

Unraveling Section 39 of the Contract Act 1872: A Pathway to Classifying Breaches?

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Abstract

Depending on when the repudiation happens, contractual breaches under common law occur as either actual breaches or anticipatory breaches. This article explores integrating the concept of anticipatory breach into the Contract Act 1872. Although not explicitly stated, it is argued that section 39 of the Act may contain elements aligning with anticipatory breach in the common law. This article aims to explain the concept of 'anticipatory breach' clearly, address potential misinterpretations of the section, and discuss its implications. In addition, the question of why acknowledging anticipatory breach is necessary is explored for its substantive and philosophical implications.

Keywords: *Anticipatory Breach, Contract Act, Section 39*

1. Introduction

Section 39 of the Contract Act must be construed to encompass all conceivable eventualities pertaining to trades and businesses. Legislation must evolve to safeguard individuals' rights in instances of contractual violations. While English law has dealt with the concept of 'anticipatory breach' maturely, it is questionable how much of this theory is incorporated in our legal system.

Section 39 effectively enshrines the notion that if a party to a contract has either refused to perform or incapacitated himself from performing his promise in its entirety, the promisee may terminate the contract, unless he has indicated, via words or actions, his consent to its continuation.

With many shifting scenarios doctrine of anticipatory breach has become a requirement, which the article has examined in its latter half. This has recently been endorsed by Lord Sumption in *Bunge SA v Nidera BV* [2015] UKSC 43, 3 All ER 1082 (12), who noted that anticipatory breach's a response to the pragmatic concern of Victorian judges to avoid the waste of economic resources implicit in any inflexible rule which required the parties to go through the motions of performing a contract which was for practical purposes dead (Davies, 2021, p. 382).

A multitude of historical and present case laws have been examined, and scholarly commentary has been reviewed to provide a definitive interpretation of Section 39 of the Contract Act 1872 in this article.

Section 39 has created the road for many forms of breaches, which will effectively assist the court in making better judgments. In the latter part of the article, types of breaches. Explanation of section 39 and a question has been posed regarding the doctrine of anticipatory breach and its link with the section 39 of the contract act and certain ideas surrounding it.

2. The Idea of ‘Anticipatory Breach’

A contract comes into existence when it is formed, not when performance is required (Pollock & Mulla, Indian Contract & Specific Relief Acts, 2001, p. 1004). A contract may be formed at any given moment but repudiation will only occur before the start of performance. Anticipatory breach, also called anticipatory repudiation (Black & Garner, 1999, pp. 1806-7), happens when one party in a contract refuses to fulfill their obligation before the agreed-upon performance date. An example may clarify further:

X and Y made a contract on 1st of April that in exchange of taka 1,00,000, X would sell his car and hand it over to Y on April 26th at once. On April 13th, X informs Y that he cannot deliver the car on April 26th. Here, X has committed an anticipatory breach. This allows Y the chance to not to fulfill his contractual duty.

The anticipatory breach on the part of X raises a question: Does Y need to prove he could have fulfilled his part if X had delivered the car? It is likely the court would not look into this. So, Y does not need to prove he could have fulfilled his part if X had done his. However, some argue that Y might have needed to indicate they were ready and prepared to fulfill his part if X had done his part (*Foran v Wight* [1989] 168 CLR 385, dissenting opinion of Mason J.).

In the case of anticipatory breach, the promisee refusing in advance to perform his obligations when it is due, the refusal must be a complete refusal. It will not be considered an anticipatory breach if it is founded on the other party's concern that the promisor could default on his commitment. The right to receive assurance that the other party intends to fulfill his obligation exists for the party who reasonably feels the other party may make an anticipatory breach according to American Law (Uniform Commercial Code, § 2-609). It is called the Doctrine of Adequate Assurance. There can be no conditions on the repudiation.

Given that it has already been hinted at what an anticipatory breach is, let us visit the promisee's choices for better understanding. The options available to the promisee are as follows —

- a) To accept the repudiation
- b) To disregard the repudiation.

2.1 The Option of the Promisee

When a promisor makes an anticipatory breach, the promisee has the option of accepting the repudiation, in which case the contract may be terminated and damages may be sought. The promisee has the ability to put off his own performance if it is clear that the promisor has broken the contract in advance. Such breach in advance frees the promisee from his own obligation. Imagine a scenario in which the idea of an anticipatory breach does not exist. Therefore, the promisee cannot terminate the agreement before the day on which it was supposed to start. It would only make things difficult for the promisee. Repudiation may occur if one party disables himself from performing or refuses to perform (Sahay, 2014, p.183).

