

IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION OF CONTRACT

Section 56 of the Indian Contract Act, 1872¹ talks about the **impossibility of performance of contract**. The provisions contained in Section 56 are closely related with the English “**doctrine of frustration of contract**.” The **first paragraph** of Section 56 lays down the simple principle that "an agreement to do an act impossible in itself is void (**initial impossibility**)." For example, an agreement to discover a treasure by magic, being impossible of performance, is void [Illustration (a), Section 56]. The **second paragraph** lays down the effect of subsequent impossibility of performance. By virtue of Section 56, paragraph 2, “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 (**supervening impossibility**).” For example, A and B contract to marry each other and

¹ **Section 56** of the Indian Contract Act, 1872:

Agreement to do impossible act — 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.

Illustrations

- (a) A agrees with B to discover treasure by magic. The agreement is void.
- (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- (c) A contracts to marry B, being already married to C and being forbidden by the law to which he is subject to practice polygamy. A must make compensation to B for the loss caused to her by the non-performance of the promise.
- (d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) A contracts to act at the theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

before the time fixed for the marriage, A goes mad. The contract becomes void [Illustration (b), Section 56]. The third paragraph of Section 56 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.

The Indian law on the impossibility of performance of contract is wider than the English “doctrine of frustration” because it covers both the initial impossibility and subsequent impossibility. On the other hand the “doctrine of frustration” applies where the performance of the contract is initially possible, but it becomes frustrated due to some extraordinary event. In fact, the frustration of contract is identical to the subsequent impossibility mentioned under paragraph 2 of Section 56. This principle is not only confined to the physical impossibilities. It extends to the cases where the performance of the contract is physically possible, but the object of the parties had in mind has failed to materialized. In *Krell v. Henry* [(1903) 2 KB 740], a flat was hired only for viewing a coronation procession but the procession having been cancelled due to King’s illness, it was held the object of the contract was frustrated by the non-happening of the coronation.

SPECIFIC GROUNDS OF FRUSTRATION

There is not any exhaustive list of situations in which the doctrine is going to be applied. But, the following grounds of frustration have become well established.

1. Destruction of Subject-Matter

The doctrine of impossibility applies with full force "where the actual and specific subject-matter of the contract has ceased to exist". *Taylor v. Caldwell* [(1863) 3 B&S 826] is the best example of this class. There, a promise to let out a music hall was held to have frustrated on the destruction of the hall. Similarly, in *Howell v. Coupland* [(1876) 1 QBD 258], the defendant contracted to sell a specified quantity of potatoes to be grown on his farms, but failed to supply them as the crop was destroyed by a disease, it was held that performance had become impossible.

2. Unusual Change of Circumstances

A contract will frustrate "where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated." This happens when the change of circumstances has affected the performance of the contract to such an extent as to make it virtually impossible or even extremely difficult or hazardous.

The Supreme Court laid down this principle in *Alopi Prashad v. Union of India* [AIR 1960 SC 588]. In this case, the plaintiffs were acting as the agents to the Government of India for purchasing ghee for the use of army personnel. They were to be paid on cost basis for different items of work involved. The performance was in progress when the Second World War intervened and the rates fixed in peace time were entirely superseded by the totally altered conditions obtaining in war time. The agents demanded revision of rates but received no replies. They kept up the supplies. The Government terminated the contract in 1945 and the agents claimed payment on enhanced rates. They could not succeed. The contract was held not frustrated.

In *Tarapore & Co. v. Cochin Shipyard Ltd.* [(1984)2 SCC 680], the Supreme Court observed that "the law has to adapt itself to economic changes. Marginal price rise may be ignored. But when prices escalate out of all proportion, then it cannot be said that it could not be reasonably expected by the parties and make performance so crushing to the contractor as to border virtually on impossibility, the law would have to offer relief to the contractor in terms of price revision in such a situation."

3. Non-occurrence of Contemplated Event

Sometimes the performance of a contract remains entirely possible, 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. *Krell v. Henry* [(1903) 2 KB 740] involved a situation of this kind. There, a contract to hire a room to view a proposed coronation procession was held to have frustrated when the procession was postponed. For this result to follow it is necessary that the happening of the event should be the foundation of the contract. This is shown by *Berne Bay Steam Boat Co v. Hutton* [(1903) 2 KB 683 (CA)],

which also arose from the postponement of the coronation. The Royal Naval Review was proposed to be held on the occasion. The defendant chartered a steamboat for two days "to take out a party of paying passengers for the purpose of viewing the naval review and for a day's cruise round the fleet". But the review was cancelled and the defendant had no use of the ship. Yet he was held liable to pay the unpaid balance of the hire less the profit which the plaintiff had made by the use of the ship in the ordinary course.

