ISSN : 2348-7674

Research Innovator

International Multidisciplinary Research Journal

Vol II Issue I : February 2015

Editor-In-Chief

Prof. K.N. Shelke

www.research-innovator.com

Research Innovator

A Peer-Reviewed Refereed and Indexed International Multidisciplinary Research Journal

Volume II Issue I: February – 2015

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The Doctrine of Frustration of Contract: An Analysis and Comparison of Indian Law and English Law, with reference to Landmark Cases

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Abstract

The Law of Contract is as relevant in the present day as it used to be centuries ago. The Doctrine of Frustration is an integral component of the Law of Contract. This doctrine was developed to counter the problems imposed by the rule of absolute performance of promises made between parties. This doctrine plays a major role in protecting the interests of the parties to a contract whose performance has become impossible due to initial or subsequent impossibility.

This article attempts to explain the origin and concept of the Doctrine of Frustration and also compares the position of the doctrine in Indian and English laws. Finally, the content of the article is supported by the decisions of both English and Indian courts in various landmark cases concerning the said doctrine.

Key Words: Doctrine of Frustration, Contracts, Impossibility, Supervening Illegality, Subject Matter

Introduction:

The Law of Contract is as relevant in the modern day as it used to be centuries ago. An important and integral part of it is the Doctrine of Frustration. This doctrine was developed to combat the difficulties imposed by common law's rule of absolute performance of promises made between parties. Under this rule, the obligation to perform was kept intact even in situations where the very performance became impossible. The doctrine of frustration developed under such circumstances, provided that the contract may become discharged in the event that performance becomes impossible. Before 1863 , the rule of law was that a party was absolutely bound to perform a contract undertaken by it, and did not have any relief available in case performance became impossible. This reason was considered to be a 'mere excuse', providing no respite to either of the parties. Thus, no interfering events which were beyond the control of either of the parties, who had no faults of their own in the changed circumstances, could relieve the parties from the obligation to perform. In other words, the Common Law rule of absolute performance of contracts set the stage for the evolution of Doctrine of Frustration.

The rule of absolute performance was firmly laid down in the landmark case Paradine v. Jane (1647). The brief facts of this case were: Paradine sued Jane for rent due upon a lease. Jane pleaded that an alien enemy had invaded with army and expelled him out of possession due to which he could not take

the profits from the lease. The plea was that the rent was not due because the lessee had been deprived of the profits from which the rent should have come by the events which are beyond his control. The Court ruled that the excuse was not relevant and insisted on absolute performance. It said:

When the party by his own contracts creates a duty, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; though the land be surrounded or gained by the seas, or made barren by wildfire, yet the lesser will have his whole rent.

Taylor v. Caldwell is considered to be a landmark decision in the development of the doctrine of frustration. The Court of Queen's Bench, in this case, laid the foundation of the doctrine. The brief facts of the case were: Caldwell (defendant) agreed to let Taylor (plaintiff) have the use of the Surrey Gardens and Music Hall for the purpose of giving concerts on four designated days in the summer of 1861. The plaintiff had agreed to pay £100 each day. After the making of the agreement and six days before the first day on which the concert was to be given, the hall was destroyed by an accidental fire. The destruction was without any fault on either party and was so complete that in consequence of it no concert could be given as intended. The Court decided in favor of the defendant, that is, he was not liable to pay. In his judgment, Blackburn J. stated:

The principle seems to us to be that, the contract 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.

As a consequence of this judgment, the doctrine of frustration became an essential ingredient of the Law of Contract. It has been applied in various cases where performance becomes impossible and justice calls for discharge of the contract. It is applicable to both situations, that is, where impossibility was from the beginning as well as where it was a subsequent development. In a landmark decision of India, Satyabrata Ghose vs. Mugneeram Bangur & Co , B. K. Mukherjee J observed:

This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view. And if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

Applications of Doctrine of Frustration:

There are numerous grounds on account of which a contract could be said to be frustrated. Some of these grounds have been explained in this section.

1. **Subject matter destroyed**: When the basic subject matter for which the contract was entered into is destroyed, it is but obvious that the contract will absolutely

cease to exist. The doctrine of frustration applies effectively where the actual subject matter of the contract is destroyed.

