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Revisiting the Statutory Periphery of Section 56 of the Contract Act, 1872: Concept, Conundrum and Reforms

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Abstract

This paper will attempt to explain and understand how frustration is dealt with in English law where it originated and then move on to our domestic law, where the cases that are typically dealt with under Section 56 of the Contract Act, 1872 mainly and in some cases under Section 32 of the Act. We will thoroughly explain the provisions of Section 56 and then attempt to differentiate between the common law doctrine and our positive law, that is Section 56. This article will focus on Section 56 only.

Keywords: Doctrine of frustration, Contract Act, 1872, Section 56, Force-majeure, Covid-19

Introduction

In our daily life, we enter into different kinds of contracts, ranging from purchasing simple households to large scale commercial contracts for manufacture of goods and services. We enter these contracts with some specific assumptions and expectations in mind, usually that both parties will perform their part of the contract. The usual discharge of a contract is done by performance. However, in many cases, the performance of the contract is not possible without any of the party's fault and the contract is said to have been frustrated.

The doctrine of frustration is a creature of common law and grew over time to mitigate the harshness of the rule of strict obligation of contracts. When any subsequent event grave enough to frustrate the contract occurs, it is usually any or both parties to the contract who go to the Court to have their contract annulled. The Court does this by considering all the facts and circumstances of the case.

The English law on Contract forms the backbone of Bangladeshi law of contract, which is dealt with by the Contract Act, 1872. The Act promulgated in 1872 borrows heavily from the common law doctrine of frustration of contract when it talks about the discharge of a contract on subsequent illegality or impossibility under Section 56.

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Section 56 of the Act deals with contracts where the contract was made for an impossible thing or purpose, in which case it is void ab initio and, cases where the performance of an otherwise valid contract becomes void on the happening of some future event making the performance impossible or illegal. In fact, upon further investigation in this paper, we will find that though some Courts of India[1] have observed that Section 56 of the Contract Act, 1872 breaks away from the English law, English law still holds a tight grasp on our law of frustration.

The different clauses in the nature of liability-exclusion clauses have been accepted in our domestic contract law the same way as in English law. The Indian Courts have referred to Section 32 of the Act to deal with specific clauses such as force-majeure clause differently. But that is outside the ambit of this article.

What is "Frustration"

Once a contract is entered between the parties they are bound by the terms of the contract and perform their part of the bargain. This is the most essential rule of contract law. When a party fails to perform his part of the contract, that results in a breach of the contract and the other party is entitled to compensation. This follows the well-known maxim of *pactasuntservanda*, a contract must be honored. In cases it is breached, the breaching party must compensate the non-breaching party.

However, after a lawful contract is concluded, there might take place some event that changes the circumstances under which the contract was initially entered into. A contract is entered between the parties through their mutual consent, and they are free to make provisions in case any future event makes it difficult for them to perform. But the parties may not always have the gift of foresight to make conscious provisions for their rights and duties under those changed circumstances; or they might make provision for dealing with one event but what happened was beyond their contemplation. This subsequent event might not only have the effect of making the performance more onerous but might also make it impossible or illegal or even though possible, not practicable. In those cases, performance sometimes can amount to something which is totally against the spirit of the contract they had entered into or amounts to something that is radically different from what was promised. In such cases the contract is said to have been frustrated. Frustration is an exception to the general rule of absolute obligation. In cases of frustration, a contract is discharged without full performance, but the non-performance does not amount to a breach.

[1]Since the literature on Law of Frustration meaning Section 56 did not receive adequation attention of the judiciary of Bangladesh we have to rely heavily on the judicial precedent of the Indian jurisdiction because both the countries follow the same legislation i.e., the Contract Act, 1872.

Frustration is always a result of a subsequent event or subsequent change in the circumstances that render the contract either illegal or impossible or makes the performance radically different than what was promised to be performed. The doctrine is applied by the Courts very narrowly before excusing performance based on a claim of frustration, that is, the doctrine is to be invoked not as a matter of course whenever a changed circumstances make the performance more onerous, or where either of the parties could reasonably foresee the subsequent change in the legislation or circumstances or event.

