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## USING MISREPRESENTATION AS A DEFENCE UNDER CONTRACT THEORY

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### ABSTRACT

The opposite party can cancel a contract based on a falsehood. Section 18 of the 1872 Contract Act addresses misrepresentation. Misrepresentation is when someone says something they know isn't true but says it nevertheless because they think it's true. It can also be a violation of duty that doesn't intentionally deceive but benefits the person who breached the obligation or anybody claiming under him an advantage by deceiving someone else to their cost. Misrepresentation is a violation of duty that benefits the perpetrator by deceiving the victim. This provision covers circumstances where no one is aiming to deceive, yet the one who profits from the arrangement is just as liable as if he were. The researcher has relied on secondary data to complete the research by using articles and journals. The research questions in the given paper is also proven throughout. The aim of the paper is to prove that the defence of misrepresentation can be used by the plaintiff when free consent is not acquired. The plaintiff must prove that misrepresentation occurred by the defendant and as a result of which, damage was caused to the party instituting the suit. This was proved throughout the paper.

**Keywords:** Misrepresentation, Contracts, Contract Theory

## REVIEW OF LITERATURE

1. Robert Herian, in the paper, “*Smart contracts: a remedial analysis*” analyses smart contracts as legal tools in contractual or property law are still disputed. Smart contracts' failure to fulfil many of the essential elements of commercial contracts and theory, such as failure to perform and compensation for violation, creates confusion. Smart contracts seem to lower contracting to a level far below that produced through contract law and philosophy over millennia in both common law and civil regimes. This study's restorative analysis of smart contracts will include the law's elements of restitution to comprehend and, where feasible, assess the legal validity of this post-human innovation and investigate the possibility of smart contracts to augment or replace traditional contract law. Under equity, the power to rescind applied even to benign deception, while in common law it only applied to fraudulent or entire lack of consideration. Ever since Act of 1967, the court can deny rescission and impose damages in lieu, except in circumstances of fraud. There are also specific limitations to rescission throughout all cases. Misrepresentation still warrants contract rescindment.<sup>1</sup>
2. In the article, “*Misrepresentation*”, it is explained how One side misrepresents to persuade the other to sign a contract. Misleading conduct voids the other party's consent to the contract, entitling it to remedies. This paper critically analyses contract misrepresentation in Malaysia and Australia. The findings indicate that certain Malaysian legal decisions have given remedies. According to the study, Malaysian courts sometimes granted contract rescission remedies and sometimes cancelled the contract and awarded damages. Contract rescission, however, is explicitly provided under the Contracts Act 1950. Each remedy's goals are different, making this confusing. Unlike in Australia, where state laws govern lawsuit awards, The terms should be reviewed for compliance with Malaysian misrepresentation laws using the Contracts Act 1950. The Malaysian misrepresentation regulations, the Contracts Act of 1950's terms should be examined using Australia's legal standards as a reference. The paper is limited to the Malaysian borders.<sup>2</sup>
3. Kimey Emmanuel Elimhoo, in, “*An Analysis of Passing off under Indian Trade Mark*”,

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<sup>1</sup> Robert Herian, *Smart contracts: a remedial analysis*, Information & Communications Technology Law, 17–34, (2020).

<sup>2</sup> *Misrepresentation*, LEGAL SERVICES COMMISSION SOUTH AUSTRALIA, (Oct. 9, 2018) <https://lawhandbook.sa.gov.au/ch10s03s06.php>

describes the trade mark passing off principles, what constitutes passing off, remedies, exceptions to the theory, and a brief study of an Indian case law interpreting the doctrine. A section of the article highlights the topic of misrepresentation. It discusses Misrepresentation confuses one's good with another's. Passing off requires proof of deception. False claims might harm the plaintiff's brand. "In *Advocaat case* (1979) AC 731, Lord Diplock" argued that if two parties to a claim for false representation are selling or delivering the same services or commodities, a misleading suggestion would hurt the plaintiff's company.<sup>3</sup>