2. Specific event does not occur: Where an event is expected to occur and is central to the contract, the non-occurrence of the event leads to the contract becoming void. Even if the performance of the contract is possible, the non-occurrence of the event may lead to a substantial reduction in the value of the contract. Thus, if such a situation is created, the contract becomes void as per the doctrine.

3. Death or incapacity: If the promisor of a specific personal service dies, he cannot be held liable to perform the contract. Similarly, if the party becomes too ill to perform, leading to its incapacity, it may be excused from performance. Such a situation causes a radical change in the terms of the contract, making it frustrated under the doctrine.

4. Modified circumstances: This point concerns the idea of subsequent impossibility, where the contract becomes unfit to perform because of such changes in circumstances that lead either to absolute impossibility or to a substantial loss to both the parties. Thus, where the circumstances have changed in such a manner in terms of manner and time of the contract, it becomes frustrated as per this doctrine.

5. Interference of legislative changes: When the expected environment in which the contract was to be executed is changed substantially due to legislative or administrative intervention, the contract for performance may be made impossible as defined by the doctrine of frustration. In such circumstances, the contract is said to be dissolved under the doctrine.

Effects of Doctrine of Frustration:

This section enumerates the various effects that application of the doctrine of frustration may have. The situations for its application have been explained in the previous section, and its effects are listed here:

1. Contract discharged automatically: It is established that when the frustrating event occurs, neither of the parties is supposed to take any positive action to rescind the contract. The duties and obligations of both the parties get terminated automatically with the occurrence of the event and the contract ends immediately.

2. Discharge of subsequent obligations: Both the parties to a frustrated contract are discharged from any further obligations that may arise as a consequence of the contract. All duties subsequent to the occurrence of the frustrating event are outside the scope of the frustrated contract. Continuance of implied obligations: The duties of parties before the frustrating event occurred are kept intact and actionable. If any party benefited from the other during such time, it is bound to compensate the other party for the accrued benefit. This is contained in Section 65 of the Indian Contract Act.

The next section presents the position of Indian law with regard to frustrated contracts.

Frustration of Contract in Indian Law:

In India, the law is very clear and definite on the issue of frustration of contracts. There is

no doubt regarding the fate of frustrated contracts, as the law clearly provides that in the event of impossibility of performance, the contract is considered to be frustrated and the parties are discharged from performance. Frustration is defined as: a certain set of circumstances arising after the formation of the contract, the occurrence of which is due to no fault of either party and which render performance of the contract by one or both parties physically and commercially impossible. When the performance of the contract becomes substantially or entirely impossible without the fault of either of the parties, the contract is said to become dissolved by the doctrine of frustration. This doctrine is incorporated in the Indian Contract Act, 1872. Section 56 of this Act deals with the possibility of performance of contracts and lays down that performance is excused in cases where the contract becomes void on account of impossibility. Section 56 provides:

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 a 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 be 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 promise for any loss which such promisee sustains through the non-performance of the promise.

The Section also presents certain examples to support the provisions. For instance, where A and B contract to discover treasure by magic, the agreement is considered to be void for the simple reason that it is not possible to do so. Another example incorporated in the section is where A goes mad before he can marry B, with whom he had contracted to marry. An important concept in this context is the force majeure clause. It is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, or an event described by the legal term act of God (such as hurricane, flooding, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract. In case of absence of force majeure clause in the contract, Section 56 of the Indian Contract Act can be applied. The Section lays down two situations where the Doctrine of Frustration comes into operation. These are:

• **Initial Impossibility**: In the events when the contract was impossible from the very beginning, the contract is said to be void ab initio, that is, it never came into existence. The first example of discovering treasure by magic comes under this category, because this agreement was impossible from the very beginning. Thus, this contract is considered to be void.

