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DOCTRINE OF FRUSTRATION: A LEGAL ANALYSIS

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ABSTRACT

This paper deals with the Indian provisions on Doctrine of Frustration, which is defined under section 56 of the Indian contract act, 1872 and to know what is meant by impossibility and types of impossibility. There are certain grounds which help in determining whether the contract comes is frustrated or not.

The concept of the doctrine of frustration has an evolving history, originating from English law and was subsequently adopted by Indian law. India also through case laws at times has followed English law and, in some cases, has taken its own decisions. The complex nature of the doctrine can be seen in the cases, since it depends on the facts and circumstances of each case and is not a rigid principle which can be applied similarly in every scenario.

It can also be seen that the concept is still evolving from time to time through judicial pronouncements. With the development of technology and other factors, the doctrine of frustration must keep adapting to the changing times, in order to dispense justice to the aggrieved party.

It's quite important to know about the Doctrine of Frustration in this present COVID-19 situation. There has been a lockdown for many days due to which many contracts performed by parties became void. This research also helps to know the status of contract when it becomes impossible and unlawful to perform.

INTRODUCTION

A contract is a multifaceted area of law, made up of many aspects and intricacies and is the origin of many doctrines and principles. The doctrine of frustration is also found in contract law with regards to the non-performance of contracts. Contracts are present everywhere in the world due to their significant nature and are considered an essential part of the business sphere and the foundation of the civilized world. The law of contracts has a rich history and every country has its own stance on the doctrine.

The doctrine of frustration renders the performance of a contract impossible due to some intervention originating from beyond the contract. Like many laws, it also originated from the Roman laws. In the Roman law of contracts, it was an established principle that the party was innocent and would be relieved of responsibility and liability in case the subject matter of the contract was destroyed without any interference of the party, which leading to the unattainability of the purpose of the contract. In those times, when slavery existed, the doctrine was used for circumstances when the slave died a day before the delivery.[1]

The English law of contracts, which evolved before the Indian contract law has developed the area a lot. The law also relates the doctrine of common mistake. The law has also been amended in the form of the Law Reforms Act, 1943.

A "force majeure" clause, which literally means "superior force" and refers to unforeseeable circumstances which prevent the fulfillment of a contract, is also linked to the doctrine of frustration. The Force majeure clause originates from the French Civil Code. However, the clause is not present in English law and other common law jurisdictions such as Australia. Some of the usual force majeure events would be war, government actions and decisions, commercial impractibility and industrial action.[2]

In India, the doctrine of frustration is derived from section 56 of the Indian Contract Act, 1872, which states that "an agreement to an impossible act is void and that A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or

[1]Abhishek Arya & Arvind Thapliyal,'India: Doctrine of frustration' (10th March 2020). https://www.mondaq.com/india/CorporateCommercial-Law/407868/Doctrine-Of-Frustration

[2]Ashurst.com,'Force majeure under Common Law,'(17th March 2020). https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---force-majeure-under-common-law/.

unlawful"[3], though the doctrine has not been expressly mentioned. There are also other co-related sections and doctrines such as the doctrine of initial and subsequent impossibility in the Indian Contract Act.

The concept of frustration is intricate and has been subject to various interpretations over the years. It has become so dynamic, that the case laws have to be observed, in order to understand the rationale behind the judgments given in India and UK, to grasp the principle and the main motive intended by the law.

LAWS ON DOCTRINE OF FRUSTRATION

DOCTRINE OF FRUSTRATION UNDER INDIAN CONTRACT ACT, 1872

Doctrine of Frustration is defined under Section '56' of Indian contract Act, 1872. It states that "An agreement to do an act impossible in itself is void."

Contract to do act afterwards becoming impossible or unlawful: A contract to do an act which after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful: Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Section '56' of Indian Contract Act, 1872 clearly mentions that if a promisor intentionally agrees to do an act which was impossible to do and the promise is not aware of that impossible act then promisor should pay the loss for promise.

Illustrations:

If 'A' contracts with 'B' to discover treasure by magic, the agreement becomes void.

Section '56' of the Indian Contract Act, 1872 contains two aspects of impossibility.

Initial Impossibility: A performance of an agreement is impossible or impracticable since it was made by parties, that agreement becomes void ab initio. Impossibility not only deals with physical or material impossibility, it also includes legal impossibility.

Example:

[3]Indian Contract Act, § 56 (1872).

- 'X' agrees with 'Y' against some amount of consideration to make alive his death father. It is an impossible act and this type of contract comes under initial impossibility.

Subsequently Impossibility: when the performance of a contract is valid and possible to do when it was made by the parties, but subsequently, an event happens because of which the act becomes impossible or unlawful then that contract becomes void.