4. Gergen., Mark P., in the paper, "*Negligent misrepresentation as contract*", highlight the importance of negligent misrepresentation. The history of misrepresentation is defined in the paper. It looks at the linkage between the tort of negligence and misrepresentation. The Article examines discussions on the best contract, tort, and negligence theories from the mid-19th century to the present to prove this. Long-term analysis of these discussions reveals a phenomena that field-specific theorists miss. The greatest hypothesis for each field's centre fails to explain its peripheral. Promise-based theories, for example, beautifully explain contract law. The negligence hypothesis of responsibility for reckless injury effectively explains negligence law. Addressing careless deception as a contract issue counters these inclinations. It expands contract and limits carelessness.<sup>4</sup>
5. Sayali Patil, in the article, "Misrepresentation under the Indian Contract Act," explains Misrepresentation under Sec. 18 of the Indian Contract Act and its remedies are covered in this article. Parties can cancel the contract for misrepresentation. Section 10 of the Indian Contract Act, of 1872 outlines contract fundamentals, including voluntary consent. Misrepresentation invalidates consent. The paper highlights the types of misrepresentation along with the remedies given in each case, which are already defined under the Indian contract act. The concept and definition of the same are also defined. One individual misrepresenting significant information without intending to deceive another is committing a misrepresentation. The statement-maker feels it's true. Lawful falsehoods are not misrepresentations. Fraud is deliberate, while misrepresentation is innocent and voidable. If the plaintiff can establish intent, misrepresentation can become a fraud. Misrepresentation is remedied by contract rescindment. The court determines damages for

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<sup>3</sup> Kimey Emmanuel Elimhoo, *An Analysis of Passing off under Indian Trade Mark*, SSRN, (2022).

<sup>4</sup> Gergen Mark P, *Negligent misrepresentation as contract*, California Law Review, 953-1011 (2013).

the same.<sup>5</sup>

6. Sahin, in the article “*Misrepresentation under the Indian Contract Act*” explains the importance of misrepresentation. Three types of misrepresentation are explained. The first is fraudulent misrepresentation. The party making a false representation commits fraudulent misrepresentation. Remember that practically every legal subject, including fraudulent misrepresentation, depends on the circumstances and context. No two instances are alike, therefore even if a previous case is similar to yours, the outcome may change. The next is Negligent misrepresentation under the Misrepresentation Act 1967 (MA 1967) occurs when a contracting party makes a declaration without a reasonable basis for believing it. Finally, Innocent misrepresentation occurs without blame. The misstatement is fraudulent or negligent if X cannot prove it had reasonable factors to think its assertion was true.<sup>6</sup>
7. The article titled, “*Misrepresentation*”, discusses torts that create liability for the defendant's activities that directly impact the plaintiff's economic well-being. Misrepresentation is a tort, although deliberate, negligent, and strict culpability might prove liability. The components needed for a strong evidence of misrepresentation and the extent of responsibility depend on which of the three bases of liability is employed. But it's usually not a good idea to trust the defendant's opinions, and the defendant won't be held responsible unless: The defendant has better information than what the plaintiff has (when the defendant deals in special goods). The defendant owes the plaintiff a duty of good faith. The plaintiff and the defendant know each other or are connected in some way. For example, the plaintiff and the defendant are both in the same club, and the plaintiff trusts the defendant. The defendant gives the plaintiff business advice, but he doesn't tell the plaintiff that he holds a stake in the deal.<sup>7</sup>
8. Sadual Manoj Kumar, in the paper, “*Free Consent Under Indian Contract Act 1872*”, it is discussed that a contract must have free consent to be legal. The Indian Contract Act of 1872 asserts that for a contract to be valid, both parties must freely agree to it. In a

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<sup>5</sup> Sayali Patil, *Misrepresentation under the Indian Contract Act*, LEGABHYAS, (Nov. 19, 2020).  
<https://legabhyas.com/2020/11/19/misrepresentation-under-indian-contract-act/>

<sup>6</sup> Sahin, *Misrepresentation under the Indian Contract Act*, LEGAL SERVICES INDIA,  
<https://www.legalserviceindia.com/legal/article-7817-misrepresentation-under-the-indian-contract-act-.html>,  
(last visited Feb. 23, 2023).

<sup>7</sup> *Misrepresentation*, Foundations of Law, LAW SHELF,  
<https://lawshelf.com/coursewarecontentview/misrepresentation>, (last visited Feb. 23, 2023).

comparable manner, section 13 of said contract Act of 1872 talks about the real consent. It says that both parties have to concur on an identical subject in the same way for a contract to be free, namely consensus ad idem. Any agreement that isn't made in person isn't valid. Sometimes, one party may not have given its consent freely. This could be because of a lie, being under the influence of something, or a mistake about the facts. So, any contract made when these things are present is not a reasonable deal in the eyes of the law, and the party whose consent was taken can get out of it if they want to.<sup>8</sup>

## **OBJECTIVES**

1. To understand the concept of misrepresentation under contract theory.
2. To study the defence of misrepresentation under contract theory.
3. To learn how consent links itself with misrepresentation.