• **Subsequent Impossibility:** This concerns the situations where the act to be performed was possible at the time of creation of the contract, but consequently, due to the happening of some event beyond the control of both the parties, the performance of the contract becomes impossible. In such situations, the contract is taken to be void. For instance, if one of the parties to the contract of marriage goes mad, though he was well at the time of the formation of the contract, the marriage is considered to be void. An Indian case, Chamanlal Jain vs. Arun Kumar Jain, is important in this regard. In this case, it was held that when a singer agrees to sing but becomes too sick to perform, s/he shall be excused from performance.

Section 56 of the Indian Contract Act, 1872 is the provision relating to the doctrine of frustration in Indian law. The first paragraph of Section 56 deals with the law just like in England, while the second lays down a general rule as to the application of the doctrine, giving a clearer perspective in comparison with the English law. It represents the law concerning the discharge of contract due to supervening impossibility or illegality. Section 56 lays down the rule of positive law and does not leave that matter to be determined according to intention of the parties. The Indian law does not allow the courts to import the principles followed by English courts that are inconsistent with the statutory provisions in India. The various theories followed by English courts enumerated above are not relevant in India due to the fact that statutory provisions in India are very clear as to the situations and methods of application of the doctrine. Such theories are not required to be constructed by courts in India. Simply, the Act provides the situations of initial and subsequent impossibility as the causes behind the contract becoming void.

In case an event that could not have been expected by either of the parties occurs, the doctrine of frustration would be applicable, as per the provisions contained in Section 56. The section does not deal with the cases in which an event, which was not considered by the parties as having any effect on the contract, happens and leads to impossibility. However, in cases where the impossibility of performance happens due to the fault of one of the parties, frustration cannot be pleaded. In addition, if the parties have provided for sudden circumstances in the contract itself, the doctrine will not be applicable. In another scenario, when the parties recognize an event as probable but do not make any express provisions, stating how the situation will be dealt with, if it does happen, then the doctrine of frustration can be successfully applied. According to Section 56, an agreement of performing an act which is, in itself, impossible to the core, is absolutely void. In addition, when a subsequent impossibility arises, or the act becomes illegal due to a new statutory provision, beyond the expectation of both the parties, it is assumed that the core of the contract, or the fundamental provision for which the contract was created, is destroyed and the contract becomes void. The Court held, in the prominent case of Syed Khurseed Ali v. State of Orissa, that doctrine of frustration under section 56 is

attracted in the event of a subsequent unforeseen event or contingency for which, neither of the parties is responsible. In Indian law, the following situations are considered to attract the doctrine of frustration and render the contract void.

• Destruction of the subject matter of the contract;
• By death or permanent incapacity of the parties (like insanity) where the contract is personal in nature;
• Supervening impossibility or illegality, involving actions contrary to law or public policy;
• Outbreak of war, war restrictions (avoidance of trading with alien enemy, and so on);
• Imposition of government restriction or orders or acquisition by government; and
• Non-occurrence of a particular state of things.

Apart from the above circumstances, impossibility does not discharge a person from the contract. He who agrees to do an act should do it unless impossibility arises in any of the ways mentioned above.

A point to be noted with emphasis is that the term 'impossible' used in Section 56 does not only indicate literal impossibility. Sometimes, though the performance of the act agreed to be done by the parties is very much possible, it may become impossible due to the fact that it has become impracticable, and the object supposed to be achieved by the parties can no longer be achieved. It considers the situation when the act becomes impossible on account of the foundation or core of the contract becoming destroyed. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in mind, then it is assumed that the performance of the contract has become impossible. But, an important point in this regard is that this intervening event must strike at the root of the contract, or destroy the very core of the contract. In addition to this, another situation to be considered is when the frustrating event is elf-induced. It is well established that frustration should not be induced by the parties themselves. This was firmly laid down in Maritime National Fish Ltd v Ocean Trawlers Ltd by Lord Wright, when he observed:

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.

Moreover, when an event leading to the impossibility of performance occurs, frustration comes into operation immediately and automatically. This happens irrespective of the individuals and their circumstances. It does not matter whether the event is within the knowledge of the parties or not, because legally, the contract has ceased to exist. Section 56 lays down a positive law according to which it is the discretion of the Court and not the intention of the parties, which leads to the application of the doctrine.

