DOCTRINE OF FRUSTRATION AND FORCE MAJUERE

Doctrine of frustration means those cases **where the performance of contract has become impossible to perform due to any unavoidable reason or condition**. Under the doctrine of frustration, a promisor is relieved of any liability under a contractual agreement, in the event of a breach of contract, where a party to the agreement is prevented from, or unable to, perform his/her obligations under the agreement, due to some event which occurs, and which was outside of their sphere of control.

Force majeure is present in common law as the doctrine of frustration of contract. This doctrine says **that a contract will be frustrated if its fundamental purpose is destroyed.** If this happens then the parties to the contract will be discharged from their obligations to perform the contract. **Force majeure is some event which is unforeseen and unstoppable and which renders the performance of the contract impossible.** The doctrine of frustration says that a contract's performance will be rendered impossible because of some intervening or supervening event after the contract has been made. A lot of people while entering into contracts incorporate these force majeure clauses to be relieved from performance of all or part of their obligations on the happening of certain specified events beyond the control of the parties.

The **Covid 19 is one such force majeure** situation where contracts have become impossible to perform.

The doctrine of frustration of contract law was initially defined by two points, namely:

(i) The doctrine was to be permitted where it was raised as a defense to the non performing party due to impossibility to perform as per the agreement; and
(ii) The parties were entitled to insert provisions as a contingency measure to provide for the occurrence of the same.

The **object of the doctrine of frustration is to find a satisfactory way of allocating the risk of supervening events**. The doctrine does not prevent the parties from making their own provision for this purpose. They can expressly provide that the risk shall be borne by one of them, not by the other, or they can apportion it or deal with it in any other way they like or let it lie where it falls.

The doctrine of frustration is really an aspect or part of law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done.

To invoke the aid of frustration, the party who wants to establish that the contract has become frustrated, has to establish the following conditions:

1. **That the performance of the Contract has become impossible.**

2. **That the impossibility is not on account of some event which the promisor could not prevent or anticipate.**

3. **And that the impossibility is not self induced by the promisor or due to his negligence.**

It was clarified in the landmark English case, ***Taylor v Caldwell [QB (1863) 3 B&S 826],*** where **Blackburn, J** laid down that the above *"rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied."* An implied condition would be read into contract when the performance becomes impossible from the perishing of the thing without default of the contractor. In this Lord Summer said that "*the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands."*

It was further held "*where the contract was entered into for the use of the musical hall for concert purpose, but before the day of the concert, the hall was destroyed by fire, held that performance becomes impossible*." This was because the very thing on which the contract depended on ceased to exist. Thus it was held that for the doctrine of frustration it must be so that the nature of contract is such that it would not operate if a thing ceased to exist.

The **doctrine of frustration comes into play when the contract becomes impossible on account of circumstances beyond the control of the parties** or a change in the circumstances makes the performance of the contract impossible. **It is settled law that the causes of frustration must not have occurred because of default of either party.**

In understanding the substance of a contract it is necessary to ascertain from the surrounding circumstances whether an indefinite period of time was in contemplation or whether the parties have contemplated some limit to the indefinite period.

The sanctity of contract is the foundation of the law of contract and the doctrine of impossibility has not displaced this principle but merely enabled the court to enforce such a contract in an equitable manner. **It releases a party from its obligation to perform a contract where performance has become impossible as a result of event out of the control of the party.**

In ***Govindbhai Govardhanbhai Patel v/s Gulam Abbas Mulla Allibhai, AIR 1954 SC 44,*** the Court held the meaning of the expression "impossible of performance" as used in Section 56 means the parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible.

Further, the word "impossible" has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

Ref: ***Supreme Court: Ganga Retreat & Towers Ltd. & Anr vs State of Rajasthan & Ors (2003) 12 SCC 91, Supreme Court: Energy Watchdog vs Central Electricity Regulatory Commission (2017) 14 SCC 80***

In a Supreme Court case ***Dhanrajmal Gobindran v Shamji Kalidas AIR 1961 SC 1285,*** the Court said force majeure is a term of wide import and includes act of God, war, insurrection, riot, civil commotion, strike, earthquake, tide, storm, flood, explosion, fire break down of machinery, etc.

