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UNDERSTANDING THE LEGAL IMPLICATION OF AGREEMENTS TO PERFORM IMPOSSIBLE ACTS

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Abstract

Contracts weaving the fabric of possibility, torn asunder by the threads of impossibility. The doctrine of frustration, originating from Roman law and influenced by the English Rule (Paradine vs Jane, 1647)[92]*, allows contract discharge when performance becomes impossible, addressing cases where strict adherence is deemed unfair. It emerged as a necessary remedy for situations where a contract couldn't be fulfilled through no fault of the defendant. The doctrine of frustration, constitutes the Indian Contract Act,1872, as Section 56(Agreement to do impossible acts). An agreement to do something, which was possible or lawful when the contract was constructed, but subsequently, becomes impossible or unlawful without any fault of either party, then such an act will be void. The doctrine of frustration becomes applicable when a contract becomes impossible to perform due to the happening of some unforeseen circumstances which were beyond the control or calculation of the parties involved. When such a contract becomes entirely impossible without the fault of the parties, the contract gets dissolved by this doctrine. Assessing the relevance of the doctrine of frustration in determining the binding nature of contracts under the Indian Contract Act. The doctrine is relevant, when it is alleged that a change of circumstance or the alteration of the conditions, after the formation of the contract but before the conclusion of the contract, has rendered the fulfillment of the contract impossible, physically as well as commercially. The contracting parties may avoid the realm of uncertainties caused by any future event by inserting well-drafted and specifically defined provisions in the contract, such as a force majeure clause. The researcher has taken this topic to examine understanding the legal implication of agreements to perform impossible act and under how Doctrine of frustration as enshrined in Section 56 of the Indian Contract Act 1872.*

Keywords – *Agreement, Contracts, Doctrine of frustration, Impossible act, Mechanism.*

[92] Paradine v Jane [1647] EWHC KB J5

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1. Introduction

The main purpose of dealing with Contract is to bind both the parties to fulfill their commitment/obligation and to set their rights, obligation, damages and remedy in case of breach of contract to both the parties. The Doctrine of Frustration is an exception for it. Frustration in general scenario means defeated and this term has been widely used in agreements and contract between parties.[93] The term frustration is being used to deal with unsuccessful transactions which could not be completed due to any reason. In law of contracts doctrine of frustration has emerged as one of the most common issues which have arrived to deal with failed contracts.

The Doctrine of Frustration is used when a contract becomes impossible to fulfill and eventually becomes void in case due to some unforeseen or impossible situations. This doctrine is based on the Latin maxim "*Les Non Cogit Ad Impossibilia*" which means law cannot force a person to perform a contract which is impossible due to unforeseen reasons.

In such circumstances, the promisor cannot be bound to obligate with the contract. The doctrine of supervening impossibility is also called the doctrine of frustration, which is one of the aspects of the law of contracts. It deals with the enforceability of contracts on the occurrence of some unforeseen incidents. The word 'frustration' means 'efforts made ineffective' and it is one of the modes by which a contract can be discharged as per Section 56 of the Indian Contract Act, 1872. [94]

Section 56 provides relief to parties when the purpose or basis of a contract is frustrated by events beyond their control, rendering the contract impossible to perform or radically altering the obligations under it. [95]It seeks to mitigate the harsh consequences that would otherwise arise from the strict enforcement of contractual obligations in situations where performance becomes impracticable due to unforeseen circumstances.

2. Origin and Evolution

The Doctrine of Frustration finds its roots in English contract law and has been incorporated into Indian law through Section 56 of the Indian Contract Act, 1872. This arises from acknowledging that unforeseen circumstances can render contracts unenforceable by making their execution impossible. In historical context, the English common law strictly adhered to principles that compelled parties to honor all contractual commitments, even in situations where fulfilling them became impracticable.

Notable cases like Paradine v. Jane[96] established a rigid approach, holding parties liable for their obligations regardless of uncontrollable events. It was also observed that no legal system consistently held parties absolutely liable for the contracts they made, and that the holding of Paradine itself is limited to its own circumstances, meaning that either the defendant could not counterclaim his own plea against the landlord's action for rent, or that the court considered the leasehold to be a fully executed transaction. However, this approach proved too stringent and potentially unjust.[97]

The case of Taylor v. Caldwell[98] brought about a significant shift in Indian Contract Act law by recognizing that contracts could be frustrated when performance was rendered impossible due to events beyond the parties' control. Until this case, parties to a contract were held to be absolutely bound and a failure to perform was not excused by radically changed circumstances. Instead, the contract was breached, and that gave rise to a claim for damages.[99] This ruling, although quite narrow,

