence does not amount to fraud or misrepresentation. But the rule has certain exceptions as follows:

- Half-truths- half-truths are statements that are true but do not reveal the truth in their entirety. When a person reveals a piece of information and stops, there is an implied duty to disclose the whole truth.
- Change of state of affairs- when the conditions on which the contract was formulated change and it affects the representation made prior to the contract and deems it untrue, it must be communicated to the other party.
- Contracts of utmost good faith (*uberrimae fidei*)- contracts based on utmost good faith like those of insurance, sale of immovable property, etc. carry a duty to disclose all material facts and if a person remains silent, it amounts to misrepresentation.

- Fiduciary relationship- when the parties stand in a relationship where one party has been trusted to disclose all the knowledge they have in relation to the material facts of the subject matter, failure to do the same is deemed as misrepresentation.
- Active concealment- when knowledge as per the material facts is actively hidden or concealed, it amounts to misrepresentation.

Effect of Misrepresentation:

Misrepresentation is largely governed by the Misrepresentation Act, 1967 in the United Kingdom. The prime remedy available to the affected party is the rescission of the contract. Damages were awarded in cases of fraudulent misrepresentation. But the introduction of the Misrepresentation Act in 1967 made damages available as a remedy to the affected party in cases of negligent misrepresentation as well.

Remedies available are:

1. Rescission of Contract- rescission means to cancel or revoke the contract. It places parties in the position they were in prior to the contract. It is the chief remedy available to affected parties under the common law system. In some cases, rescission may not be awarded and the refusal to allow a party to rescind the contract is called bars to rescission. They are:
 - Where the contract has been confirmed.
 - Where there is a significant delay in bringing a case for rescission.
 - Where a third party has acquired privileges.
 - Where it is impracticable to restore the parties to their pre-contractual positions.³
2. Damages- Traditionally, damages were only awarded for fraudulent misrepresentation in the United Kingdom. In 1967, the Misrepresentation Act was implemented and through it, the remedy of damages was extended to negligent misrepresentation. Section 2(1) of the Act extended the remedy of damages and gave English courts discretionary powers to decline rescission and grant damages instead if the court thinks it is fit to do so. The plaintiff has the obligation to mitigate (reduce or lessen) the damages as far as possible. The burden of proof for *the balance of probabilities* to

³ Matthew Clarke, *Have you been Misled in Contract Negotiations?*, NELSONS, (Feb 14, 2022 7:50 AM), <https://www.nelsonslaw.co.uk/misrepresentation-contract/>

*show causation and remoteness of loss*⁴ lies on the plaintiff while the burden of proof for proving that there was no misrepresentation lies on the defendant.

Comparison between the Indian and the English Legal Systems:

In India, misrepresentation is governed by the provisions of the Indian Contract Act, 1872. The relevant provisions concerning misrepresentation are sections 18, 19 and 238 of the Act. In India, misrepresentation can be through unwarranted statements, breach of duty or inducing a party to mistake. The remedy available to the affected party is the rescission of the contract. The party can also accept the contract and insist on its performance along with restoration of their position to their original position.

In the United Kingdom, misrepresentation is governed by the Misrepresentation Act, 1967. In the United Kingdom, three kinds of misrepresentations are recognized: innocent, negligent and fraudulent. In case of innocent misrepresentation, the only remedy available is the rescission of the contract. In cases of negligent and fraudulent misrepresentations, the remedies available are rescission of the contract and damages.

Conclusion:

As it can be inferred from the above analysis, the major difference between the Indian legal system and the English legal system is that damages are available as a remedy to the affected party in case of negligent misrepresentation in the United Kingdom. This leaves the affected party more satisfied. This is missing in the Indian context. There is a need to reform and adapt the Indian Contract Act of 1872 since it exists since the time of the British Raj in India and the times have changed immensely since then. International best practices should be adopted in order to fulfill India's vision to become the International Arbitration Hub.

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