This idea is introduced to us through the landmark case: *Hochster v. De la Tour*(1853) 2 E & B 678. In April 1852, De La Tour engaged Hochster to join him on a three-month voyage around Europe, beginning June 1. In May, when De La Tour informed Hochster that he didn't need his services, Hochster filed a lawsuit on May 22 without any delay. According to De La Tour, Hochster was not eligible to receive damages until after he had prepared himself for the June 1 performance. According to Lord Campbell CJ, The Plaintiff thereupon, could without completing the treatise, initiate a case for breach of contract.

What if they were forced to wait until the performance's scheduled start time? Obviously, there would not be any room to terminate the contract before the date of the performance if the promisee's anticipatory breach were really a figment of the promisor's imagination. The promisee would have to wait till the date of commencement of the performance and then had to file a lawsuit for damages based on an actual breach. These words could be perplexing to us. So, let's look at a specific illustration.

3. The Importance of Acknowledging Anticipatory Breach

Let's consider a scenario where A and B enter into a contract wherein A agrees to produce 10 statues depicting B's class teacher, Mr. C, in exchange for a payment of 1 lac taka. The agreement

is formalized on September 4th with a delivery deadline set for November 15th. A commences preparations for the statues, including sourcing materials for their construction, with a completion target of September 15th. The payment method agreed upon is cash-on-delivery. On September 8th, B informs A that he lacks the necessary funds to fulfill his payment obligation, effectively signaling an anticipatory breach of the contract.

In the absence of the concept of anticipatory breach, A is compelled to proceed with his performance obligations regardless of B's repudiation. Consequently, A is obligated to continue crafting the statues, even though he anticipates that B will not be able to compensate him. Failure to do so would constitute a breach of contract on A's part. A can only pursue legal action against B for breach of contract after the actual breach occurs, i.e., upon B's failure to make the payment upon delivery.

Conversely, if anticipatory breach were recognized, A would have the option to accept B's repudiation upon notification, thereby releasing himself from the obligation to continue production. This recognition would spare A from expending resources on creating statues that would not yield compensation and allow him to pursue legal remedies for damages incurred. In essence, the recognition of anticipatory breach alleviates undue hardship for the promisee.

3.1 Acquiescence: Concept of Retraction

To put it into perspective, we can use a substitution; the word consent will be used to understand it clearly. It appears as though the promisor had broken the contract in advance and now wants to fulfill it again. For instance, A signs a contract committing to perform at a concert on December 20. The deal, referred to as an executory contract, was made on December 12. On 15th December, A refuses to perform at the concert on the 20th. In other words, he committed an anticipatory breach. But on 17th December, A wishes to perform on 20th December. Here, the promisee could terminate the contract on 15th December; instead, he waited, and on 17th December, when A wanted to perform again, he gave his acquiescence, and as a result, the contract remained subsisting.

3.2 Right of Election

The party that feels wronged must select one of two rights.

- a) Affirmation
- b) Termination

Let's now examine each right individually.

3.2.1 Affirmation

An election to affirm the contract means both parties to the contract have their obligations up and running (Poole, 2012, p. 310). That implies that they are not excused from their performance. In this situation, the promisee often chooses to disregard the repudiation and continues to conduct business as usual. Thus, the promisor is obliged to fulfill the obligations specified in the contract's due date. The promisee must express his desire to continue the contract in a clear and unequivocal manner for the affirmation to be considered effective. The election is said to be considered to be irrevocable (*Fercometal v. Mediterranean Shipping* [1989] AC 788). The affirmation method has disadvantages as well. The faults are -

1. Promisee might fail to perform their promise. In that scenario, he cannot argue that the promisor's breach has given him the excuse to commit a breach. However, that is true. Let's use an example: On September 1, A and B made a deal stating that A will sell 10 cars to B in exchange for B paying 1200000 TK. According to the contract, A was required to provide the cars on September 12th, and payment was due upon delivery. On September 5th, A stated that he would prefer not to provide the cars, which is akin to renunciation. B chose affirmation over termination of the contract in the hopes that A would alter his mind and perform by the deadline. And on September 12th, much to B's astonishment, A delivered the cars; nevertheless, B failed to make payment for the cars. He could now counter that A's renunciation has given him the opportunity to justify his behavior. However, if you decide to uphold the agreement, there is a good chance that the promisor will fulfill his end of the bargain, and the promisee will then have an obligation to do the same. If not, he will be the person who breaches the agreement.
2. The contract might get frustrated. When the non-breaching part decides to affirm the contract there might be a chance that the contract gets frustrated between the affirmation and the due date of performance. We will revisit the case of (*Avery v. Bowden* [1855] 119 E.R. 1122) to demonstrate this argument.