[93] Doctrine of frustration in light of Covid-19 pandemic | available on https://blog.ipleaders.in/doctrine-of-frustration.in | Last seen on 01/04/2024

[94] Impossibility Of Performance And Frustration Of Contract | available on https://www.legalserviceindia.com/legal/article-7353-impossibility-of-performance-and-frustration-of-contract.html | Last seen on 01/04/2024

[95] Ibid 3

[96] Paradine v Jane [1647] EWHC KB J5

[97] Discharge by Impossibility of performance and Frustration | available on https://monad.edu.in/img/media/uploads/discharge%20by%20impossibility%20of%20performance%20and%20frustration.pdf | Last seen on 01/04/2024

[98] Taylor v Caldwell (1863). EWHC J1 (QB), 3 B & S 826, 122 ER 309

[99] Supra 6

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opened the door for the modern doctrine of contract avoidance by frustration. This ruling laid the groundwork for the modern Doctrine of Frustration.

Further Doctrine of Frustration was criticized by the House of Lords under National Carriers Ltd v. Panalpina (Northern)[100] Ltd as they said individuals not party to the contract are intruding in the contract. The doctrine of frustration was, however, strengthened when the "loss of object" theory was given to justify doctrine of frustration, this theory stated when the main object on which the entire contract surrounds is destroyed by an event which is not reasonably foreseeable and out of the control of the parties the completion of the contract becomes impossible and hence, the parties should not be made liable to pay the damages in such a case.[101] This was a more sophisticated theory and was firstly used in the landmark case of Krell v Henry.[102] Thus, it can be observed that the roots of the doctrine of frustration are ancient but it has developed over time and continues to be extremely relevant till date.

3. Doctrine of Frustration as Per the Indian Contract Act

According to the dictionary meaning, the term 'frustration' means "feeling of being annoyed on not achieving something you wished".[103] In terms of contract, it is a situation that makes the performance of a contract impossible and hence, the contract becomes frustrated. One of the essentials of a contract is that it must be capable of being performed.

According to the legal dictionary meaning the term ' frustration of contract' means " the effect that when the performance 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, a Court will consider what, as fair and reasonable men, the parties would have agreed upon if they had in fact foreseen and provided for the particular event, and if, in its opinion, they would have decided that the contract should be regarded as at an end would discharged the party who would otherwise be liable to pay damages for non-performance"[104].

In India, the term "frustration of contract" is not explicitly defined in the Indian Contract Act of 1872. However, Section 56 of the Act governs the Agreement to Perform Impossible Acts in India. This section allows a court of law to void a promisor's promise to perform an impossible act. When an act becomes impossible or unlawful due to unforeseen circumstances that the promisor cannot control, the entire contract is rendered void. [105]It provides that an agreement which is incapable of being performed is itself void, it also provides that A contract to do something which afterwards becomes impossible is void. If a contract contains performance of an act which becomes impossible to be performed or unlawful after it is made due to some unforeseeable circumstance or event, then it becomes void and also the promisor must compensate for non-performance of the contract. If the promisor promises to do an act which he knew or he might have known is impossible, must compensate the promisee for the non-performance of the act.

As general rule parties to contract are having an intention towards the fulfillment of their part and in case of breach, party breaching is liable to compensate for the same.[106] But an exception to this rule is laid down in Section 56 of the Indian contract act 1872. Section 56 deals with the doctrine of frustration as being acts which cannot be performed.[107] Under this doctrine a

[100] National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675
[101] Doctrine Of Frustration | available on https://www.livelaw.in/articles/doctrine-frustration-contract-240094 | Last seen on 01/04/2024
[102] 2 K.B. 740 (1903) Krell v Henry.
[103] Supra | Oxford Dictionary | Page 578
[104] Supra | The Law Lexicon The Encyclopaedic Law Dictionary 3rd Edition| Page 677
[105] Impossibility of performance and frustration of contract | available on https://blog.ipleaders.in/impossibility-performance-frustration-contract/ | Last seen on 01/04/2024
[106] ibid
[107] Supra Indian Contract Act 1872| Section 56

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promisor is relieved of any liability under a contract in the event of the breach of contract and contract will be deemed to be void. Section 56 is based on the maxim "*lex non cogit ad impossibilia*" which means that "If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility elements", [108]in simple words, the law will not compel a man to do what he cannot possibly perform.

