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**SECTION 56 OF INDIAN CONTRACT ACT AND ITS IMPLICATIONS
IN THE TIMES OF COVID-19**

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ABSTRACT

The impending crisis of Covid-19 has brought innumerable changes in our lives. With frequent lockdowns and other physical restrictions, the usual duty to sustain the obligations of a contract has become impossible in some situation. Section 56 of Indian Contract Act reflects the provision of impossibility of performance in a contract and the principles of Doctrine of frustration. This article is an attempt to dissect and cast the importance and relevance of section 56 and doctrine of frustration in times of the global pandemic. The article takes into account the genesis of the doctrine to its current implications and inferences. The research methodology used in writing this article is doctrinal, taking into consideration relevant case laws, articles and statutes.

INTRODUCTION

Black's Law Dictionary defines the term 'contract'² as "*An agreement between two or more parties, creating obligations that are enforceable or otherwise recognizable at law*". Execution of these contractual obligations may become impossible due to some unforeseen circumstances i.e. "*Events which are incapable of being known in advance by either of the parties and which ultimately discharge the parties from their contractual obligations*".³

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² Garner Black's Law Dictionary, 9th Edition, p.365

³ *Satyabrata Ghose v Mugneeram Bangur and Co* AIR 1954 SC 44[14]; *Dhruv Dev Chand v Harmohinder Singh* AIR 1968 SC 1024 [6].

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The Black's Law Dictionary defines Frustration in relation to contracts as "*The doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered frustrated*".⁴

"The doctrine comes within the purview of section 56 of the Contract Act as it discharges the contract by reason of supervening impossibility of the act agreed to be done".⁵

"To determine whether the supervening event has made the performance "impossible" under the ambit of section 56, it is important to lay bare different factors adopted by the courts, including the recently developed "multi-factorial approach".⁶

The courts in India and in England have identified a number of factors that may and may not render a contract frustrated. "*The question of whether the supervening event constitutes a frustrating event is a question of degree*"⁷, i.e. how substantially the supervening event has affected the performance

GENESIS OF THE DOCTRINE

The origin of the 'Doctrine of frustration' can be traced back to Roman law. It was part of the Roman contract law which extinguished responsibility of parties where the "*thing is destroyed without the debtor's act*", and the contract purpose has "*ceased to be attainable*". It was enforced in Roman times, for instance, to free, from liability, "*a man who assured to bring a slave by a certain day if the slave died before delivery*".⁸

The genesis of this doctrine can be traced to the Queen's Bench judgement in the case of *Taylor v Caldwell*⁹ in 1863 in England. Although in the case of *Paradine v. Jane*¹⁰ (1647), the court held that, "*when the party by his contract creates a duty or charge upon himself, he is*

⁴ Bryan A Garner, Black's Law Dictionary (9th edn, West Group 2009)

⁵Boothalinga Agencies v VTC Poriaswami Nadar AIR 1969 SC 110[10].

⁶ Energy Watchdog v Central Electricity Regulatory Commission [2017] 14 SCC 80 [39] discussed "multi-factorial approach" as laid down in Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage and

Towage) Ltd [2007] 2 All ER (Comm) 634 [111].

⁷National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675, 688 (Lord Hailsham).

⁸Vijay Pal Dalmia, 'The Doctrine of Frustration and Force Majeure: Covid 19' (17th April 2020) <<https://www.mondaq.com/india/contracts-and-commercial-law/407868/doctrine-of-frustration>> accessed 20 June, 2021.

⁹[1863] 3 B&S 826.

¹⁰Paradine v Jane [1647] EWHC KB J5

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bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it¹¹”.

The doctrine is based on the old Latin maxim “*Lex non cogit adimpossibilia*”¹² which stands for “*the law does not compel a man to do which he cannot possibly perform*”.

Prior to this judgement, in both Roman Law and Common Law, the law regarding contractual obligation was extremely rigid. Supervening unforeseen events, owing to which the performance has become impossible were not regarded as an excuse for non-performance. This stringency in Common Law was diluted in *Caldwell*. In this case, it was held that when an opera house, which was rented for holding concerts, was demolished by fire, the contract was frustrated. This was because the very thing on which the contract depended on ceased to prevail.

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 thing ceased to exist. In the case of “*Taylor v. Caldwell*”¹³, *Blackburn J* developed the theory of “implied condition” or “implied term” while holding that “*in contracts in which the performance rely on the continued presence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of thing, shall excuse the performance*”.

