
COVID-19 AND FORCE MAJEURE CLAIMS IN PERFORMANCE OF CONTRACTS

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ABSTRACT

This research paper mainly analysed on the position of contracts and contractual obligations of the parties in India, which are affected by the Corona epidemic. The bottom line for any business or commerce is the contracts entered into between the parties. The law of contracts lays down the reciprocal obligations of the parties. As per Section 37 of the Indian Contract Act, 1872, the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law. The rapid progress and spread of the COVID-19 has created a condition where parties are unable to fulfil their contractual obligations. This research paper also deals with the position of governmental contracts. The study found that the doctrine of frustration has been applied in the time of lockdown, as it is a governmental policy to prevent the spread of covid-19 and having it's own legality under the provisions of Disaster Management Act. Undoubtedly, the current situation raises important questions pertaining to performance off contractual obligations. Whether a party can be excused for delayed or non-performance will depend on their ability to prove utter helplessness to fulfil their obligations during the raging pandemic. The doctrine of frustration has been defined under the provisions of section 56 of Indian contract Act 1872, according to which, A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promissory could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

KEYWORDS: *Force Major, Vis Major, Supreme Court, High Court, Indian Contract Act, 1872, Corona epidemic, Lockdown*

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INTRODUCTION

The COVID-19 pandemic in India is also a part of the worldwide pandemic of COVID-19 disease 2019 caused by severe acute respiratory syndrome corona virus 2. In order to control the spread of Covid-19 in India, government in India imposed lockdown; which could be explained under the provisions of Disaster management act. Covid-19 and lockdown effected the contractual obligations of the parties to the contract worldwide. Covid-19 and lockdown has made performance of contract difficult or impossible.

It has caused commercial problems to some parties in performance of their contractual obligations, while rendering others completely incapable in performance of their obligations. The bottom line for any business or commerce activity is the contracts entered into between the parties. The law of contracts lays down the reciprocal obligations of the parties. As per Section 37 of the Indian Contract Act, 1872, the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law³.

The rapid spread of the COVID-19 has created a condition where parties are unable to fulfil their contractual obligations. COVID- 19 has applied doctrine of frustration in the time of lockdown, as it is a governmental policy to prevent the spread of covid-19. Even the Union of India through Ministry of Finance has recently issued a clarification that Covid- 19 will be considered as a case of natural calamity under the provisions of Disaster Management Act and as such covered under the force majeure clause and doctrine of Frustration available to be invoked wherever necessary and applicable.

Force majeure means 'superior force' or 'chance occurrence/unavoidable accident'. It is mainly a type of inevitable accident. As the term and its meaning suggests, it is an event that the contracting parties could not have contemplated at the time of acceptance of contracts. In India, provisions of Section 56 of the Indian Contract Act deal with this situation.

Though some say that Section 32 is also a part of frustration, as any contingency becoming impossible to perform results in dissolution of the contract. However, this is outside the purview of strict frustration or force majeure condition in India, while an event of this nature under English law would lead to invocation of a force majeure clause.

³ Indian Contract Act, 1872 § 37

THE DOCTRINE OF FRUSTRATION

DOCTRINE OF FRUSTRATION IN INDIA

“The Doctrine of Frustration is an English contract law doctrine which acts as a device to set aside or make the contracts void, where an unforeseen event either renders contractual obligations impossible or unlawful or changes the party's principal or material purpose of the contract.” The doctrine of frustration defined under the provisions of S.56 of the Indian Contract Act, 1872.

The basic idea upon which the doctrine of frustration of contract is based the impossibility of performance of the contract; in fact, ‘*impossibility*’ and ‘*frustration*’ are often used as synonymous terms. The changed circumstances of Corona pandemic made the performance of the contract impossible, and the parties are absolved from the further performance of it as they did not promise to perform impossibility.

“The doctrine of Frustration is defined under the provisions of section 56 of Indian Contract Act, 1872. Agreement to do impossible act.—an agreement to do an act impossible in itself is void. —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.

A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract.

This rigidity of the common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in Taylor vs. Caldwell in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.