Development of the Doctrine of Frustration Over the Years:

Earlier Stage of Development:

Once the parties to a contract were absolutely and strictly obliged to perform the act or service contracted for *strictosensu*, no matter what happened. Once a contract is finalized the parties could in no circumstances be discharged from their obligations.

This strict obligation theory affected the lessee very harshly in Paradine vs. Jane[2] where the occupant was not discharged from his duty to pay rent though the land was occupied for three years.[3] This strict-liability doctrine, however, began to change in the middle of the nineteenth century.

Taylor vs. Caldwell: The First Instance of Successful Invocation of the Doctrine

In 1863 in Taylor vs. Caldwell[4] marked the first departure from the absolute obligation theory when the destruction of the subject matter was held to have excused the parties to the contract from further performance. The Surrey Garden Hall being destroyed by fire, the contract could not be performed. Taylor claimed damages for breach of contract. Blackburn, LJ was tasked with the onerous duty to reconcile the ideas justice with the strict obligation theory. In his effort, he devised a new theory to excuse performance, the implied term theory. He held that the contract had in fact, a term implied in it that the continual existence of the subject matter or circumstances is the basis of the contract, the destruction of which will render the performance impossible without default of the contractor. "He attributed a conventional character to an obviously reasonable, if not inevitable, solution".[5] "According to this theory, though no express term for the discharge of the contract was made by the parties, the Court would

[2] [1647] 82 Eng. Rep. 897
[3] M P Furmston, *Cheshire, Fifoot and Furmston's Lawof Contract* (16thedn, OUP 2012) 715
[4][1883] 32 LJ 164 (QB)
[5]Furmston (n 3) 717

read into the contract a term to the effect that had they anticipated and considered the catastrophic event that in fact happened, they would have said, 'if that happens it is all over between us'"[6]

This theory was devised to justify the fact that the Court, though does not have the power to absolve the duties undertaken by the parties, it is in fact absolving the parties. And in order to do that they are reading into existence a term that is not there; 'the law is only doing what the parties really (though subconsciously) meant to do for themselves'. Though the doctrine of frustration gained momentum and was expanded to cover cases other than destruction of subject-matter, the implied term theory garnered mixed reviews and soon a debate started as to what exactly is the basis of the doctrine of frustration.

To attempt to guess the arrangements that the parties would have made at the time of the contract, had they contemplated the event that has now unexpectedly happened, is to attempt the impossible, as it is not enough to say that in the event of something unexpected happening some term must be implied: it must be clear also what that term should be.[7] As Wright, LJ rightly observed, if a term is implied based on the rationale that the parties would have themselves made a provision for discharge had they known what would happen, then is it not too simplistic and unreal to assume that the parties would have opted for absolute discharge rather than make provisions to salvage as much of the contract as could be salvaged?[8]

A rather more sophisticated rationale is the non-occurrence of some event which must reasonably be regarded as the basis of the contract.

Coronation Cases: [9]Foundation of the Contract Destroyed

Where the foundation of the contract is lost, frustration was granted in Krell vs Henry[10]. Due to the suspension of the Coronation procession, the

[6]F A Tamplin Steamship Co Ltd vs Anglo-Mexican Petroleum Products Co Ltd [1916] 2 AC 397 at 404, per Lord Loreburn; HirjiMulji vs Cheong Yue Steamship Co Ltd [1926] AC 497 at 504; Port Line Ltd vs Ben Lin Steamers Ltd [1958] 2(QB) 146at 162, per Diplock J; British Movietonews Ltd v London and District Cinemas Ltd [1952] AC 166 at 183, per Lord Simon; and at 187, per Lord Simonds; Joseph Constantine Steamship Line Ltd vs Imperial Smelting Corp Ltd [1942]AC 154 at 163, per Lord Simon

[7]Davis Contractors Ltd. vs Fareham UDC [1956] AC 696, per Lord Simonds

[8] Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd [1944] AC 265, per Lord Wright

[9] A series of cases that arose from the coronation procession of King Edward VII being postponed when he suddenly fell ill and many contracts were rendered seemingly incapable of performance.