The plaintiff, Avery, was required to transport goods for the defendant. Avery informed their customer that they will not have any cargo to deliver on the scheduled performance day before the deadline. Of course, this constituted an anticipatory breach. Avery, however, chose to keep the contract alive and refrained from terminating it. He made the decision to hold off in the hopes that Bowden would carry out his duty in some way. War broke out before the scheduled shipping date for the cargo. As a result, the defendant was unable to fulfill his duty. Additionally, the contract was frustrated. As a result, the plaintiff was prevented from suing. He could have filed a lawsuit for the breach only if he had decided to end the contract when the anticipatory breach was really committed (*Avery v. Bowden* [1855] 119 E.R. 1122).

3.2.2 Termination

If the innocent party wishes to terminate the contract he needs to communicate it to the breaching party. Conduct can also be interpreted as acceptance of repudiation, and it doesn't always have to be expressed that way. To further comprehend it, let's look at the case of *Vitol S.A. v Norelf Ltd.* [1996] 3 WLR 105. According to that, an acceptance of repudiation doesn't require a certain format. V and N entered into a contract in this instance on February 11, 1991. A propane cargo was to be purchased under the agreement. V informed N that he couldn't buy it on March 8, which amounted to an anticipatory breach. If N accepted the breach, the agreement would be terminated. On March 15, N did not communicate; instead, he sold it to X. It was decided that N had accepted an anticipatory breach through his behavior.

The non-breaching party must offset the loss if he decides to terminate the contract, which is another crucial point to remember. It is not mandatory but a choice. Mitigation of loss means minimizing the damage caused by the breach. For instance

Rahim and Karim decide to sign a contract stating that Rahim will sell Karim 10 keyboards on July 18. On July 3rd, the contract was signed. On July 8th Rahim informs Karim that he won't be delivering the keyboards to him on. which leads in a breach that was anticipated. If the products are not delivered on schedule, Karim understands that he will experience financial losses and takes action to lessen such losses. Even if the things cost more than the agreed-upon price, he is still allowed to purchase them from a store. Assume that the contract's price is 2,000 taka. And now he must pay 5,000 tk

for these. He will receive 3,000 tk in compensation. It is when the anticipatory breach is accepted, only then will the duty to mitigate arise. (*Roth and Cov. Taysen, Townsend, and Co. and Grant and Co*, (1895) 73 L.T. 628).

Loss mitigation demonstrates reasonable behavior by the non-breaching party, and damages are determined by the court's investigation.

4.Types of Breaches

We should be familiar with breaches before we go into the intricacies of section 39. What kinds of breaches are possible? We are aware that a party to a contract is considered to be in breach of the agreement when he does not uphold his end of the bargain. However, there are two different sorts of breaches depending on when they are committed –

- a) Actual Breach
- b) Anticipatory Breach.

We will focus on the actual breach right away because we have previously talked about anticipatory breach. A contract's specified responsibilities not being met might be referred to as an actual breach. It could not be anticipated. To be more specific when the breach occurs at the time of the stated performance. Imagine A and B as the two contracting parties in order to provide a clear illustration. A must supply the requested goods by February 18th. On that day, however, he missed delivering his items, and no previous notice was given. B couldn't anticipate that breach, meaning A has committed an actual breach.

Since we now understand what an actual breach is, it can be broken down into other categories based on how serious it is. These types are –

1. Material Breach: it occurs when the promisee's expectation of the contract has been fully dashed as a result of the breach. The breach goes root to the contract and it diminishes the essence of the contract.
2. Material Breach that is not yet a total-partial breach and cure (Ablum, 201, p. 509): it is a kind of material breach that can be turned into a non-material breach by rectification.
3. Non-material Breach: it could be also called substantial performance, as it falls short of what was promised. But the breach doesn't destroy the essence of the contract, it could be adjusted through monetary compensation.