It is not possible to lay down an exhaustive list of situations in which the doctrine of frustration is to be applied to excuse performance. Yet certain grounds of frustration which are well established are destruction of subject matter⁴, death or incapacity for personal

⁴Taylor v. Caldwell (1863) 3 B & S 826

service⁵, non- existence or non- occurrence of a particular state of things⁶, intervention by legislative or executive authority⁷; intervention of war⁸; and change of circumstances of particular state of things. The last point of the ground includes lockdown.

DOCTRINE OF FRUSTRATION AND COVID-19

As far Indian law is concerned, Section 56 of the Indian Contract Act, 1872 is absolutely clear that an act, after the contract is made, becomes impossible to perform or by reason of some event which a party could not prevent becomes void and is not capable of performance. In the time of covid-19 epidemic the contracts in India are being frustrated due to their non performance.

These contracts even include Government contracts. The reason behind is that there is a lack of transport facilities, workers, raw materials and most important factor is the willingness of consumers to buy the good and services due to lockdown. In this regard, the Supreme Court of India right from the Judgment in Satyabrata Ghose v. Mugneeram Bangu and Co. & Anr⁹.r, M/s. Dhanrajamal Gobindram v. M/s. Shamji Kalidasand Co¹⁰. And, Smt. Sushila Devi & Anr. v. Hari Singh & Ors¹¹.

Interpreted Section 56 to mean that an act must result in an impossibility of performance or makes the contract unlawful, or the performance of an act becomes useless from the point of view of the material object and purpose which the parties had in view while framing the agreement and if an uncertain event or change of circumstances totally renders the very foundation of the contract; upon which the parties rested their bargain, it can very well be said that the party finds it impossible to do the act which he promised to do.¹²

Further, the Supreme Court in Sushila Devi has held that since the law of frustration in India is different than under English law, recourse to English law may not be available to us. The interpretational process has developed various theories of frustration (i) basis or foundation of the contract i.e. disappearance of the basis of the contract; (ii) implied term theory i.e. it is

⁵Stubbs v. Holywel Railway Co., (L.R. 2 Exch 311)

⁶Krell v. Henry (1903) 2 KB 740

⁷Metropolitan Water Board v. Dick Kerr & Co. Ltd., (1918), AC 119

⁸Basanti Bastralaya v. River Steam India Navigation, AIR 1987, Cal. 271

⁹Satyabrata Ghose v. Mugneeram Bangur and Co. & Anr, AIR 1954, SC 44, para 9

¹⁰ M/s. Dhanrajamal Gobindram v. M/s. Shamji Kalidasand Co, AIR 1961 SC 1285

¹¹ Smt. Sushila Devi & Anr. v. Hari Singh & Ors., AIR 1971 SC 1756

¹² Kunal Tondon, India: Frustration of contracts- when does it arise?, 27th April 2020, <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/913870/frustration-of-contract-when-does-it-arise>

implied that the subject of the contract must survive for it to be performed; (iii) radical change in obligation i.e. significant change in the nature of the contract; (iv) just and reasonable solution i.e. if the termination is believed to be just and fair.

In context of Indian laws; Further down the legal parlances' corridor the Supreme Court in Alopi Parshad & Sons Ltd. v. Union of India, the Supreme Court, premising on section 56, held, it is only when a consideration of the terms of the contract, in light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind¹³. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

More recently, Justice Nariman in Energy Watchdog v. Central Electricity Regulatory Commission and Others, held that if a contract has an express or implied force majeure clause, it will apply over the principles under Section 56 of Indian Contract Act, 1872. The doctrine of Frustration is totally relevant to the current scenario for the frustration/impossibility of the contracts during the time of corona pandemic in India.

Several writ petitions in SC and High Courts have been filed in order to get excuse from the liabilities and obligations which arise from the contracts. Government contracts are also fall under the domain of Doctrine of Frustration; as only Indian Contract Act, 1872 is the act which deals with different nature of contracts including government contracts defined under Article 299 of Indian Constitution, 1949.

FORCE MAJEURE CLAUSE

Force Majeure Clause is a clause put in during the drafting of a contract to affirm that a party shall not be liable for the failure of or any delay in performing his own responsibilities in the contract so far as the failure or delay is as an effect of an event beyond the reasonable control of a party and could not reasonably have been provided against or foreseen.