Restitution or adjustment of rights of the parties is another important aspect, provided for in Section 65 of the Act. The section states:

Obligation of person who has received advantage under void agreement or contract that becomes void - 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 to it, to the person from whom he received it.

Thus, according to this section, if any party has received benefits through an agreement that is from the beginning, void, or is later discovered to be so, the party has to restore them to the other party. It is bound to reimburse the other party for the benefits received thus.

Frustration of Contract in English Law:

The English Law followed the principles established in the noted judgment of Krell v. Henry before there was any specific statute governing such situations where the contract becomes impossible to perform. Thereafter, the Law Reform (Frustrated Contracts) Act, 1943 was enacted to lay down certain guidelines to be followed in these situations. The contract used to be automatically discharged on the happening of the frustrating event, at common law. Many theories have been developed by the English courts to explain the basis of the doctrine of frustration. These are explained here:

1. Implied Term Theory: This theory implies that the contract is discharged because the parties can be taken to have impliedly provided that in the events which have subsequently happened, the contract would come to an end.

2. **Theory of Disappearance of the Foundation of the Contract**: This theory implies that the contract is discharged because the foundation of the contract has gone by destruction of the subject-matter.

3. **Theory of Just and Reasonable Result**: This theory states that it is the law that in particular circumstances, the contract shall come to an end.

4**. Radical Change in Obligation**: This theory states that the 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.

The Section 1(2) of Law Reform (Frustrated Contracts) Act, 1943 provides that: 'all sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable'. The Act also provides that if a party has incurred expenses during the time of the contract, the court may allow the party to recover such expenses if it considers it justifiable to do so. However, the party is not allowed to recover any additional expenses in excess of the above. The basic principle behind this is to prevent any party from unjust enrichment at the expense of the other party in event of frustration of the contract. Three principal types of frustration have been established by English courts

through various cases. These are applicable in situations where a force majeure clause is not present in the contract. These are:

1. Supervening illegality: This happens when a new legislative development renders the contract illegal and consequently, impossible. An example of this can be illustrated through Avery v. Bowden, in which the outbreak of the Crimean War led to the government making it illegal to load cargo at the enemy port and the specific party could not fulfill its contract of loading cargo at the port of Odessa. The contract was, thus frustrated.

2. Further performance not possible: Subsequent performance of the contract may become impossible due to two main reasons that are, destruction of the subject matter or death/incapacity/non-availability of the other party.

3. The nature of the contractual obligations significantly different from what was agreed upon: This occurs due to the non-occurrence of an event which was fundamental to the contract, or, which formed the core of the contract. This can be illustrated through Krell v. Henry in which a coronation procession was organized for King Edward VIII, but it had to be cancelled at the last minute because the King became ill. The defendant had hired a flat for the day so as to view the procession. He refused to pay the day's rent when the coronation was cancelled, because he said the contract had been frustrated. The court held that the defendant was not liable to pay the day's rent.

Legal Effects of Frustration:

The English statute to be considered in the context of frustration is the Law Reform (Frustrated Contracts) Act 1943. It applies when there is no express provision, or a force majeure clause in the contract providing for situations rendering the contract frustrated. The key provisions are, that, firstly, if some sort of pre-payment or deposit has been made, the buyer can get that pre-payment back, minus any expenses incurred by the seller. In addition, if the contract has already been partly performed, the party has to pay for any benefit it has already received. Suppose the contract is for a complete garden makeover, and at the time of the frustrating event, the contractor has already installed a swimming pool in the party's garden. The party will have to compensate the gardener for the expenses he's incurred in installing the pool.

Important Cases:

This section deals with the important points discussed in the paper, and some landmark cases in respect of the points. It is through these cases, that the law relating to the application of the doctrine of frustration has been well established in Indian law.

1. Destruction of Subject Matter: The doctrine of frustration is very effectively applicable to cases in which the particular subject matter, around which the contract was created, is destroyed or ceases to exist. In the recent case, Markfed Vanaspati & Allied Industries v. Union of India, the Supreme Court held that the force majeure clause can be invoked when it pertains to the contractual obligation that has purportedly become impossible of performance. In another case, W.B. Khadi and Village

Industries Board v. Sagore Banerjee, the court said that once the structure was completely destroyed, the tenancy ceased to exist. If the landlord reconstructed the premises, the tenant has no right of its possession.