5. Explanation of Section 39

Under section 39 the “disabled himself from performing his promise” can be explained by the given example. A and B sign a contract to buy and sell an automobile. A says he would deliver the car on April 8th, but on April 2nd, he sells the vehicle to C. B is aware of the sale. Given the circumstances, it should be very clear that A cannot sell his car to B on April 8 because he "disabled" himself from fulfilling his contract by selling it to C. It is now clear that A cannot fulfill his obligations under the contract he signed with B because he sold the car to C. Here A has committed an anticipatory breach of contract.

The section states that if a promisor refuses to fulfill their obligation in its entirety, the promisee can terminate the contract. The singer's missed one night may not give management the authority to end the contract. A promisor can only terminate if the promisee has materially breached the agreement. To support the illustration, it is necessary to establish that missing one night constitutes a material breach. Some new terminologies that are not specified in our Contract Act of 1872 have come into use. We must first comprehend what Substantial performance and Material breach represent in order to have a comprehensive idea.

5.1 Material Breach

When one party doesn't respect, or in other words, doesn't carry out, their commitment, there is a breach. There are two types of breaches in common law. One of them being material breach. A breach occurs when the performance falls short of the contract. Breach types come in two different degrees of severity. A breach qualifies as a material breach when it is significant and fundamental enough to provide the other party the right to refuse to perform and end the agreement (Ablum, 201, p. 510). The opportunity to terminate the contract is provided to the promisee when his expectation is completely dashed as a result of the breach. Therefore, a breach will be referred to as a material breach if it is so serious that it fundamentally undermines the terms of the contract. The breach deprives the promisee of a significant portion of his agreement. We'll walk through a real-world example to help you better comprehend it. Let's say B and F sign a contract on January 1st. Where B is a contractor. B offers to construct a home for F for \$100,000 within 30 days. Time was of the essence in this arrangement, as evidenced by a clause that required him to complete the house within a certain period of time. Following the performance, it was discovered that B had constructed a magnificent house with just one

flaw. He neglected to set up the electrical system. B needs to demolish this house and start over if he wants to solve this issue. The problem is that because time is of the essence in this situation if B decides to build this house again, he will actually be unable to complete it within the allotted time. As a result, he has prevented F from receiving a sizable portion of the benefit. It might be useless to him after that. Therefore, it might be claimed that he broke the contract in a material way.

Even if time were not an issue, it would be difficult for a contractor to build a house on his own dime in the real world. It would be considered a material breach if he didn't build another house, and it wouldn't be considered a breach at all if he did.

5.2 Substantial Performance

Another term for it is a partial breach. It alludes to a breach that doesn't go to the heart of the agreement. In this case, the breacher's behavior significantly complies with the promisee's expectations (Ablum, 201, p. 512). We'll explain it through an example. B and F entered into a contract requiring B to construct a home for F. 50 ornamental lights have to be installed in order to beautify the home. B built the house flawlessly, however, he unintentionally installed 48 lights rather than the intended 50. In this case, he has essentially fulfilled the contract because it can be inferred from the data that 48 lights would accomplish about the same amount of work that 50 lights would have. B has obviously broken the term, yet it is not a serious enough breach to entirely contradict F's expectations. F would be awarded a little sum of damages for the partial breach he has experienced. However, the promisee does not have the right to end the contract due to a partial breach. This amount of damages is often determined by subtracting the cost of fixing the error from the actual value of the performance that was lost (Ablum, 201, p. 513).

Returning to the example from the section, it tends to convince us that the singer only committed a partial breach by skipping one out of the twelve scheduled performances, which means he essentially met his responsibilities. Since the singer's performance largely complies with what was promised, it would be harsh to allow the contract to be terminated (Ablum, 201, p. 513). However, one thing to keep in mind is that the example can also be used to demonstrate that the singer had committed a material breach of the contract, giving the manager the authority to terminate it.

Before moving on to further discussion, it is important to note that Mulla indicated in his book that the Act's illustrations should be read with the understanding that there are no more terms beyond those that are specified in them (Pollock & Mulla, *Indian Contract & Specific Relief Acts*, 2001, p. 1002). If that is the case, we can deduce that skipping a single show typically indicates that the singer has partially violated the terms of the contract and that the manager has unlawfully terminated the agreement. Law, however, will never be on the wrongdoer's side. Therefore, we must demonstrate that the singer's material breach of the contract caused the contract to be terminated in order to support the illustration.