¹³ Vineet B Naik, *Coronavirus crisis force majeure frustration of contracts ?* What it means for courts and businesses, May 11, 2020, 18:30, <https://www.businesstoday.in/opinion/columns/coronavirus-crisis-force-majeure-frustration-of-contracts-courts-businesses-covid-19-impact/story/403484.html>

However, such failure to perform the contract will not be mitigated for failure or delay resulting from only common economic conditions or other common market results such as an increase in the price of delivery as a result of the event.¹⁴

The motive of this clause is to defend parties from events that are outside the average risks come hand by hand with the business, and to put the parties on notice of events that may suspend or excuse performance. It is necessary to point out that the differentiating factor between Force Majeure and Frustration is that the act which looks for delay or because either party not to execute their contractual obligations must be stated in the Force Majeure Clause in the contract while the parties only need to meet the requisite tests for frustration to apply.

This Clause is often elucidated narrowly, and the party supplicating the force majeure clause to excuse performance must evince the event in question falls within the scope of the clause.

For example, Act of God, Riot, War. However, in the immediate circumstance, parties may have failed to comprise a term that will sufficiently cover the recent outbreak of COVID-19 but where parties comprise general terms like Disease, Epidemic, pandemic, or Government action which the COVID-19 or events arising from COVID-19 may fall under, would enable parties to invoke the Force Majeure Clause to excuse the delay or non-performance of their contractual obligations in order to avoid a breach of the contract.¹⁵

FORCE MAJEURE CLAUSE IN CONTRACT

The importance of a force majeure clause in contract cannot be overemphasized¹⁶. Force Majeure which is a French word signify “superior force”. It is commonly used in a contractual agreement to trace events that are totally outside the control of parties to a contract. The motive of such a clause is to discharge the parties from liability in the event that they cannot complete the terms of a contract for reasons which go out of their control.¹⁷

¹⁴Clause Taxonomy: Force Majeure, <https://www.contractstandards.com/public/clauses/force-majeure>

¹⁵ Baker Mackenzie, Coronavirus Outbreak: Global guide to Force Majeure and International Commercial contracts <https://www.bakermckenzie.com/en/insight/publications/2020/03/coronavirus-outbreak-global-guide>

¹⁶The Force Majeure is an exception to the principle of law imbedded in the doctrine of Pacta Sunt Servanda – an agreement must be kept.

¹⁷COVID-19 – A Force Majeure Event? Published on Mondaq by [Chrysanthos Christoforou](#) of Elias Neocleous & Co LLC

This clause is of essence keeping in mind the universal concept of *Pacta Sunt Servanda* - means an agreement must be kept. This clause therefore assists to answer the question as to what should occur in the event a party to a contract is not able to perform and complete his contractual obligations due to unforeseeable events.

Black's Law Dictionary¹⁸ describes force-majeure clause as '*A contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled.*'

Pandemic being termed as a Force Majeure event in India

On February 19, 2020, the Indian Government issued Office Memorandum, stating that covid-19 pandemic shall be considered as natural calamity and force majeure clause may be invoked wherever necessary. It should be noted however that the memorandum was related to Government contracts. As a result, it would only serve as an indication for private contracts.

The Supreme Court in 2017 has clarified that economic hardship cannot be considered as a force majeure event. COVID-19 would be covered under the terms epidemic, pandemic or even natural calamity, prescribed in a force majeure clause. However, it is important to note that the failure to perform an obligation is primarily due to lockdown implemented by the Government, therefore, the respective force majeure clause should also contain term '*lockdown*', in order to be invoked.

Thus, whether the force majeure event will rather depend on the nature of the obligations and whether the parties are truly unable to discharge these obligations under the agreement. The pandemic/ lockdown cannot be said to be a force majeure event, if the parties are able to somehow continue operations, either digitally or partially and there is an extended time within which they can complete their obligations, post the lockdowns in the city/country.