Another similar provision to doctrine of frustration is Section 32 of the Indian Contract Act, 1872 which deals with contingent contracts. Both the provisions are based on performance of the contract however, both are different in their sense. Contingent contracts are those which are dependent on fulfilment of a particular condition or a future event and if the condition is not fulfilled, the contract stands dissolved.[109] Doctrine of frustration on the other hand makes the contract void when the said act is impossible or incapable of being performed for reasons outside the control of parties.

4. Theories of the Doctrine of Frustration

The theories of the doctrine of frustration evolved by English Courts were discussed by the Supreme Court, but were held unimportant in view of the statutory provision in the Indian Contract Act.

In deciding the cases in India, the only doctrine we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Indian Contract Act, taking the word 'impossible' in its practical and not literal sense.

It held that this section was exhaustive and that importing the English law *de hors* the statutory provision was not permissible. In Naihati Jute Mills Ltd V. Khyaliram Jagannath[110], it was states that these theories have been evolved to adopt a realistic approach to the problem of performance of contract when it is found that owing to causing unforeseen and beyond the control of the parties intervening between the date of the contract the date of the contract and the date of performance it would be both unreasonable and unjust to exact its performance in the changed circumstances. The necessity of evolving one or the other theory was due to the common law rule that Courts have no power to absolve a party to the contract from his obligation. On the other hand, they were anxious to preserve intact the sanctity of contract while on the other, the Courts could not shut their eyes to the harshness of the situation in cases where the performance became impossible by causes which could not have been foreseen and which were beyond the control of parties. Such difficulty has, however, not to be faced by Courts in this country. In Ganga Saran vs Ram Charan Ram Gopal,[111] this Court emphasised that so far as the courts in this country are concerned, they must look primarily to the law as embodied in Section 32 and 56 of the Contract Act[112]. In Satyabrata Ghose v. Mugneeram [113]in which Justice Mukherjee held that the basic idea upon which doctrine of frustration is based is that of the impossibility of performance of the contract and the expression frustration and impossibility can also be used as synonyms. Over the time, English law has pronounced many theories and principles relating to the law of frustration. However, it was made clear by this case that in India we have statutory provisions to be followed under Section 56 of Indian Contract Act[114] It has 3 provisions. First says, an agreement to do an act impossible in itself is void. Second says contracts to do an act which afterwards become impossible or unlawful are void. So when do contracts become impossible? First, impossibility does not apply to the cases where the contract contains an implied term which

[108] Supra 13| page 1000
[109] Supra 16| Section 32
[110] Naihati Jute Mills Ltd V. Khyaliram Jagannath 1968 AIR 522 1968 SCR (1) 821
[111] Ganga Saran vs Ram Charan Ram Gopal 1952 AIR, 9 1952 SCR 36, AIR 1952 SUPREME COURT 9
[112] Supra 16| Section 32 and 56
[113] Satyabrata Ghose v/s Mugneeram Bangur - 1954 AIR 44, 1954 SCR 310
[114] Supra 16| Section 56

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discharges them from the performance of contract.

It would nevertheless be useful to discuss the theories which English Courts evolved to soften the rigours of the absolute rule; using which, they formulated the true basis of discharge of contract when its performance is made impossible by intervening causes, over which the parties have no control.

The theories or juristic bases for the doctrine of frustration were evolved for justifying the departure from the doctrine of absolute contracts. [115]The main theories are:

(i) implied term theory

(ii) basis or foundation of the contract;

(iii) just and reasonable solution; and

(iv) radical change in the obligation under the contract.

5. Factors of Frustration of Contract

1. Impossibility of Performance

The frustration doctrine arises because an action is impossible. For Satyabrata Ghose vs. Mugneeram Bangura & Co &Anr,[116] 'impossible' in Section 56 of the Act was held not to be used. It may not be literally impossible to fulfil an act, but it may be unworkable and useless and if an unfavourable occurrence or a change of circumstances totally disrupts the very foundation on which the parties have negotiated, it is quite likely that the promising party finds it impossible to do the act he has promised to do. Therefore, if the object of the contract is lost, the contract will be frustrated.

2. Change of Circumstances

The courts shall declare frustration of the contract on the basis of subsequent impossibility when it finds that the whole purpose or foundation of the agreement was frustrated by an intrusion or incident, or change of circumstances beyond what the parties were seeking to do at the time of the agreement.[117] The changing circumstances make it impossible to execute this contract and, as they have not promised to exercise their power, they are exempted from further execution.