2. Death or Incapacity of Party: The famous English case, Robinson v. Davison, is of importance in this context. The facts of this case were that a sponsor had contracted with a pianist to play at a certain concert. On the particular day, the pianist informed the sponsor, that she was too sick to play, due to which the sponsor incurred major losses. The court held that under the circumstances she was not merely excused from playing, but she was also not at liberty to play, if she was unfit or incapable to do so. In India N. Chandrasekhar v T.N. Cricket Assn. is a recent case, where a one day international match could not be held because of rainfall. Only actual buyers of tickets were allowed refund to the extent of 1/3 of the ticket money.

3. Government, Administrative or Legislative Intervention: In the case of Naihati Jute Mills v. Khyaliram Jagannath , the buyer applied for license of import but the rules had been changed and to obtain a license he had to show that he had used an equal quantity of Indian jute. Thus the buyer failed to supply the license and was sued for breach. He pleaded frustration caused by the change in Government policy. But he was held liable. Shelat J pointed out that if the government had completely forbidden imports, section 56 would have applied. But the policy of the government was that the licensing authority would scrutinize the case of the each applicant on its own merits.

4. Intervention of War: In a case before the Patna High Court i.e. A.F. Ferguson v. Lalit Mohan Ghose , performance of a contract of life insurance had become impossible because the insurer was a German company and on the outbreak of war its business was closed by the Government of India and the disposal of pending policies was handed over to a the money paid by him under the policy.

Conclusion:

In this article, the Doctrine of Frustration was discussed and its position in English and Indian law was compared. Through this study, it can be concluded that the Indian Contract Act, 1872 deals with the doctrine in a better fashion than English law, because there is a possibility of lack of concurrence among judges in the English court, while the clearly laid down provisions in India provide a better statutory environment for the courts to work in. Under the Indian law, the doctrine of frustration is an aspect of the law of discharge of contract by reason of supervening impossibility or illegality of the contract to be done and hence comes within the purview of section 56 of the Indian Contract Act, 1872. A very significant point is that no theories are constructed by Indian courts in order to make the doctrine applicable. The clear provisions of Section 56 are operational, resulting in a lack of requirement for legal fiction by Indian courts. They simply apply the provisions of Section 56 in the situations provided for and explained earlier, where it is quite established that the contract has become

void. The decisions of English courts have a persuasive significance, but the Indian courts are not bound to follow the precedents established by them. Thus, the Indian law seems to be on a more solid footing as compared to English law, when it comes to the doctrine of frustration. An important point is that any misuse of the doctrine has been guarded against by the third paragraph of Section 56, which provides for restitution of any benefits received by a party under a void agreement. Such a provision is not found under English law. The courts in India have eliminated any ambiguity that could be established through its definitive decisions relating to the various provisions concerning the doctrine.

Notes:

1. *Taylor v. Caldwell*, [1863] EWHC QB
2. [1647] Aleyn 26
3. [1863] EWHC QB
4. AIR 1954 SC 44
5. Pollock and Mulla, *The Indian Contract Act, 1872*, 1124 (14th Ed. Vol. I 2013)
6. Section 56, Indian Contract Act, 1872
7. Schaffer, Agusti, Earle, *International Business Law and Its Environment*, 154 (7th Ed. 2008)
8. AIR 1996 DEL 108
9. *Satyabrata Ghose v. Mugneeram Bangur & Co.* (1954) SCR 310
10. AIR 2007 ORI 56.
11. [1935] UKPC 1
12. [1903] 2 KB 740
13. Mulla, *Indian Contract and Specific Relief Acts*, 1118 (12th Ed. Vol. I, Butterworths India, New Delhi 2001)
14. Law Reform (Frustrated Contracts) Act, 1943 Chapter 40 6 and 7 Geo 6
15. 1856 AC 450
16. AIR 2007 SCC 679
17. AIR 2004 SCC 991
18. 1871 LR 6
19. AIR 2006 3 MAD
20. AIR 1968 SC 522
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