In the case of *Schiller v Sooltan Chand* ILR[1878] 4 Cal 252 Chand a contract was signed for the sale of 200 tons of oil from linseed in April and May, with payment due upon delivery (Singh, 2017, p. 461). Certain deliveries were completed, and the plaintiffs rendered partial payment while retaining the remainder for modification of their assertions. However, the defendants, interpreting that as an anticipatory repudiation, declined to provide additional supplies, prompting the plaintiff to initiate a lawsuit for breach of contract.

Garth CJ observed as follows:

That illustration is perhaps not a happy one, because it may lead to misapprehension. The singer by willfully absenting herself, though on one night only, did in fact refuse altogether to perform an integral and essential part of her contract. By doing so she put it out of her power to perform her contract in its entirety. But here the plaintiffs have never refused to perform any part of their contract. They were willing to pay the sum due as soon as their cross-claims were adjusted (*Schiller v Sooltan Chand*, ILR [1878] 4 Cal 252, 256)

We can infer that missing on the sixth night severely wounded the foundation of the agreement. It may have deprived the manager of getting a substantial bargain from the contract. The importance of performing on the sixth night was such that failing to do so greatly reduces the contract's worth. We might cite (*Raymond Weil, S.A. v. Theron* 585 F. Supp. 2d 473 (S.D. N. Y. 2008) as legal authority to support our contention that even a little flaw can have a significant effect on the contract. Actress Charlize Theron, the defendant, and Raymond Weil, S.A. signed a contract committing Theron to promote their watch. For the right to use her likeness in an international commercial campaign, they agreed to pay her \$3 million. The agreement stated that Theron would only endorse RW for the duration of its 15-month term and that she would refrain from donning watches from other brands during that time. Theron wore a Dior watch for

one hour at a film festival, though. Which constitutes a breach. Additionally, the opposite party claimed damages after terminating the contract. Theron argued that wearing another watch for such a short period of time within a 15-month contract period did not amount to a material breach. Unfortunately, pictures of her wearing another watch were also captured. Additionally, pictures of the Dior timepiece were widely disseminated online. Some were offered to Dior watch retailers. It demonstrates that Theron's breach in the obligation to only endorse RW items had a meaningful impact despite the breach's transient nature.

This situation is relevant to the illustration in our section. Even a brief absence on the sixth night might have materially affected the manager's expectations from the contract. And as a result, the contract was terminated.

5.3 Essential Term

Any clause in a contract can be made mandatory or optional by the parties. They can stipulate that failing to comply with a given term can release them from their obligations and cause the contract to end, or that it will only entitle them to compensation and not release them from their obligations (Pollock & Mulla, Indian Contract & Specific Relief Acts, 2001, p. 1002). For example, if A and B sign a contract stating they will supply 5 tons of sugar and make payment upon delivery, B's refusal to make payment immediately grants A the right to end the contract and pursue damages. In the case of a singer's failure to appear on stage on the 6th night, the management had the power to terminate the agreement, as being on stage on the 6th night was a fundamental term. The evidence will be based on what the parties intended when they entered into the contract (Pollock & Mulla, Indian Contract & Specific Relief Acts, 2001, p. 1002).

5.4 Innominate Term

It might be referred to as a midpoint. It is neither a condition nor a warranty. Only the court has the authority to determine whether a breach of that provision constitutes a condition or warranty and how significant it is. We must first discuss condition and warranty in order to better appreciate the indefinite term.

In legal terminology, a condition refers to a contract provision that is both essential and substantial. Similarly, a violation of a term that is designated as a condition gives rise to the right to terminate the contract subject to the innocent party's choice, as well as the right to seek

damages (*Lombard North v Butterworth* [1987] 1 QB 727).

Parties may consider certain issues, which seem to be of minimal significance, to be essential. It will be one if they adequately convey their aim to make it a condition precedent (*Bettini v Gye* [1876] 1 QBD 183, per Blackburn J).

The innocent party can terminate the contract or can continue with the contract.

Take this as an example. A and B went into a contract where A will have to build a Computer with certain products of certain brands, it was agreed by both parties that it was a condition, if A builds the computer using products of another brand then B could consider it a breach of the condition. Thus he could terminate or continue with the contract.