Examples:

- 'K', who lives in china, made a contract with 'L', who lives in India about import of goods. After the contract was made, the Indian government had forbidden the import of goods from other countries. This is valid contract when it was made but after this subsequent event or impossible event, the contract cannot be performed and it becomes void.

GROUNDS OF IMPOSSIBILITY OR FRUSTRATION:

1. **Death or Incapacity of the party to perform the contract**: A party to the contract shall be exempted from the performance of the contract if it depends upon the existence of a given person, if that person becomes too ill to perform. Therefore, if the terms or nature of a contract requires personal performance by the promisor, his death or incapacity puts an end to contract. In the case of Robinson v. Davison[4], there was a contract made by the parties that plaintiff should perform in a concert but at that time of contract she becomes too ill and she was not in the position to perform in a concert. Due to this, the defendant lost a sum of money and he sued the plaintiff. The court said that under circumstances a contract will be frustrated[5].
2. **Destruction of subject matter of the contract**: Doctrine of frustration or impossibility applies "where the actual and specific subject-matter of the contract has ceased to exist".[6] In the case of Howell v. Coupland[7] , there was a contract between the plaintiff and defendant, in which the defendant was to provide potatoes, after cultivation. However, the defendant failed to do so because the crops were destroyed by a disease.

[4]Robison v. Davison , (1871) LR 6 Exch 269.

[5]Varun singh, frustration of contracts: The Indian Perspective http://www.legalserviceindia.com/legal/article-626-frustration-of-contracts-the-indian-perspective.html.

[6]Mc Cardie J in *Blackburn Bobbin Co v. T.W. Allen & Sons,* (1918), where the learned judges formulates a list of the grounds of frustration as warranted by the authorities.

[7]Howell v. Coupland, (1876) 1 Q.B.D 258.

The court held at the time of contract, crops were fully grown and afterwards they were destroyed by diseases so it unexpected event and performances would have been excused and the performance becomes impossible.

3. **Non happening of a particular events or Non- occurrence of contemplated events**: At the point of time a contract was made by parties is a valid contract and it is possible to perform. "But owing to the non- occurrence of an event contemplated by both parties as the reason for the contract, the value of the performance is destroyed."
4. **Change in Law and Interference of the Government:** When a new law is implemented and a contract is made before the law is passed, then it is impossible to make performance of the agreement and the contract becomes void. In the case of Metropolitan Water Board v. Dick Kerr and Co. Ltd.[8] the appellant and defendant made contract for construction of reservoir in the year 1914 and the reservoir took six years to build. At that moment, the work was started, but after two years that is in 1916 the government had ceased. The court held that the contract was frustrated, because the delay clause was a temporary difficulty.

DOCTRINE OF FRUSTRATION IN ENGLISH LAWS

Though the doctrine of frustration has originated from the Roman and French law, the English or common law has developed it a lot. Common law is followed by many countries such as Australia, New Zealand, Pakistan and even India has adopted the common law for contracts and many other areas.

English law of contracts had its origin which dated back to the Magna Carta Charter of 1215. It then went through many changes due to industrialization and the cases which came up due to it. During the industrialization period, English courts became open to the idea of "freedom of contract". Though there has been no specific act for the law of contracts, it is a body of governing laws. However, the English law has been the basis for many legislations like the Indian Contract, 1872 of India. The doctrine of frustration was established and has evolved in the English law through various case laws. Historically in English law of contracts, the doctrine was also developed by the English law as a solution to the absolute liability of the people in all cases during earlier times despite the unnatural situations in some cases.

[8]Metropolitan Water Board v. Dick Kerr and Co. Ltd., (1918) A C 119.

However, it had been mentioned and concentrated in the Law Reforms (Frustrated Contracts) Act of 1943. In this legislation the term frustration has been expressly stated, unlike how other terms have been used in other laws. It mainly focuses on the rights and liabilities of the parties to a frustrated contract. This legislation was the result of a case. The case of Chandler V. Weber, in the year 1940, displayed the situation of the law which restricted the rights of a party, who claimed payment in a frustrated contract. The judgment of this case and the rule it imposed was considered to be unjust and continued for many years before the Law Review Commission which proposed a less arbitrary rule through the seventh interim report of the commission.