Therefore, calling the pandemic or lockdown a blanket force majeure event can be incorrect depending on the contractual obligations and ways to perform the same and thus, may lead to disputes between contracting parties

¹⁸Black's Law Dictionary Eighth Edition, First South Asian Edition 2015

INDIAN JURISPRUDENCE ON THE CONCEPT OF FORCE MAJEURE

Force majeure is often mixed up with the doctrine of frustration of contract. But these are completely different concepts. The concept of force majeure has neither have been defined nor specifically dealt with under the Indian statutes. However, the legislators have to some extent dealt with this concept as is clear from Section 32 of the Indian Contract Act, 1872 dealing with contingent contracts. Section 32 of the Indian Contract Act, 1872 reads as follows:

"32. Enforcement of contracts contingent on an event happening –Contingent contracts to do or not to do anything if 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."

From contractual perspective, a force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon occurrence of a force majeure event.

THE ESSENTIAL INGREDIENTS OF FORCE MAJEURE CLAUSES ARE AS FOLLOWS:

1. An unexpected/unforeseen intervening event occurred;
2. The parties to the agreement assumed that such an event will not occur;
3. Such an event has made the performance of the obligations under the contract impossible or impracticable;
4. The parties have taken all such measures to perform the obligations under the agreement or at least to mitigate the damage; and
5. The affected party claiming relief under force majeure will have the burden of proof to show that the force majeure event has affected such party's performance of the contract.

Having analysed the ingredients of Section 32 and Section 56 of the Indian Contract Act, 1872, it is pertinent to note that where the contract itself, as a matter of construction, contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the question of dissolution of the contract according to its term falls to be determined under Section 32 and not under Section 56 of the Indian Contract Act, 1872. Under the English law, they are all treated as cases of frustration, but under the Indian law such cases would fall under Section 32, which deals with contingent contracts.

JUDICIAL PRECEDENTS*M/S HALLIBURTON OFFSHORE SERVICES V. VEDANTA LIMITED*¹⁹

The Hon'ble High Court of Delhi in M/s Halliburton Offshore Services Inc. v. Vedanta Limited vide its interim Order dated April 20, 2020 (Order reserved on April 15, 2020) observed that the lock down done by the Government in view of the outbreak of corona virus was prima facie in the nature of a force majeure. In this case, the contract entered into between the parties contained the force majeure clause which was allegedly invoked by the petitioner. The Hon'ble Court therefore stayed the invocation of bank guarantees by Vedanta Ltd.

The relevant portions of this interim order read as follows:

"20. the country wide lockdown, which came into place on 24th March 2020, was, in my opinion, prima facie in the nature of force majeure. Such a lockdown is unprecedented, and was incapable of having been predicted, either by the respondent or the petitioner.

Prima facie, in my view, special equities do exist, as would justify grant of the prayer, of the petitioner, to inject the respondent from invoking the bank guarantees of the petitioner, forming subject matter of these proceedings, till the expiry of a period of one week from 3rd May 2020, till which date the lockdown has been imposed."

"29. There shall be an ad interim stay on invocation and encashment of the eight bank guarantees....."

Based on the analysis of the aforesaid judicial precedents, it is clear that the judicial response to the doctrine of force majeure has been rigid. The courts have not allowed economic inability, inconvenience, difficulty in performance, nervousness etc. as grounds of force majeure for a party to terminate or get exemption from a contract.

CONCLUSION

The situation on account of the outbreak of corona virus, the subsequent lock downs and restriction on movement as declared by the Government and a halt to the economic activities is something which no reasonable and average contracting party could have foreseen.

¹⁹O.M.P. (I) (COMM)& I.A. 3697/2020

Based on the current jurisprudence as it stands, the aforesaid exceptional circumstances may only result in litigation in a catena of commercial contracts. It is then a matter of interpretation by the courts whether a contract containing force majeure clause would cover such restrictions in movement and lock downs imposed by the Government.

The recent interim Order of the Hon'ble High Court of Delhi in M/s Halliburton Offshore Services Inc. v. Vedanta Limited is certainly a step in evolving the jurisprudence in this direction. However, the need of the hour is that instead of having piecemeal notifications, we need to have a codified law which exempts an affected party from performing its obligations under the contract during the period of such lock downs and such lock downs have to be considered as force majeure.

The time has come that we should have law related to force majeure rather than only drawing light from Section 32 of the Indian Contract Act or the contractual provision.