Conditions in a contract are more important than warranties. Only in the event of a warranty breach may a party file a claim for damages. He cannot terminate the contract.

A breach of an innominate word may result in various repercussions. It is conceivable that the court will allow the innocent party to cancel the contract if the innominate term had such significance that the loss resulting from that breach would virtually prevent the innocent party from receiving the substantial advantage from the contract. An innominate term can be referred to as a condition or warranty depending on how serious the breach was. When does a breach become a severe breach? When the innocent party is prevented from receiving the substantial benefit of a bargain. when the most crucial aspect of the contract is damaged by the breach. The court will designate ambiguous language as a condition if it determines that the breach has affected the contract's fundamental terms. Additionally, when a condition is broken, the innocent party has the option to terminate the contract. When it cannot be demonstrated that a term is a condition or warranty, it becomes innominate (*Bettini v Gye* [1876] 1 QBD 183, per Blackburn J). We can only refer to an undefined word as a condition or warranty after the breach. It will be referred to as a warranty if the term's breach is relatively minor.

Kawasaki Kisen Kaisha Ltd. v. Hong Kong Fir Shipping Co. Ltd [1962] 2 QB 26 is relevant at this point. Innominate terms were developed thanks to this case. It demonstrates that these clauses are neither warranties nor conditions. Only when the breach was discovered could these phrases be specified. Depending on how bad the breach was, either conditions or warranties

would apply.

To apply this idea to our part, we might say that until the singer skipped the sixth night, the effects of performing on that night had not yet been fully understood. Only after the breach had been made did the management learn the consequences of performing that night. We may call the term a condition after the breach because it was discovered that performance on the sixth night had a significant impact on the entire contract. The management had the right to end the contract because a condition had been broken. The language used by CJ and Gareth –

“When one party to a contract "entirely refuses to perform ... his part of it." (The Contract Act, 1872, Section, 39)

The phrase ‘his promise in its entirety means the substance of the promise taken as a whole (Pollock & Mulla, Indian Contract & Specific Relief Acts, 2001, p. 1002). Here refusal to perform in its entirety means a substantial part of the bargain. The promisee will lose the value of his agreement if the part is not fulfilled. The contract will be struck at its core, losing all of its importance. Even a minor flaw could have a significant effect on the contract. Therefore, declining to do a minor task may have a significant impact on the contract. In short, entirety means a vital part of the contract which may even seem to be a small part of the contract but has a significant role on the contract. And failing to perform that portion will give the innocent party chance to terminate the contract.

6. Does Section 39 Actually Reflect the Concept of Anticipatory Breach?

Mulla claim that section 39 inadvertently mentions anticipatory breach (Sahay, 2014, p.182). One could argue that it does mention anticipatory breach.

It is argued that A repudiation can take place at any point between the contract's creation and the date on which it is due to be performed—that is, prior to either party's performing under the terms of the contract, or after the performance has started but before the repudiated performance's due date (Ablum, 2017, p. 522). From this point of view, the section of the Act and the illustrations have an alignment with the notion of anticipatory breach. As the singer in illustration no. a willfully absents herself on the 6th night it gives the right to terminate the contract to the promise it could be argued that it was an anticipatory breach. By willfully absenting herself on the sixth night, the singer impliedly suggested that she no longer desired to

fulfill her obligations under the contract. In other words, her actions hinted that A would not honor the performances due in the future. Anticipatory repudiation transpires when a party explicitly or implicitly declines to perform its obligations entirely before the performance date, constituting a contract breach that could be labeled as an anticipatory breach (Burnham, 2012).

One can also interpret the breach as a material breach.

The subsequent illustration also depicts the concept of Acquiescence. Despite the singer's anticipatory breach, the contract was reinstated with the authority's consent, allowing the singer to resume performances on the seventh night. Consequently, the notion of acquiescence is illustrated here. From this perspective, one can contend that section 39 somewhat exemplifies the concept of anticipatory breach.

The writer of this article argues that in plain and simple language anticipatory breach occurs before the due date of performance. The breaching party repudiates prior to the due date of performance. Therefore, we must emphasize that in order to label a breach anticipatory, we must take into account whether the repudiation occurred prior to the start of the performance. For instance, A and B contracted on April 7 that A will supply Apples to B between April 10 and April 15. 20 kilogram each day. An anticipatory breach will occur if A refuses to provide the Apples before the performance begins, for example on April 8. However, if A begins supplying apples on April 10 and then indicates on April 12 that he will no longer be doing so, that would not be seen as an anticipatory breach but rather as an actual breach.