The legislation finally came into force in August 1943. The main objective of the act was to provide more rights to the party who has paid on the basis of the contractual agreement by making it necessary that the sum paid by the party should be made partly or fully recoverable, in order to prevent unjust enrichment of one party.[9]

INDIAN AND ENGLISH CASE LAWS ON DOCTRINE OF FRUSTRATION

INDIAN CASE LAWS

- **SUSHILA DEVI AND ORS V. HARI SINGH AND ORS.**

In this case, Sushila Devi was the owner of the village Gujranwala which is presently located in Pakistan. She gave land on lease to other people. In January, 1947 she called for a tender in the village for properties on lease for the period of three year. The respondents accepted the tender deposited some amount for tender and security for the payment of rent for that land. The owner of the village gave a notice by stating that the lease deed of the terms of tender must be registered by the lessee and that the each lessee was responsible for taking possession of land. After the tender that is in August 1947, the India and Pakistan partition took place. Before this partition, because of some reasons the respondents did not go to the village for cultivating the land or to collect the rent from the people who were cultivating. But the lease was not executed and registered. By this situation, respondent a filed suit for claiming or receiving a decree for the refund of the amount which was deposited and damages. The lower court held that "Impossible of performance and decreed the suit in part." This appeal of the court held that "the law of frustration was included in section '56' of Indian Contract Act, 1872. It applies for the

[9]Law Reforms Act (1943), (LawTeacher.com, Oct.12, 2018) (18th March 2020). https://www.lawteacher.net/acts/law-reform-frustrated-contracts-act-1943.php

contract that was only for a lease and not for the leases. But in this case, there was no lease. Because lease was to be for the period of three years and it was not validly made by the registered form and there was an agreement only to a lease and not a leases. This type of agreement comes under the concept of Section 56 of Indian Contract Act, 1872. In Section '56' Impossibility contemplated was not confined to something that which was not possible by human. If the performance of contract becomes inappropriate or impractical with regard to the object and purpose of the parties then it was held that the performance of the contract became impossible. In this case, the respondents took the land on lease for the purpose of personally cultivating or sub-leasing them. But this became impossible because it was supervening events. In the terms of the agreement the owner was not expected to deliver the actual possession of the land but because of some reasons the respondent was impossible to go to the village. Because of this the contract becomes impossible of performance"[10].

- **SATYABRATA GHOSE V. MUGNEERAMBANGUR& CO.**

In this case, there was a company which was run by the defendant. This company owned a large area of land in Calcutta. For the sale of the land, the defendant decided to divide the land in to various plots and offered it to people who were interested to purchase the plots. At the time of agreement, the purchasers paid some amount of money to the defendant and the remaining amount was to be paid after the construction of roads and drains was over. In November, 1941 the collector of Calcutta passed an order that the area of the land which belong to company was to be requisitioned for military purposes. At that moment, Company informed this information to one of the purchasers Bejoy Krishna Roy that because of the land was being taken by government, the company had decided to cancel the agreement for sale and had decided to return their money within a month of letter. To continue the agreement, the company made another offer that by performing their rules, the plot of land would come back to them after the war. The purchasers did not accept the two of that offers which was given by the company. Satyabrata Ghose assignee of Bejoy Krishna Roy sued the company owner for wrongfully renouncing the sale of plot of land and also demanded for the specific performance of the same. In this case, the court held that "the doctrine of frustration is based on the impossibility of performance of the contract. The impossibility of performances and frustration are often interchangeable expression." By comparing English law provisions, the Supreme Court

[10]Sushila Devi and ors v. Hari singh and ors, AIR 1756 SC 197.

observed that the doctrine of frustration was part of the discharge of contract by supervening events and impossibility and section 56 of Contract Act, applies only to case of physical impossibility and this section was not applicable. "It also held to the extent the Indian Contract Act deals with a particular subject exhaustive upon the same and it is not allowed to import the English law principle." The word impossible was not used as physical or literal impossibility. The performance due to requisition would be temporary and it was used as commercial object. Because of unspecified of time period, it cannot determine that performance of contract had become impossible.[11]"

- **NAIHATI JUTE MILLS LTD. V. KHYALIRAM JAGANNATH**

In this case, there was a contract to purchase jute. The buyer (appellant) entered into a contract in July, 1958 with the respondent and the jute was imported from Pakistan. In this contract shipment was to be made if the buyer had import license but he failed to get import license by November 1958, the extension of shipment was increased to one month that is till December 1958. But in January, 1959 the contract had been settled at market prices. When buyer applied for the first time for the import license, it was refused because in his mill he had enough stock for the end year (i.e., for two month). But the buyer applied again in month of December 1958; at that time he was suggested that the government rules had changed and if he wanted to obtain the import license for obtaining goods from another country he should show that he had used one and the same quantity of Indian jute. Because of this, the buyer did not obtain the license. The appellant sued for breach and he pleaded that frustration was caused because of the change in the government policy. The court held that "if the government had completely banned the imports, at that time section 56 would have applied. But the government policy was that the licensing authority would examine the case of the government and also scrutinize the case of each applicant on its own merit. In this case doctrine of frustration was not applicable because the parties had agreed to an implied term; the court also held that section '56' the contract of frustration applied on the basis of the supervening events and impossibility or change of circumstances which was not contemplated by parties at the date of the contract."[12]

ENGLISH CASE LAWS

INITIAL CASE

[11]Satyabrata Ghose v.MugneeramBangur& Co, *AIR 44SC1954*

[12]Naihati Jute Mills Ltd. V. KhyaliramJagannath, AIR528 SC 1968.