## **RESEARCH QUESTIONS**

1. Can Misrepresentation can be used as a defence under the Indian Contract Act 1872?
- 2: Is the defence of misrepresentation is inclined towards the plaintiff?

## **CHAPTERISATION**

Chapter I deals with the historical background of misrepresentation under contract theory. This chapter follows through the inception of misrepresentation under the British rule, followed by the implementation of a new type of misrepresentation in recent times.

Chapter II analyses the legal provisions given under the Indian Contract Act of 1872. Two provisions are highlighted under this chapter, being Section 18 and Section 19.

Chapter III explains the role of the judiciary in deciding the verdict of cases. This chapter explains 4 cases in depth proving how misrepresentation was used as a defence in the front mentioned cases.

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<sup>8</sup> Sadual Manoj Kumar, Free Consent Under Indian Contract Act 1872, 9 IMPACT: IJRHAL, 95, 97-98 (2021).

Chapter IV highlights the concluding remarks and certain suggestions provided by the researcher. The conclusion critically examines the entire paper in one paragraph.

## I. HISTORICAL BACKGROUND

The English law idea of "misrepresentation" led to the Indian Contract Act's "Principle of Misrepresentation" in 1872. In English contract law, misrepresentation was indeed split into two categories: fraudulent misrepresentation and reckless misrepresentation. Fraudulent misrepresentation is when a person makes a false statement that he knows is not true and has no reason to believe it is true, or when he makes a false statement without thinking about whether or not it is true. When someone makes a false statement that they may honestly believe to be true, but they have no good reason to believe it, this is called "negligent misrepresentation." The last of the three types of known misrepresentation is innocent misrepresentation, which happens when the person making the statement believes it to be true and can show that he has good reason to believe it to be true. There is something special about the innocent misrepresentation that makes it unique. The courts won't consider it a case of misrepresentation if the lie doesn't help the person who said it or if it ends up hurting both parties to the contract. Later, when the Indian Contract Act was made in 1872, the Provision of Innocent Misrepresentation was added to our law.<sup>9</sup>

## II. LEGAL PROVISIONS

### Section 18 in The Indian Contract Act, 1872

18. "Misrepresentation" defined.—"Misrepresentation" means and includes— —  
"Misrepresentation" means and 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 of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

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<sup>9</sup> Sofia Bhambri, Misrepresentation Under Contract Law, S. BHAMBRI ADVOCATES, (June. 5, 2021) <https://www.sbhambriadvocates.com/post/misrepresentation-under-contract-law>

- (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.<sup>10</sup>

### **Section 19 in The Indian Contract Act, 1872**

19. Voidability of agreements without free consent.—“When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. —When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.” A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.<sup>11</sup>

## **III. ROLE OF JUDICIARY**

### **Derry v Peek (1889)**

In this case which is well known to misrepresentation, the company was permitted to use steam powered trams rather than horses, according to the brochure published by the defendants company. Actually, the company did not have this authority as it requires a Board of Trade approval. In such instances, the claim to get the approval was considered a formality, and the assertion and it was added to the offer document with this knowledge in mind. The board, however, rejected the company's request for this right. Since they relied on the statement, the people who had bought stock in the company later filed a lawsuit against the defendants company for fraud. The House of Lords dismissed the shareholder's claim. The shareholders did not attest to the director of the company's belief being false. As per the court, a statement that is recklessly or carelessly made as to its truth constitutes fraudulent misrepresentation. Due to this, the plaintiff was unable to bring an unfair business practice claim against the defendant.<sup>12</sup>

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<sup>10</sup> Indian Contract Act 1872, §, 18, No. 9, Acts of Parliament, 1852 (India).

<sup>11</sup> Indian Contract Act 1872, §, 19, No. 9, Acts of Parliament, 1852 (India).