The question arises that 'What will happen in a situation when *force majeure* clause in a contract is not provided for and the performance of the contract becomes impossible because of supervening impossibility?'

In an English case of ***Paradine v Jane [KB (1647) Aleyn 26*** it was pointed out that subsequent happening should not affect a contract already made. It was held that- *"when the party by his own contract creates a duty, he is bound to make it good, if he may, notwithstanding any accident by inevitably necessity, because he might have provided against it by his contract."*

Wherever the reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. (Ref: ***Supreme Court: Dhanrajamal Gobindram vs Shamji Kalidas And Co. AIR 1961 SC 1285***)

In ***Easun Engg. Co. Ltd. v Fertilizers & Chemicals Travancore Ltd. (AIR 1991 Mad 158),*** Easun Co. failed to supply 2/3rd of transformers on account of price increase in transformer oil. The contract also provided for liquidated damages for any delay in the supply of goods and that such damages would not be applicable in case of delay caused due to force majeure viz due to strikes, war, revolution, civil commotion, epidemics, accidents, fire, wind, flood, because of any law/proclamation/ordinance/ regulation of Government, an act of God, or any other cause beyond the control of the parties.

Easun contended that they were prevented from supplying, due to *force majeure* conditions namely, strikes, power cut and phenomenal increase in the cost of the transformer oil (a 400% increase) due to war conditions in the Middle East and the Government of India's Ordinance imposing higher excise duties. The Arbitrator came to the conclusion that Easun was justified in asking for variation of price in transformer oil, in view of the aforesaid force majeure conditions. Further, the contract itself provided that liquidated damaged will not be applicable in case of delay caused due to force majeure conditions.

Therefore, in ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended but what as reasonable men they should have intended.

Further, in ***Ganga Saran* v. *Firm Ram Charan Ram Gopal AIR 1952 SC 9***, the Supreme Court held that *for the application of the doctrine of frustration, courts in India must look primarily at the law as embodied in (the second part of) Section 32 and Section 56 of the Contract Act, 1872, as amended (Contract Act)*:

Section 32 (second part) of the Contract Act pertains to contract being discharged by its own internal forces- that is, where such impossibility was within their contemplation, at the time of entering into the contract. Then, such dissolution of contract, would be governed by Section 32.

Section 56 of the Contract Act pertains to contract being discharged by an external force or outside impact or a supervening impossibility- that is, such impossibility was never within the contemplation of the parties, at the time of entering into the contract. Then, such dissolution of contract, would be governed by Section 56.

Satisfying all these essentials, a court can refuse or entertain any suit as to specific performance under Section 56 of Indian Contract Act, 1872.

In Supreme Court case, ***Energy Watchdog v Central Electricity Regulatory Commission (2017) 14 SCC 80,*** the Gujrat Urjaa Vikas Nigam Limited (GUVNL) issued a public notice inviting proposal for supply of power. Later, Haryana Utilities also initiated a similar bidding process. Adani Enterprises was selected as the successful bidder for 1000 MW of power by GUVNL and a power purchase Agreement was signed between Adani Enterprises and GUVNL. Haryana Utilities also selected Adani Enterprises for 1424 MW and entered into a power purchase Agreement.

Change in laws took place in Indonesia, which increased the export price of the coal from Indonesia, instead of the price that was prevalent in the last 40 years. Adani Enterprises filed a petition under Central Regulatory Electricity Commission seeking relief to discharge them from the performance of the contract on account of frustration. Central Regulatory Electricity Commission refuse and Adani Enterprises went to the Supreme Court.

It was held that "*neither was the fundamental basis of contract dislodged, nor was any frustrating event except for the rise in price of coal pointed out. Alternative modes of performance were available, even though at a higher price. Therefore this does not led to the Contract, as a whole being frustrated.*"

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