In order to bolster this claim, we would like to draw attention to the fact that every major case involving an anticipatory breach demonstrates that all of the parties that breached the agreement had refused to do so before the performance was due. It was evident in *Hochster v De La Tour* (1853) 2 E&B 678 where the employer expressed his intention not to have the service of the employee before the due date of performance. For instance, in *Frost v Knight* (1872) LR 7 Ex 111, 41 LJEx 78, the defendant pledged to wed the plaintiff following the passing of his father. But while the plaintiff's father was still alive, he resisted doing so. Which indicates that he retracted even before the performance's date. In *Avery v. Bowden* (1855) 5 E & B 714, the ship's master was advised in advance that no cargo was available before the last date for loading. It was comparable to repudiation. Thus, it reveals the type of anticipatory breach. It is

essential that the refusal to perform occurred prior to the due date of performance in order for it to qualify as an anticipatory breach.

There is not a single mention of anticipatory breach in our Contract Act, 1872. The intriguing aspect is, that despite our ability to draw attention to Section 39, we were unable to do so since the examples showed that the breaches were actual rather than anticipatory.

We can claim that the section did not indicate an anticipatory breach because the performance had already begun. As Chitty put it –

“An anticipatory breach occurs when a party expresses a desire to break a contract before the due date for performance and does so by acting in a way that would lead a reasonable person to believe that he does not intend to fulfill his obligations (Chitty, 2000, vol. 1, p.1383).”

Our example defies the idea of an anticipatory breach because the singer had already begun performing, whereas for there to be an anticipatory breach, the repudiation must occur prior to the performance's due date.

So, if the illustrations were such that, a singer, enters into a contract with B, the manager of a theatre, to sing at his theater two nights in every week during the next two months, and B engages to pay her 100 Taka for each night's performance. Before the start of the performance (the singer has not sung for a day) the singer informs B that he will be unable to perform on the 6th day. B is at liberty to put an end to the contract. Why is he free to break the contract? Because if the threatened deviation materialized when performance was due, it would constitute a serious and complete breach (Ablum, 2017, p.523). It diminishes the value of the contract.

In our Contract Act 1872, section 65 talks about the obligation of the person who has received advantage under a void agreement, or contract that becomes void. Any person who has received any advantages under an agreement which is discovered to be void or becomes void is bound to restore it, to the person from whom he received it. Section 73 talks about remedies for actual breaches. Section 75 talks about the party rightfully rescinding the contract, entitled to compensation. It covers section 39. The manager rightfully rescinded the contract, so he is entitled to any damages which he has sustained through the non-fulfillment of the contract. But here there was no mention of anticipatory breach, rather referred to the remedy the party will get who has rescinded the contract rightfully. Therefore, in our opinion, section 39's examples have

restricted its application.

In every week during the next two months, and B engages to pay her 100 Taka for each night's performance. Before the start of the performance (the singer has not sung for a day) the singer informs B that he will be unable to perform on the 6th night. B is at liberty to put an end to the contract.

7. Conclusion

Anticipatory breach is a breach that occurs before the performance of the contract is due, it is opposite to actual breach which takes place on the date of performance of the contract where one of the parties denies to perform his part of the obligation under that contract on that specific date of performance. The most essential feature of anticipatory breach is that it occurs before the performance is due. Section 39 of the Contract Act 1872 explains the concept of anticipatory breach from a different angle altogether. By inserting the words “when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety” and further adding the first illustration (a), the section does not give an idea of anticipatory breach rather it opens the avenues for classification of breaches in different ways. Material and Partial breaches were never part of the Contract Act. By inserting the word ‘entirety’ the section opens the gate for us to explain breaches in different ways and this could include partial and material breaches. In this article, we have tried to decipher the true meaning of anticipatory breach and the possibility of clarifying the concept of breach (Breach is never defined under the Contract Act, 1872) and open a wide option to include different kinds of breaches which would help us to have a clearer view of breach and remedies.

Acknowledgement

The author acknowledges the assistance of Fahim Faisal, student of 1st Year, Department of Law, University of Dhaka.

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