

De Jure

March 23, 2017

Frustration of Contract - *Impossibility of performance*



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simple solutions

"The doctrine of frustration comes into play when a contract becomes impossible of performance, after it was made, on account of circumstances beyond the control of parties"- **Mr (Retd) Justice B K Mukherjea**¹

INTRODUCTION

- Whilst entering into various commercial documents, parties seldom foresee their contract getting frustrated. Indeed, since the very aspect of a contract getting frustrated may not be anticipated by the parties whilst executing the contract. The law governing the contracts is embodied in the Indian Contract Act, 1862 ("**Contract Act**"). However, the term 'frustration of contract', explicitly, is not found in the Contract Act. The doctrine of frustration has been envisaged in Chapter IV in Section 56² of the Contract Act.
- The term 'frustration' has been defined in the Black's Law Dictionary³ as "*The prevention or hindering of the attainment of a goal, such as contractual performance*" and in relation to 'contracts' the terms has been described 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 terminated*".
- The concept of frustration of contract dates centuries back to the 'Doctrine of Frustration' and has, thereafter, evolved in the English Laws.

GENESIS OF FRUSTRATION OF CONTRACT

- The doctrine of frustration was initially, in English laws, based on the notion of 'implied contract' *i.e.* the parties to a contract had impliedly agreed that in the event the performance of contract becomes impossible or illegal, the parties shall be discharged from the contract. The

¹ *Mr (Retd) Justice B K Mukherjea; Satyabrata Ghose versus Mugneeram Bangur & Co & Anr (AIR 1954 SC 44)*

² *"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."

³ *Black's Law Dictionary Ninth Edition.*

principle was based on the theory "*that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance*"⁴.

- A contract when entered and was capable of being performed, however, thereafter becomes impossible of performance for reasons of some event which a party could not prevent or the act for which the contract was entered itself become unlawful, then such contract itself becomes void or rather to say the contract becomes 'frustrated'. The parties to such a contract are discharged. The concept of frustration of contract is principally based on impossibility of performance of the contract.

INDIAN SCENARIO

- In India, since Section 56 of the Contract Act, itself, embodies the doctrine of frustration, the controversy is fairly narrow. The aspect of discharge of contract has to, therefore, be analysed within the contours of Section 56 of the Contract Act. However, it cannot be entirely ruled out that the doctrine of frustration, as recognised in English law, does not come within the parameters of Section 56 of the Contract Act.
- The doctrine of frustration *qua* the Section 56 of the Contract Act has been discussed extensively in the judgement of Supreme Court of India("SC") in the case of Satyabrata Ghose versus Mugneeram Bangur & Co & Anr⁵ and the same has been since followed in India. The SC in Satyabrata Ghose's case (*supra*) has held that the "*doctrine of frustration of contract is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract, Act*".
- While discussing frustration of contract it may also be important to note the difference between Section 32⁶ and Section 56 of the Contract Act.

⁴ *Taylor v. Caldwell* ([1863] EWHC QB J1)

⁵ *Satyabrata Ghose versus Mugneeram Bangur & Co & Anr*:(AIR 1954 SC 44)

⁶ "*Contingent contracts to do or not to do anything in an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void*"

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- Section 32 postulates two things (i) the contingent contract is enforceable only on the happening of an uncertain event; and (ii) if the event, on which the contract is contingent which parties have contemplated at the time of entering the contract, becomes impossible, the contract becomes void.
 - In the context of this article we are concerned with the second part of the Section 32 of the Contract Act. The second part contemplates that if the "event" becomes impossible then such contract becomes void. Thus, in terms of Section 32 of the Contract Act, if the designated event on which the contract is contingent becomes impossible, such contract becomes void. Whereas, under Section 56, the parties have not, while entering the contract, considered any such event due to which the contract may become void.
 - On a plain reading of Section 56 of the Contract Act, it is evident that the section envisages some impossibility or unlawfulness of the performance of the act which the parties had not contemplated. It leads to a pertinent question as to what is such impossible act that would lead to frustration of contract. The courts, both in India and England, have held that the word 'impossibility' used in Section 56 of the Contract Act must be interpreted in a practical form and not in its literal sense. Thus, a contract would come under the purview of Section 56 of the Contract Act even if it is not an absolute impossibility, but the contract has fundamentally changed, which the parties had not contemplated at the time of the agreement. This principal has been upheld in Satyabrata Ghose's case (*supra*), *Inder Pershad versus Campbell*⁷ and other judgement of English Courts.
 - Section 56 of the Contract Act, however, may not be applicable in situation of (i) self-induced frustration, and (ii) where in a contract, parties have, expressly stipulated that the contract would stand despite such intervening circumstance.
 - In order to establish that a contract is frustrated, the below mentioned conditions are required to be satisfied:-
 - There must be a valid and subsisting contract between the parties;
 - There must be some part of the contract yet to be performed;
 - That part of the contract, which is yet to be performed, should become impossible or unlawful; and
 - That the impossibility should be by reasons of some event which the promisor could not prevent.

⁷ *Inder Pershad versus Campbell*; (1881) 7 Cal. 474

CONSEQUENCES OF FRUSTRATION OF CONTRACT

- The consequence of a contract getting frustrated is that the contract becomes 'void'. In simple words, on the happening of an event which makes the contract impossible or unlawful, the contract stands determined and discharged. When frustration occurs, it avoids the contract itself and discharges both parties automatically⁸.
- Section 56 of the Contract Act, however, provides for compensation *to be payable for loss of non-performance if the same was known to such party*. If a promisor knew or could, with reasonable diligence, have known that the act which he had promised to perform was impossible or unlawful, but the same was not known to the promisee, in such a scenario the promisor is liable to make compensation for the loss which the promisee may suffer in view of the non-performance by the promisor.
- It is also worthwhile to note Section 65⁹ of the Contract Act in the context of the frustration of contract. Section 65 postulates that when an agreement is discovered to be void, such as in case of a contract getting frustrated, the person who has received any advantage under such agreement is 'bound' to restore it or to make compensation for it, from whom he received it.



⁸ *The Law of Contract by P C Markanda 2nd Edition 2008: Pg No 893*

⁹ *When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore, it, or to make compensation for it, to the person from whom he received it.*

CONCLUSION

- The assistance under Section 56 or rather the plea of the contract having frustrated is generally taken as a defence by a party who is under an obligation to perform a part of contract. Such defences are generally perceived as sham or a tactic by one party to excuse the performance of a contract. However, events such as change in law that leads to illegality or impossibility of performance are situation or intervening circumstances which fundamentally changes the contract, which in our view, lead to contract getting frustrated.
- A party, however, taking justification under doctrine of frustration on the ground of the performance becoming impossible due to certain overturning events, in view of the aforesaid caveats in the Section 56 of the Contract Act, must reasonably show, in all *bonafide*, that the supervening impossibility is such that its performance has become impossible. SC in Satyabatra's case (*supra*) has observed, "*In 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 sense. It must be borne in mind, however, 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*".

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