<sup>12</sup> Supra.n.6 p.4

**Ram Chandra Singh v. Savitri Devi and Ors. (2003)**

The supreme court held that making a false claim is itself fraud. In fact, even honest lies can be a reason to sue for relief against fraud. Deceit is making a false statement with the intention of hurting someone by willfully or carelessly getting them to believe and act on it. In law, it is considered fraud if a person says something that he knows to be false and it hurts someone else, even if the person who said it didn't mean to hurt anyone. Court fraud is always taken very seriously. If two or more people work together to steal someone else's rights to a piece of property, the deal is void from the start. Fraud and lying are the same thing. Even though a lie might not be fraud in a certain situation, fraud is against all equitable principles, and any situation that has been tainted by fraud cannot be continued or saved by any equitable principle, including "res judicata".<sup>13</sup>

**Morgan v. The Government of Hyderabad (1888)**

The Court looked at how Section 19 of the Contract Act worked. A seller lied to a buyer about the fact that he had already rented out the property he was selling, but the buyer could have found out if he had done his research. The court decided that the case did not fall under the exception in Section 19, and that the plaintiff's lack of care was not a defence for the defendant, who had hidden the fact that the lease had been signed to trick the plaintiff and get him to sign the contract. This was a clear case of misrepresentation.<sup>14</sup>

**M/S Aruna Infracan P. Ltd. vs . Ravindra Cp Navelcar (2020)**

The accused claimed that firm directors misrepresented him and coerced him into giving them the checks. The cross examination revealed nothing about the director's misstatement, therefore the accused could not prove it. The accused did not prove the complainant's misrepresentation, and hence coercion was unclear. The accused relied on the agreement before the Hon'ble High Court. The accused could not exploit his own advantages, and baseless defences could not be considered likely. No evidence suggested the checks were given under duress. This is supported by the fact that the accused did not protect himself from liability. He did not tell his banker to reject the check. The accused also did not pursue legal options to denounce the alleged

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<sup>13</sup> Ram Chandra Singh v. Savitri Devi and Ors. (2003) 8 SCC 319

<sup>14</sup> Morgan v. The Government of Hyderabad (1888) I.L.R. 11 Mad. 419



misrepresentation or coercion. Hence, the defence was entirely bare and has failed in court.<sup>15</sup>

#### IV. CONCLUSION AND SUGGESTIONS

Misrepresentation is a weapon mostly yielded by the petitioners in a case. The establishment of said contractual fraud was made to protect the contractual rights of those entering into an agreement with a third party. Under contract theory, one of the most commonly used defences to contractual obligations is that of misrepresentation. Misrepresentation can be a valid defence under contract theory, as it allows parties to set aside contracts that have been formed through false or misleading statements. In cases of misrepresentation, a party can be released from the contract if they can prove that their consent was based on a false or misleading statement which induced them to enter into the agreement. Therefore, in order to use misrepresentation as a defence under contract theory, the person relying on it must prove that the false statement was made intentionally and with knowledge of its falseness. The person relying on misrepresentation as a defence must also prove that they had no means of discovering the truth of the statement and would not have entered into the contract if the statement had not been made. Furthermore, the person must prove that the false statement was material to their decision to enter into the contract and that they have suffered a financial loss as a result of entering into it. In other words, the burden of proof lies with the party claiming to have been misled, as they must demonstrate that misrepresentation had occurred, and that it was a key factor in their decision to enter into the contract. Despite the difficulty in providing evidence for misrepresentation, the potential for gaining reparation for losses incurred by entering into a contract due to being misled can be a very attractive prospect. As a result, it is important for any potential party to understand the implications of misrepresentation, as well as their obligations to disclose the truth of any statements made in order to protect all parties from suffering financial loss

The person accused of misrepresentation could not be required to pay damages if they are able demonstrate either that they had legitimate cause to think and actually believed the statement was truthful; or that the statement was made by someone else.<sup>16</sup>

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<sup>15</sup> M/S Aruna Infracan P. Ltd. vs . Ravindra Cp Navelcar (2020) CC No. 4955816

<sup>16</sup> Supra.n.2 p.3

A party to a contract whose agreement was based on a lie or misrepresentation can, if he thinks it's right, demand that the contract be carried out and that he be put in the same position he would have been in if the promises were true.

Exception: If a party's consent was based on a lie or silence that is considered fraudulent under Section 17, the contract is still valid if the party whose consent was based on a lie or silence could have found out the truth with ordinary diligence.

Fraud or misrepresentation that didn't make the person who was tricked or lied to agree to the contract doesn't make it invalid.

Hence, parties while entering into contracts should take into consideration the essentials of contracts. Moreover, misrepresentation and fraud should be avoided to prevent any sort of dispute between parties. The lawmakers in India should hold drives to inform the public of using misrepresentation as a defence and how to contract safely. The awareness amongst people should be increased regarding the essentials of a valid contract, the types of contracts, and various provisions related to contracts and the law should be made more stringent in order to prevent any form of misrepresentation and fraud in order to protect their own interests and make the contracting process more secure.

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