3. Loss of object

The impossibility envisaged by Section 56 of the Act is not confined to something that is not humanly possible, as in the case of Sushila Devi vs. Hari Singh.[118] The Court stated that if the performance of a contract becomes impracticable or useless in view of the object and purpose of the parties, it must be held that the performance of the contract has become impossible. But the supervening events should remove the very foundation of the contract and it should be of such a character that it strikes the root of the contract. [119]As it had happened in a case of property lease which, after the unfortunate partition of India and Pakistan, the property in dispute which was situated in India, went onto the side of Pakistan, hence, making the terms of the agreement impossible.

6. Construction of Contract

The 'construction of contract' test is sometimes called the 'construction' theory, as the Courts as a matter of law, construe the contract in the light of the facts existing at its formation, i.e. its nature and relevant surrounding circumstances when it was made. After determining the obligation undertaken by the parties, the Court must then find out whether there has been a radical change in that obligation if the performance were enforced in the changed circumstance which have subsequently arisen.[120]

On the other hand, another view is that all the theories depend, as the last resort, on the construction of the contract, that 'construing

[115] Supra | Pollock & Mulla The Indian Contract Act 1872 | 14th Edition | Page 874
[116] Satyabrata Ghose v/s Mugneeram Bangur - 1954 AIR 44, 1954 SCR 310

[117] Agreements to do Impossible Acts | available on https://blog.ipleaders.in/agreements-impossible-acts/ | Last seen on 01/04/2024
[118] Sushila Devi vs. Hari Singh 1971 AIR 1756, 1971 SCR 671
[119] Agreements to do Impossible Acts | available on https://blog.ipleaders.in/agreements-impossible-acts/ | Last seen on 01/04/2024
[120] Construction Contracts | available on https://www.mca.gov.in/Ministry/notification/pdf/AS_7.pdf | Last seen on 02/04/2024

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the contract and implying a term are in these cases only alternative ways of describing the same process', construction being necessary to ascertain the true meaning of the contract, or for construing an implied term, or for finding the 'basis' or 'foundation' of the contract when it is doubtful.[121]

Frustration depends, at least in most cases, on the true construction of terms read in the light of the contract and the relevant surrounding circumstances when the contract was made. True construction of the agreement must depend upon the import of the words used and not upon what the parties subsequently choose to say afterwards.[122]

- **Section 56 and Rule of Construction**

Section 56 is exhaustive, and it is not permissible for the Courts to travel outside the provisions. When an event of change of circumstances occurs, which is so fundamental as to be regarded by law as striking at the root of the contract, it is the Court which can pronounce the contract to be frustrated and at an end. [123]The Court has to examine the contract, the circumstances under which it was made, the belief, knowledge and intention of the parties, being evidence of whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This, in England, is termed as rule of construction in India, this is really a rule of positive law and as such comes under Section 56 of the Contract Act[124].

According to Section 9 of the Contract Act, the terms of contract may be expressed or implied.[125] Therefore, where as a matter of construction, the contract itself contains, impliedly or expressly, a term according to which it would stand discharged on the happening of a certain event, the dissolution of the contract would take place under the terms of the contract itself and that would be outside the scope of Section 56. Although, in English law these are treated as cases of frustration, in Indian law, they would fall under Section 32 [126]of the Contract Act, which deals with contingent contracts or other similar provisions contained in the Act.

7. The UNIDROIT Principles

The UNIDROIT Principles as the rules of law governing their contract or, in case of a dispute, as the rules of law applicable to the substance of the dispute. Except where one of the parties is in a position to persuade the other to accept its own domestic law, parties are usually reluctant to agree on the application of the domestic law of the other. [127]The UNIDROIT Principles are a useful alternative to the choice of both the domestic law of one of the parties and the law of a third country. The UNIDROIT Principles provide a balanced set of rules covering virtually all the most important topics of general contract law, such as formation, interpretation, validity including illegality, performance, non-performance and remedies, assignment, set-off, plurality of obligors and of obliges, as well as the authority of agents and limitation periods.[128]

The Principles contain separate provisions to cover impossibility of performance

1. Hardship

The Principles are based on the principle of '*pacta sunt servanda*' and stress that a party, for whom its performance becomes more onerous generally, is nevertheless bound to perform but they allow adaptation of the contract in cases of hardship.[129] Hardship occurs where the occurrence of events fundamentally alters the equilibrium of the contract, either because the cost of the disadvantaged party's performance has increased, or because the value of what it has to receive has decreased,