- **TAYLOR V. CALDWELL[13]**

This case was decided on 6th May, 1863 by the King's (or Queen depending on the Monarch) Bench and was heard by the Honorable Justices, Judge Blackburn, C. J. Cuckold, Wightman and Crompton. This case is a landmark judgment for the English law of contract as it is considered to be the first case in which the doctrine of impossibility was established.

In this case the defendant and the plaintiff had an agreement to let the plaintiff rent and use The Surrey Music and Garden's Hall for four particular days. However, the music hall caught on fire before the plaintiff could use it and was destroyed without the fault of either party. The plaintiff had incurred loss due to the expenses of preparing the concert, which was being claimed. The main issue was whether the plaintiff can recover the loss by the defendant.

It was held that the damages cannot be recovered. Judge Blackburn said that "though it is a positive contract where the contractor must perform or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of this contract has become unexpectedly burdensome or even impossible." He has also referred to cases such as Hall V. Wright[14] and Walton V. Waterhouse[15] where the rule has been laid out for absolute contracts where they are not subject to any express or implied conditions. He has also written upon the similar situation of bailment of chattel in English law that *"if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.", for this he has referred to the case of Coggs V. Bernard.16*

TEST OF FRUSTRATION

- **DAVIS CONTRACTORS LIMITED V. FAREHAM URBAN DISTRICT COUNCIL[17]**

[13]Taylor V. Caldwell [1863] EWHC QB J1

[14]Hall V. Wright [1954] 746 (EB)

[15]Walton V. Waterhouse (2 Wms. Saund. 421 a. 6th ed.).

[16]Coggs V. Bernard [1703] LdRaym 909.

[17]Davis Contractors Limited V. Fareham Urban District Council [1956] 2 All 145 (ER).

This case took place in 1956 and was decided by a five-judge bench of the House of Lords, consisting of Honorable judges Viscount Simmons, Lord Morton, Lord Reid, Lord Radcliffe and Lord Somerville. This case became the foundation for developing the test of doctrine of frustration in English contract law.

According to the facts of the case, the appellant had entered into a tender, which is a form of contract, to complete the construction of 28 houses in 2 months which occurred due to lack of skilled labour. The tender also included a letter which mentioned the possibility of the contract being subject to availability of materials and labour, which was not considered to be part of the primary documents of the contract. However, the construction, extended to 22 months. The appellants were paid the due money along with the increased expenses. However, the principle of *"quantum meruit"*, which means paying money for the service rendered, which has not been mentioned in the legally enforceable contract, to plead for additional charges and also claimed frustration of the contract due to the shortage of workforce.

The main issues of the case were identified to be-: whether the appellants were entitled to receive more money based on *"quantum meruit"*, whether the unavailability of the labour had resulted in frustration of contract and whether the letter overrode the contract.

The counselors on behalf of the appellant's company were Charles Russell Q.C and J.Stuart Daniel. They argued by explaining their situation by giving an example of where one party expresses that there has been frustration and they would continue working only on that basis, despite the other party denying frustration and they end up deciding to continue at all costs. They contend that in such a situation the principle of *"quantum meruit"* would apply. They also emphasized the point that through frustration the whole contract would not exist and since the appellants had no right to insist, the continuation of work, the respondents could have expelled the appellants from the site. The appellants were of the opinion that as the work which was going on with the respondent's consent, they would be paid more than the contract amount. With regards to frustration, the appellants also expressed the importance of labour in such contracts and its relation to important aspects of the contract such as time and finance. They argued that frustration occurs automatically without the party's interference and the if the work went on despite frustration it meant that for convenience the parties must have left it for later and could not decide whether the work was done under the contract. They also said that the time of frustration did not matter as it must have passed.

The respondent's counsels were consisted of H. J. Phillimore Q.C., Stephen Chapman Q.C. and

M. Stuart-Smith .In the context of frustration, they mainly contended that firstly this would be a very strange case of frustration as according to them there was no disaster or catastrophic event and that the work went on uninterrupted till the end and that both the parties were experienced, there would need to be some interruption for the frustration. They also claimed that the appellants claim for more money fell under the contract. They also contended that the main point of the doctrine of frustration is that it should be identifiable by the parties at a particular point of time, which is not there in this case.