[10] [1903] 2 KB 740

basis why the contract was made was lost and the Court granted frustration. But we must notice that, the loss of the basis or foundation of the contract must be taken to mean the loss of the entire foundation or purpose; When a part of the basis is still attainable, the Courts are not likely to excuse performance as another coronation case, Herne Bay Steamboat Co vs. Hutton[11] is the example of this, where the fleet could still be viewed by sailing around the Solent on the boat hired, though the King could not be seen.

The more palpable approach now is to find out whether the subsequent event has changed the circumstances so much that if the contract is performed in the changed circumstances, it would result in a radical change in the obligation originally undertaken.

Davis Contractors vs. Fareham UDC: Radical Change in the Obligation Test

One party to the contract claims frustration and the other party contests it. The Court decides the issue *ex post facto*, on the facts and surrounding circumstances. If the contract becomes more onerous to perform or if the Court thinks it would be unjust to ask for performance or if the performance would result in economic loss, frustration cannot be successfully claimed; unless there has been such a change that would make the contract a completely different one than what was entered into. Thus, the application of the doctrine is very narrow. The courts refuse to apply the doctrine unless they consider that holding the parties to further performance would, in the light of the changed circumstances, alter the fundamental nature of the contract.

The test was famously propounded by Radcliffe, LJ in Davis Contractors vs Fareham UDC[12],"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. *Non haec in foederaveni*; it was not this that I promised to do."[13]

In this case, the claimants were builders who entered into an agreement to build some 78 houses in 8 months. The production cost had increased drastically than what was anticipated as the skillful labour available in the market was not enough and longer period meant more expense. During the negotiations, there was a price escalation clause contained in a letter which was not ultimately incorporated in the

[11] [1903] 2 KB 683
[12][1956] AC 696
[13]Ibid, per Lord Radcliffe

contract. The contractors went on with the work even in the harsh business environment and through further negotiations, UDC did pay an extra amount. However, the contractors argued that they were entitled to much more and claimed that the contract had been annulled by operation of the doctrine of frustration, and they were entitled to payment on *quantum meruit* basis.

The Court unanimously found that though the contract had become much more onerous to perform and the claimants had undisputedly suffered more expense than originally bargained for, that was not enough to remove the footing on which the contract was based. The Court also found that the delay could have been foreseen though the degree to which occurred could not. The delay sure did make the job more onerous, but it never became a job of a different kind from that contemplated in the contract.[14] The expectation of the contractors was thwarted, "but it by no means follows that disappointed expectations lead to frustrated contracts"[15].

This view of the Court was later on adopted in many cases including National Carriers Ltd v Panalpina (Northern) Ltd[16] where Lord Simon aptly explained, "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case the law declares both parties to be discharged from further performance."

The Sea Angel: Emergence of a Multi factorial Approach

The English Courts increasingly found the above mentioned different theoretical bases of the doctrine to be quite burdensome and unnecessary as in reality, no matter what theoretic basis is propounded, the ultimate object of the doctrine was to meet the reasonable ends for the parties to the contract. With this view in mind, the Courts acknowledged that since no one fact or one theory can decide the question, a multi-factorial approach should be taken.

The Courts, in order to ensure that the doctrine is invoked and used in just cases, have recently moved towards formulating what is called a multi-factorial approach where the Court will take a panoramic view of

[14] Ibid, per Lord Reid
[15] Ibid, per Lord Simonds
[16] [1981] AC 675, 700

"the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances[17]"

The Sea Angel was chartered as salvors and after performing material part of the contract that is salvaging crude oil from a tanker and redelivering to the claimant, she was detained in Karachi Port before the last redelivery. The Court held that the charter was, not frustrated though the delay in a contract of this kind tends to greatly diminish the value of the contract; The Court reasoned that the contractual risk of delay was on the charterers, the detention was foreseeable and the purpose for which the vessel had been chartered had been largely performed.