In the case of “*Krell v. Henry*”¹⁴ the “loss of object” or the “loss of foundation” of the contract by the supervening events was put forward and principles upheld in “*Taylor v. Caldwell*” were justified. Similarly, in the case of “*Davis Contractors Ltd v. Fareham Urban District Council*”¹⁵ Lord Radcliffe stated that “*Frustration occurs whenever the law recognizes that without neglect of either party a contractual obligation has become incompetent of being*

¹¹Law teacher, ‘Paradine v. Jane’ (17th June 2019) <<https://www.lawteacher.net/cases/paradine-v-jane.php>>accessed 20th June,2021

¹²Oxford Reference , ‘Lex non cogit ad impossibilia’ (7th August , 2011) <<https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1271>>accessed on 20th June ,2021

¹³ Taylor v. Cardell (1863) 3 B & S 826

¹⁴ Krell v. Henry [1903] 2 KB 740

¹⁵ Contractors Ltd v. Fareham Urban District Council [1956] AC 696 at 729

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*performed because the situation would render it a thing radically different from that which was undertaken by the contract*¹⁶”.

With the advancement of the doctrine of frustration, “*loss of object*”, “*implied condition*” and the need to find a “*just and reasonable*” solution have become established rationalization, for exempting the performance of a contract.

“*The Indian Contract Act, 1872*”¹⁷, does not explain the term “*frustration of contract*”. However, the doctrine of frustration is enthroned under “*section 56 of the Act*”.

THE CONFLUENCE: INDIAN CONTRACT ACT & DOCTRINE OF FRUSTRATION

Though the frustration of contract has not been defined under the Indian contract act, its place can be identified under “*section 56 of the Indian contract act*”. The section not only deals with the impossibility of the performance but also takes into consideration the operation of both situations of “*initial impossibility and subsequent impossibility of the performance*”¹⁸.

The first provision of the “*section 56*” refers to initial impossibility as, “*an agreement to do an act impossible in itself is void*”¹⁹. For example, “*an agreement to discover a treasure by magic is void*”²⁰[*Illustration (a), Section 56*].

The second part of the section talks about the “*Subsequent impossibility of performance*”, written as “*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*”²¹. For example, “*A and B agreed to marry each other and before the time fixed for the marriage, A goes mad [Illustration (b) Section 56]*”.

¹⁶Case Mine, ' Davis Contractor v. Fareham Urban DC' (19th April ,2017) <<https://www.casemine.com/judgement/uk/5a8ff87860d03e7f57ec1060>>accessed on June 20th ,2021

¹⁷The Indian Contract Act ,1872, <<https://www.indiacode.nic.in/bitstream/123456789/2187/1/A1872-9.pdf>>

¹⁸Bhavik Sharma, 'Doctrine of Frustration under Indian Contract act'(June 20 ,2020) <<http://desikaanoon.in/doctrine-of-frustration-under-indian-contract-act/>>accessed on June 21,2021

¹⁹ Indian contract act, 1872 s56

²⁰Ibid.

²¹Ibid.

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The third segment of the section says that, “if 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 b”.

In the landmark judgement of “*Satyabrata Ghose v. Mugneeram Bangur & Co*”²², the supreme court of India held that “In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the contract act taking the word “Impossible” in its practical and not literal sense²³..”

The English law is narrow in respect considering the Indian law since, the Indian law not only take into account the frustration of contract but also the subsequent impossibility and compensation. The principle laid down is broad enough to consider the “cases where the performance of the contract is physically possible, but the object of the parties had in mind has failed to materialized²⁴”. In case of “*Sushila Devi vs. Hari Singh*”²⁵, “it was held that impossibility that the contract act is not confined to something which is not humanely possible”²⁶. In this case there was a property dispute, which happened due to partition went to Pakistan. “Since, the property in dispute and terms of the contract became impossible, Section 56 was invoked”²⁷.

Similarly, in the case of “*Krell vs. Henry*”²⁸ “the very object of the contract was frustrated due to the non-happening of the coronation which was the prime subject of the contract and it was frustrated”.

GROUNDS OF FRUSTRATION

²²SatyabrataGhosevsMugneeramBangur & Co. 1954 AIR 44, 1954 SCR 310

²³Ibid.