The appeal of the appellants was dismissed and this test was also upheld by the Australian High Court. The test of frustration has been established from this case which can be interpreted from the judgment as *"*Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. It was not this that I promised to do…. that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

It is also interpreted by Lord Radcliffe that "the implied term is too fanciful as nobody writes about unforeseeable events" and the House agreed that the test was objective. The doctrine not only depended on the happening of change but how the performance of the contract was affected by the change. Even if the parties foresee the possibility of the event the doctrine of frustration can still be applied.

ASPECTS OF FRUSTRATION

❖ J. LAURITZEN AS V WIJSMULLER BV (ALSO KNOWN AS THE 'SUPER SERVANT TWO')[18]

This case was decided in the Court of Appeal in July 1989 before Honorable Justices Lord Dillon and Lord Bingham. This case highlighted some of the key features of the doctrine of frustration in English law of contracts.

[18]J. Lauritzen AS v Wijsmuller BV (Also known as the 'Super Servant Two'), [1990] 1 Lloyd's Rep 1.

In the facts of this case, Lauritzen the plaintiff owned a drilling rig (named Dan King) which was being built at a Japanese shipyard. It was agreed to be transported by the defendant, Wijsmuller, who owned a machine which served as a unit of transport known as Super Servant One or Super Servant Two. The contract contained clauses like duty of care which was in favour of the plaintiff and the liability clause which stated that the principal would indemnify the contractor. The clause which governed termination of the contract gave Wijsmuller the right to cancel the performance the contract whether the loading has been completed or not in case of force majeure conditions. Due to some circumstances the Super Servant Two foundered which Lauritzen alleged was the fault of the servants of Wijsmuller which lead to Wijsmuller declaring that neither Super Servant 1 nor 2 would transport Dan King which lead to further negotiations between the parties where they came to an agreement. However, Super Servant Two was lost in one of the voyages, following which Lauritzen claimed damages for the breach of the Dan King contract, where Wijsmuller pleaded that the contract had been frustrated.

The main issues to be argued were whether the defendants were entitled to cancel the contract under the clauses of the contract and whether the contract was frustrated by the loss of the Super Servant Two with/without the negligence of Wijsmuller's servants.

The appeal was dismissed and it was held that the defendant had no liability towards the plaintiff for acts committed before the commencement of the contract, the defendant cannot cancel the contract when loss of the vessel has been caused by the servant's fault and the contract was for the use of another vessel so the sinking of Super Servant Two does not amount to frustration of the contract.

The chief aspects identified were: -

1) The doctrine of frustration is an exception to the performance of the absolute promises as per English common law.

2) The doctrine would result in the end of the contract without any further liabilities.

3) The termination of the contract is automatic and without any more conditions.

4) The doctrine cannot be the choice or option of any party and there should be an "outside event or extraneous change in the situation".

5) The parties should not have induced the event and the event must have taken place without any mistake or involvement of the parties.[19]

[19]J. Lauritzen AS v Wijsmuller BV (Also known as the 'Super Servant Two'), (Swarb.co.uk, Jul.17, 2019) (19th March 2020) <https://swarb.co.uk/lauritzen-a-a-v-wijsmuller-bv-the-super-servant-two-ca-12-oct-1989/.>

CONCLUSION

Contracts are an essential part of a person's life. A person is in the civilized world as he is subject to some rights and liabilities which are through a contract he enters into with the rest of the world. With contracts governing a significant part of our life, it is important to understand the law and the aspects of justice with it. The presence of contracts everywhere makes it evolve everyday and makes it more complex, therefore, even the doctrine is one such element which needs to be understood not with static rules but with a principle to protect the rights of the innocent and carry out justice.

Though in current situation, COVID-19 is also an unexpected event, which is one of the Force Majeure clauses examples, which is happening throughout the world. The COVID-19 is covered under the natural calamity and because of this many contracts becomes impossible to perform. In some cases, contract may be frustrated and may not be frustrated. For example, a sound visual company had made a contract to provide the sound and lighting in the concert. But Government banned the large gatherings and the concert is not possible to conduct because of the government's order. So, because of this the contract becomes frustrated. In other case, a person had a restaurant and he was suffering a loss because of no one are ready to come to restaurant and people wish to avoid infection. The restaurant leases and pays the rent monthly. Here, the person had suffered loss due the people reactions to this situation. So, this contract will not become a frustrated.