[121] Supra 24 | Page 880
[122]Construction Contracts | available on https://www.mca.gov.in/Ministry/notification/pdf/AS_7.pdf | Last seen on 02/04/2024
[123] Supra 24 | Page 881
[124] Supra 16| Section 56
[125] Supra 16| Section 19
[126] Supra 16| section 32
[127] Impossibility of Performance: A Defence against a breach of Contract | available on https://www.unidroit.org/instruments/commercial-contracts.in | Last seen on 02/04/2023
[128] Agreements to do Impossible Acts | available on www.lexisnexis.co.uk/blog/research-legal-analysis.in | Last seen on 02/04/2024
[129] Supra | Contract & Specific Relief by Avtra Singh , Twelfth Edition | Page 394

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provided that events meet the following requirements:

i. The events occur or become known to it after the conclusion of the contracts,
ii. The events could not reasonably have been taken into account at the time of the conclusion of the contract,
iii. The events are beyond its control, and
iv. The risk of the events were not assumed by it.

Hardship entitles the party to request the other party to enter into renegotiation of the original terms of the contract with a view to adapting them to the changed circumstances. It must make a request for renegotiation without undue delay, indicating the grounds on which the request it sought.[130]

Such request does not entitle the disadvantaged party to withhold performance. The request for renegotiation, as well as the conduct of both parties during the renegotiation process, are subject to the principle of good faith and the duty of co-operative. If the parties fail to reach agreement on the adaptation of the contract to changed circumstances within a reasonable time, either party may resort to the Court. The Court may, when this is reasonable either: (a) order the termination of the contract at a date and on terms to be fixed by the Court or may (b) adapt the contract with the view to restore its equilibrium[131].

Invoking the provisions of hardship is relevant to executory performances, and generally in long-terms contracts.

2. Force Majeure

A party is excused of non-performance, if it proves that non-performance was due to an impediment beyond its control, and it could not have reasonably been foreseen by it at the time of making of the contract, nor could it have avoided or overcome it or its consequences. If the impediment is temporary, the excuse will be had for the reasonable period, during which it has an effect on the performance of the contract[132]. It is necessary that the party failing to perform must give notice to the other party of the impediment and its effect on its ability to perform, failing which, there may be liability for damages for non- receipt of notice.

3. Choice of the Party

Where the factual situation can be considered as hardship and of force majeure, the affected party may decide which remedy to pursue. The remedy for hardship will enable it to renegotiate the contract and keep it alive, and the remedy for the latter to have its non- performance excused.[133]

4. Impossibility in General

Generally, a contract which is incapable of performance at the time when it is made, will be void ab initio, but subsequent impossibility ends a valid contract from the moment it becomes incapable of performance, and further performance is excused. The latter refers not only to physical or literal impossibility, but also to events vents occurring, which strike at the basis of the contracts, so as to frustrate the practical purpose of the contract.[134]

8. Conclusion

Doctrine of frustration as enshrined in Section 56 of the Indian contract act 1872 deals with those cases where the performance of contract has been frustrated and the performance of it has become impossible to perform due to any unavoidable reason or condition. This doctrine is treated as an exception to the general rule which provides for compensation in case of breach of contract.[135] But section 56 only deals with cases of subsequent impossibility as opposed to cases of initial impossibility.

The doctrine of frustration is a concept of English or Roman law. It was incorporated in the

[130] Agreements to do Impossible Acts | available on https://blog.ipleaders.in/agreements-impossible-acts/ | Last seen on 02/04/2024
[131] Supra 24 | Page 883
[132] Agreements to do Impossible Acts | available on https://blog.ipleaders.in/agreements-impossible-acts/ | Last seen on 02/04/2024
[133] ibid
[134] Supra 38 | Page 399
[135] Supra 16 | Section 56

Indian law because laws in India are mostly inspired by the common law. The doctrine makes any contract or agreement which is incapable of being performed or becomes so after it is made, void and hence, discharges the parties from their liabilities mentioned in the contract.[136] It is impliedly mentioned in the Indian law in Section 56 of the Indian Contract Act, 1872.

Usually, no compensation is to be given in case the contract stands frustrated but where one of the parties to a contract knew or was likely to know that the said act is unlawful or impossible of being performed, the other party must be compensated. Also, where one party has received any benefits due to the contract which later becomes impossible then the party must return the benefits so received. [137]It must be noted that the courts in India have narrowed down the scope of the doctrine by excluding the cases where the events that rendered the contract incapable or impossible of being performed could be contemplated by the parties. [138]It is suggested that the doctrine must be applied to all the cases of impossibility and frustration for the expansion and development of the doctrine.

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