²⁴Mahatma Gandhi KashiVidhyapith ‘Impossibility of performance and frustration of contract’ <<https://www.mgkvp.ac.in/Uploads/Lectures/27/855.pdf>> June 21,2021

²⁵Sushila Devi v. Hari Singh AIR 1971 SC 1756: (1971) 2 SCC 288

²⁶Vijay Pal Dalmia,’ The Doctrine of Frustration and Force Majeure: Covid 19’ (17th April 2020)<<https://www.mondaq.com/india/contracts-and-commercial-law/407868/doctrine-of-frustration>> accessed 20 June , 2021

²⁷Vijay Pal Dalmia,’ The Doctrine of Frustration and Force Majeure: Covid 19’ (17th April 2020)<<https://www.mondaq.com/india/contracts-and-commercial-law/407868/doctrine-of-frustration>> accessed 20 June , 2021

²⁸ Krell v. Henry (1903) 2 KB 740

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- 1. Destruction of subject matter:** -The “*Doctrine of Impossibility*” is befitting ‘where the subject matter of the contract is annihilated. “*Taylor v. Caldwell*”²⁹ as discussed previously is a good example. “*This factor is strongly considered in cases, such as where factory premises in which machine was to be installed is destroyed by fire*”³⁰

The things which are destroyed must specifically be the subject matter of the contract and therefore, “*If the contract was not restricted to those specific goods, then it may not be discharged*”.³¹

A contract of agency to sell goods manufactured by defendant was not frustrated when the factory was burnt down because the contract was not restricted to the goods manufactured by the defendant at that particular factory.³²

- 2. Change in circumstances :-** Courts declare frustration of a contract on the ground of subsequent impossibility when it finds that the whole purpose of a contract was frustrated by the occurrence of an **unexpected event** which was beyond what was contemplated by the parties when they entered into the agreement.³³ In ***Pameshwari Das Mehra v Ram Chand Om Prakash***³⁴, Justice Kapur explained : “ *It is clear that if there is entirely unforeseen occurrence the critical point that has to be pondered upon, whether this occurrence has influenced the responsibility of the parties in the contract to such an extent as to make it virtually impossible. For example, A ship was chartered to load cargo but on the same day she should have proceeded to her berth, an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage at the scheduled time, the House of Lords held that frustration had occurred in the circumstances.*”³⁵

²⁹ Taylor v. Credwell [1863] 3 B&S 826

³⁰ Appleby v Myres [1867] LR 2 CP 651

³¹M.P Ram Mohan, PromodeMurugavelu etc , Indian Institute of Management Ahmedabad ,’The Doctrine of frustration under section 56 of the Indian Contract Act (October 2020) <<https://web.iima.ac.in/assets/snippets/workingpaperpdf/8569076382020-10-01.pdf>>accessed on 20 June , 2021

³²Turner v Goldsmith [1891]1 QB 123,128, affd Union of India v Customs and Central Excise Steel Commission 2010(254) ELT 647 (Bom) [5].

³³Satyabrata Ghose v. MugneeramBangurAIR 1954 SC 44

³⁴PameshwariMehra v. Ramchand Om Prakash A.I.R. 1952 Punj 34,38.

³⁵ Diva Rai ipleaders, ‘Doctrine of frustration: Facts you need to know about’ (26th September ,2019) <<https://blog.ipleaders.in/doctrine-of-frustration-2/>> accessed on 21 June, 2012

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- 3. Loss of Object:** -The impossibility contemplated by “Section 56 of the Act”³⁶ is not confined to something which is not humanly possible, as held in the case of “*Sushila Devi vs. Hari Singh*”.³⁷

The court stated that, “*if the performance of a contract becomes useless having regard to the object and purpose of the parties, then it must be held that the performance of the contract becomes impossible*”.³⁸ The landmark judgement of “*Krell v Henry*”³⁹ captures this; where though the room could be hired yet the court declared the contract frustrated because the purpose of hiring the room (i.e., watching coronation procession) was lost.

“*The court will not accept the plea of impossibility if even after the supervening event, the object of the contract is not rendered redundant and the contract can still be performed in accordance with the original intention of the parties though not literally in accordance of the language*”.⁴⁰

4. Delay, Death or incapacity to perform

“*The delay also results in frustration of contract.*⁴¹ *But delay has to be so great and of such a character that it would totally upset the basis of the commercial object which the parties had in view.*”⁴² The fulfillment of obligations when the delay is over will not accomplish the object which both the parties to the contract had in view and for which they entered into the contract.

If the delay was within the commercial risks undertaken by the parties and it does not frustrate the commercial purpose of the contract, there can be no frustration. In a case, “*Delay in the supply of cargo did not frustrate the charter-party because such delay was already contemplated in the terms of the contract*”.⁴³

³⁶ Indian Contract Act 1872, s 56

³⁷ Sushil Devi vs. Hari Singh AIR 1971 SC 1756: (1971) 2 SCC 288

³⁸ Diva Rai ipleaders, ‘Doctrine of frustration: Facts you need to know about’ (26th September ,2019) <<https://blog.ipleaders.in/doctrine-of-frustration-2/>> accessed on 21 June, 2012

³⁹ Krell v Henry [1903] 2KB 740.