4. Death or Incapacity of Party

"A party to a contract is excused from performance if it depends upon the existence of a given person, if that person perishes" or becomes too ill to perform. *Robinson v. Davison* [(1871) LR 6 Exch 269] is the well-known illustration. There was a contract between the plaintiff and the defendant's wife (who was an eminent pianist) that she should play the piano at a concert to be given by the plaintiff on a specified day. On the morning of the day in question she informed the plaintiff that she was too ill to attend the concert. The court said that the contract has become frustrated.

5. Government, administrative or legislative intervention

A contract will be dissolved when legislative or administrative intervention has so directly operated upon the fulfillment of the contract for a specific work as to transform the contemplated conditions for a specific work as to transform the contemplated conditions of performance.

In *Man Singh v. Khajan Singh* [AIR 1961Raj 277], a contract between certain parties for the sale of the trees of a forest was discharged when the state of Rajasthan forbade the cutting of trees in the area.

In case an intervention is not of permanent character which does not uproot the foundation of the contract, it will be having no such effect of frustration. In the *Satyabrata Ghose v. Mugneeram Bangur & Co.* [AIR 1954 SC 44], the construction of housing colony was started by the defendant. The plaintiff paid the advance for the same purpose. The defendant asked for the balance of amount and completion of conveyance as the work was completed. Meanwhile, second World War began and the Government requisitioned a considerable portion of the land for military purposes. The company

contended that the contract be cancelled by reason of the supervening events, Mukherjea J., held that the contract was not frustrated. He observed:

"Undoubtedly the commencement of the work was delayed but was the delay going to be so great and of such a character that it would totally upset the basis of the bargain and commercial object which the parties had in view? The requisition orders, it must be remembered, were, by their very nature, of a temporary character and the requisitioning authority could, in law occupy the position of a licensee in regard to the requisitioned property. The order might continue during the whole period of the war and even for sometime after that or it could have been withdrawn before that was terminated. If there was a definite time limit agreed to by the parties within which the construction work was to be finished, it could be said with perfect propriety that delay for an indefinite period would make the performance of the contract impossible within the specified time and this would seriously affect the object and purpose for the venture. But where there is no time limit whatsoever in the contract, nor even an understanding between the parties could naturally anticipate restrictions of various kind which would make the carrying out of these operations more tardy and difficult, than in times of peace, we do not think that the order of requisition affected the fundamental basis upon which the 'agreement rested or struck at the roots of the adventure."

If parties have undertaken the absolute liability in terms of contract, regardless of executive changes, the parties cannot claim the liability to be discharged yet. In *Naihati Jute Mills Ltd. v. Khyaliram Jagamnath* [AIR 1968, SC 522], raw jute was to be imported from East Pakistan. The Jute Mill undertook to procure the necessary licence for importing jute from Pakistan and to handover the same to the importer. The Mill stipulated to pay damages to the importer if it failed to procure the licence on or before a particular date. The Mill did not procure licence as a result of change in the policy of the Government of issuing licence for importing Jute. The Mill was held liable as the contention of doctrine of frustration was rejected against the Mill because it took upon itself the burden to pay damages if it fails to procure licence from Jute Commissioner.

6. Intervention of War

War or War like situations has often raised difficult questions for the courts. In *Tsakiroglou & Co. Ltd. v. Noble Thorl G. m. b. H*, [(1961) 2 All ER 179], appellants had agreed to sell to the respondents three hundred tons of groundnuts. The usual route at the date of the contract was via Suez Canal. The shipment was to be in November/December, but due to certain geopolitical development the canal was closed until April next year. It was stated that the appellants could have shipped through the alternate route which was Cape of Good Hope. Appellants refused to ship goods via Cape. The appellant's argument was that it was a tacit understanding between the parties in the contract that the shipment should be via Suez. It was held that such an

understanding was wrong. What the appellants could have done was shipped the shipment through Cape route, and they were bound by law (Sale of Goods Act, 1893) to do this. Although this would have been more expensive for the appellants, but it didn't render the contract fundamentally or radically different, hence there was no frustration of contract.

Cases not Covered by Doctrine of Frustration

(a). Self-induced frustration

In *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* [AIR 1935 PC 128], Lord WRIGHT said that the essence of 'frustration' is that it should not be due to the act or election of the parties. Frustration should arise without blame or fault on either side. Reliance cannot be placed on a self-induced frustration. In this case, the appellants hired the respondents' trawler, called 'the St Cuthbert' to be employed in fishing industry only. Both parties knew that the trawler could be used for that purpose only under a license from the Canadian Government. The appellants were using five trawlers and, therefore, applied for five licenses. Only three were granted and the Government asked the appellants to name the three trawlers and they named trawlers other than the St Cuthbert. They then repudiated the charter and pleaded frustration in response to the respondents' action for the hire.

The Judicial Committee of the Privy Council held that the frustration in this case was the result of the appellants' own choice of excluding the respondents' ship from the license and, therefore, they were not discharged from the contract. In another similar case, the contract was to export 1500 tons of sugar beet pulp pellets with a further option for the same quantity. The sellers obtained an export license for 3000. They also contracted with another buyer to supply him 1500. But the Government refused to grant any further license.

They shipped the whole agreed quantity to the first buyer. They were now left with the export license for 1500 only, but were under two obligations, one to supply 1500 to the first buyer under the option given to him and other under the contract with the second buyer for the same quantity. As a face-saving device they apportioned the supply between the two buyers giving about half to either. The second buyer sued for breach of contract. The suppliers pleaded frustration. They were held liable. The Court of Appeal found no legal authority justifying the proposition that where a seller has a legal commitment to A and a non-legal commitment to B

and he can honour the obligation to A or to B but not to both, he is justified in partially honouring both obligations.

(b). Failure of one of the objects

When there are several purposes for which the contract is entered into, failure of one of the objects does not terminate the contract. This principle was established in *Herne Bay Steam Boat Co. v. Hutton* [(1903) 2 KB 683]. In this case, a ship was chartered by the defendant for two days for the purpose of viewing the naval review and for a day's cruise round the fleet, but the review was cancelled. The defendant was held liable to pay the hire amount.

(c). Commercial Hardship or Difficulty

Commercial Hardship may make the performance unprofitable or more expensive or dilatory, but it is not sufficient to excuse performance. In *Ganga Saran v. Ram Charan Gopal* [AIR 1945 Mad 291], a contract was made for supplying certain beles of cloth manufactured by the New Victoria Mills, Kanpur. The contract added: "We shall go on supplying goods to you of the Victoria Mills as soon as they are supplied to us by the said mills. The mill failed to supply goods to the sellers and, therefore, the sellers pleaded frustration. It was held by the court that there is no frustration and the sellers are liable for simple breach of contract.

(d). Frustration applies to executory contracts and not to executed contracts

In India the question was considered by the Supreme Court in *Raja Dhruv Dev Chand v. Raja Harmohinder Singh* [AIR 1968 1024] where SHAH J at once observed that the courts in India have generally taken the view that Section 56 of the Contract Act is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease. It was one of the cases arising out of the partition of the country into India and Pakistan. The lease in question was that of an agricultural land for one year only. The rent was paid and the lessee was given possession. Before the land could be exploited for any crop, came partition which left the land in Pakistan and the parties migrated to India. The action was to recover the rent paid. But no such recovery was allowed. It has been held that if the transfer of lease had not been made complete, the doctrine of frustration would apply.

In the subsequent case of *Sushila Devi v. Hari Singh* [AIR 1971 SC 1756], the Supreme Court held that an agreement of lease ended by frustration where before completing it the parties had to run away and could not go to Pakistan to give or take possession.

Conclusion

The doctrine of frustration, incorporated under Section 56 of the Indian Contract Act, 1872 provides a way out to the parties when the performance has become impossible, owing to any supervening event, without their fault. The application of the doctrine questions the sanctity of the contract under certain changed circumstances. English courts evolved various theories to justify the application of the doctrine under certain circumstances, whereas Indian Law has, by codifying this doctrine in Section 56, obviated the need for evolving and applying theories to justify the application of the doctrine. Although, the vision of the Indian legislature is wide and that is why it also included the instances of initial impossibility under the preview of this doctrine. The provisions contained in Section 56 provide a complete set of the legal consequences of the performance of the contract.