⁴⁰ Satyabrata Ghose vs Mugneeram Bangur & Co. 1954 AIR 44, 1954 SCR 310.

⁴¹ Sharda Mahajan v Maple Leaf Trading International Pvt Ltd [2007] 139 CompCas 718 (Del) [32].

⁴² Satyabrata Ghose vs Mugneeram Bangur & Co. 1954 AIR 44, 1954 SCR 310.

⁴³ Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food [1961] 2 All ER 577.

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“A party to a contract is exempted from the obligation if it is contingent upon the survival of a given person, if that person dies”. The essence of these type of cases that it requires individual to use his particular skill, in this case the promisor, his death or incapacity puts an end to the contract.

*“An illustration where A contract between painter, and the person to draw his picture on a particular date. The painter dies before that date, hence the parties are automatically discharged”.*⁴⁴

IMPLICATIONS OF DOCTRINE OF FRUSTRATION IN TIMES OF COVID-19

Covid-19 was given the caricature of a pandemic by world health organization on 11th March, 2020. Since then there has been many obligations such as physical lockdowns, governmental restrictions and other obligations. Covid-19 has brought in picture the relevance, pertinence and enforceability of *“Doctrine of frustration”*⁴⁵ and *“force majeure”*⁴⁶ in contractual obligations throughout the world.

Before descending upon determining the implications, it is important to draw lines of distinction between force majeure and frustration. In the case of *“Ganga Saran v. Firm Ram Charan”*⁴⁷, the court stated that *“Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. In cases, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances”*.

Usually 'Impossibility' and 'frustration' are confused with the same meaning, however it's true. *“The changed circumstances, it is said, make the performance of the contract impossible, and the parties are absolved from the further performance of it as they did not promise to perform an impossibility”*⁴⁸.

⁴⁴Diva Rai ipleaders, 'Doctrine of frustration: Facts you need to know about' (26th September ,2019) <<https://blog.ipleaders.in/doctrine-of-frustration-2/>> accessed on 21 June, 2012

⁴⁵Indian Contract act, s 56

⁴⁶ Indian Contract act, s 32

⁴⁷Ganga Saran v. Firm Ram CharanAIR 1952 SC 9

⁴⁸Vijay Pal Dalmia, 'The Doctrine of Frustration and Force Majeure: Covid 19' (17th April 2020)<<https://www.mondaq.com/india/contracts-and-commercial-law/407868/doctrine-of-frustration>> accessed 20 June , 2021

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Impossibility here means events which are not in control of the parties in normal circumstances or in subsequent events and destroys the very basis of the contract or further performance of a contract has been rendered impossible or has been indefinitely postponed in consequence of the happening of an event which was not and could not have been, contemplated by the parties to the contract when they made it which has been explicitly clear in the current circumstances of pandemic, especially in the cases of contracts where there are international parties doctrine of frustration has been implied. In the case of “*Yew Siew Hoo & Ors v Nikmat Maju Development SdnBhd*”⁴⁹, Malaysian high court held the contract to be frustrated because of outbreak of Japanese Encephalitis. However, Covid-19 cannot be the only reason of ground of frustration, “*It must be proved that the COVID-19 outbreak has rendered the contract legally and physically impossible of performance*”.⁵⁰

In the case of “*Naihati Jute Mills Ltd. V. Hyaliram*”⁵¹ and considering the Section 57 of the act⁵² court held that, “*A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events*”⁵³.

The test applicable to determine whether an event is a frustrating event within the ambit of Section 57 is the “*radical change in the obligation test*”⁵⁴. The test indicates that frustration of contract will occur where there is a radical or fundamental change in circumstances which renders the performance of the contract to be legally and physically impossible.⁵⁵ One important thing to take into consideration is that the question of frustration of contract is contingent upon the provisions and differ from case

⁴⁹Yew Siew Hoo & Ors v NikmatMaju Development SdnBhd and another appeal [2014] 4 MLJ 413 (Court of Appeal)

⁵⁰The Legal 500, Azmi & Associates, ‘Covid-19: Frustration of Contract?’ (November 11, 2020) <<https://www.legal500.com/developments/thought-leadership/covid-19-frustration-of-contract/>> accessed on 21st June, 2021.

⁵¹Naihati Jute Mills Ltd. V. Hyaliram 1968(1) SCR 821

⁵²Indian Contract Act, 1872 s 56

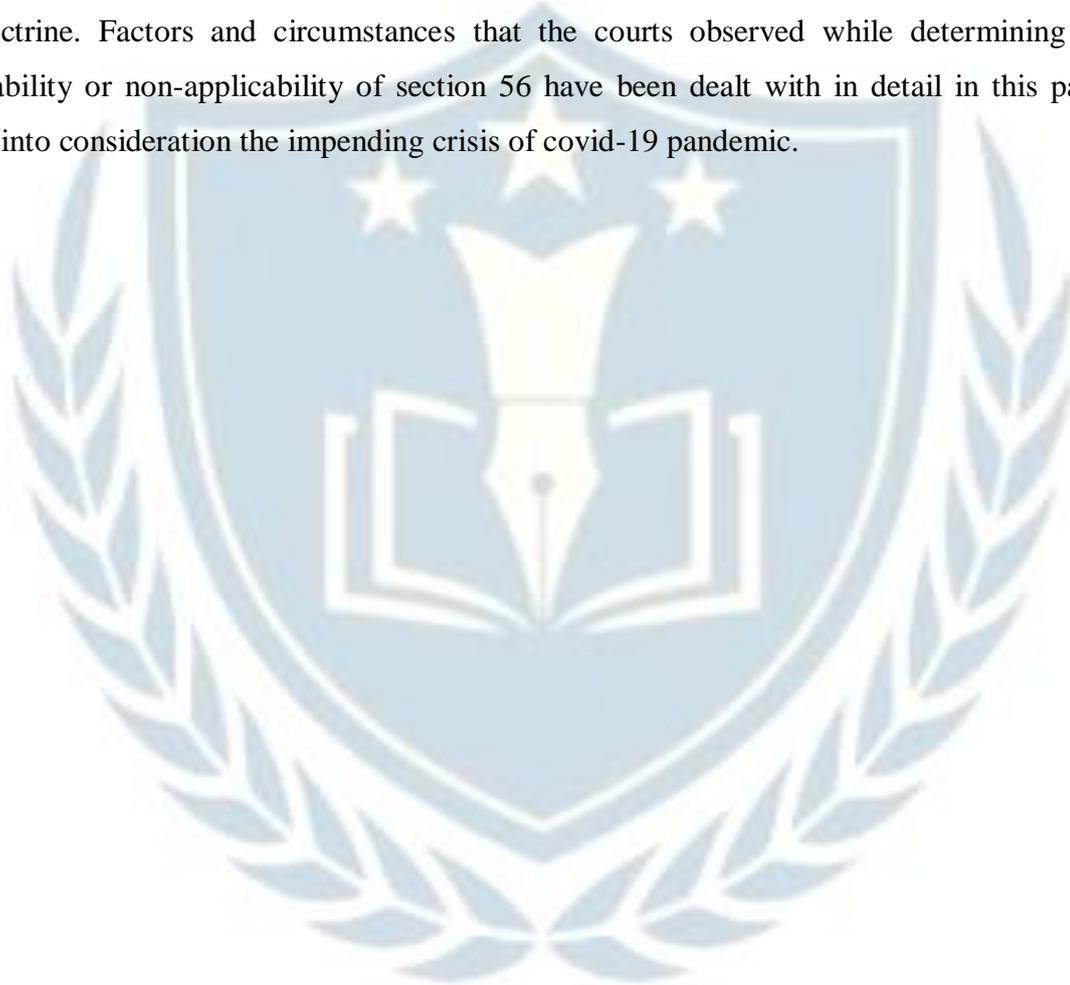
⁵³Naihati Jute Mills Ltd. V. Hyaliram 1968(1) SCR 821

⁵⁴The Legal 500, Azmi & Associates, ‘Covid-19: Frustration of Contract?’ (November 11 ,2020) <<https://www.legal500.com/developments/thought-leadership/covid-19-frustration-of-contract/>> accessed on 21st June , 2021.

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CONCLUSION

The Doctrine of frustration, covered under section 56 of the Contract Act, provides a way out to the parties. When the performance has become impossible, due to any unforeseen event, without their fault. English courts devised various theories to justify the application of the doctrine under certain circumstances, whereas Indian Law has, by codifying this doctrine in section 56, precluded the need for evolving and applying theories to justify the application of the doctrine. Factors and circumstances that the courts observed while determining the applicability or non-applicability of section 56 have been dealt with in detail in this paper taking into consideration the impending crisis of covid-19 pandemic.



⁵⁵Salleh Abbas CJ in *Kim Nam Development SdnBhd v Khau Daw Yau* [1984] 1 MLJ 256

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