Our Law on Frustration of Contracts:

In our jurisdiction, it can be said that there is hardly any difference from the English law doctrine in the principles, though it has been repeatedly affirmed by the Indian Courts, including the Supreme Court that since there is an express provision of law, namely Section 56 of the Contract Act, 1872 which exhaustively deals with the issue of supervening illegality or impossibility, albeit not always literal impossibility, the Courts only need to look at Section 56 while considering a case of frustration.[18]

Section 56 of the Act, though commonly treated as incorporating the doctrine of frustration, in fact deals with more than just frustration as we have seen in the English law. The first paragraph deals with initial impossibility, where the contract is entered for the performance of an impossibility. Such a contract is void ab initio.

The second paragraph of S. 56 enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. A contract for doing something completely possible or legal is entered into, but subsequently through any unforeseen event or any Government intervention or any changed circumstances beyond the control of any of the parties, the performance becomes impossible or illegal. In those cases, the parties are discharged from performance as the contract becomes void.

[17]Edwinton Commercial Corporation vs Tsavliris Russ, The Sea Angel [2007] EWCA Civ 547 per Lord Rix, para 111

[18] [1954] SCR 310

Subsequent/ Supervening impossibility

When through no fault of any of the contracting parties, the performance becomes impossible; the contract comes to an end. However, here impossibility does not mean a literal or physical 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 upset the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.[19]

Much like in English law, any change in circumstances *ipso facto* does not frustrate the contract and excuse under S. 56 cannot be granted. If the parties were able to reasonably foresee the events that actually took place or the interruption is not of a nature to do any substantial harm to the performance of the contract, S. 56 cannot be availed of.

The landmark case of Satyabrata Ghose vs Mugneeram Bangur[20]has set and established the law authoritatively which has been consistently followed by all the Courts till this day. In the judgment, Mukherjea, B.K, J, after stating with unrelented and unwavering certainty that S.56 of the Act is exhaustive and the courts need not take recourse to English law, did however admit that the decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those which have come before our courts.

In Satyabrata Ghose vs. Mugneeram Bangur[21], though the land contracted for building residential area got requisitioned by the government, impossibility does not apply because the work had not begun when the land got requisitioned and thus, there was no interruption in the work. As the defendant pleads there would be an indefinite delay in performance of the contract so the impossibility should be applied. But there was no time limit described in the contract and the requisition was only temporary. So, there was no indefinite delay.[22]The Court upon assessment of the facts when the contract was entered into found that the parties were aware of the ongoing war and the requisition could have been reasonably foreseen.

"The courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events."[23]

[19]Satyabrata Ghose vs Mugneeram Bangur 1954 SCR 310
[20] Ibid
[21] ibid
[22] ibid
[23]Naihati Jute Mills Ltd v KhyaliramJagannath [1968] SCR 821

However, an argument can be made that the drastic change in the price had actually made the contract unworthy of performance in the practical sense of things. Though it was not literally impossible, the performance was highly impracticable. However, the Indian Courts have also consistently held that S. 56 does not make out a case for where the commercial purpose of the contract has been removed.

The recent case of Energy Watchdog v CERC[24]is as phenomenal as Satyabrata, even more so as this case deals with modern times and modern troubles. This case deals with both frustration and force-majeure clauses.

The claimants were the lowest bidders on the project of the defendant. They won the contract and were given a chance to choose between escalable and non-escalable tariffs. Since they had a long-term fuel supply from Indonesian Coal Mines, they chose the non-escalable tariff. In the power purchase agreement, a clause was inserted which was to discharge the parties in case the legal position regarding those kinds of contracts changed. This clause was a standard force-majeure clause incorporated in such contracts. Later, after two years, the Indonesian Govt. passed a new regulation in consequence of which, the price of coal increased drastically.

The claimants sought shelter of the force-majeure clause, but upon the true construction of the facts, the Indian Supreme Court held that, the change of legal position in Indonesia was not covered by the force-majeure clause, but only covered changes in Indian law.

The claimant also sought the protection of Section 56 in case the force-majeure clause failed. They argued that the abnormal rise in coal price should render the contract frustrated as it was impracticable for them to perform under the contract now. The Indian Supreme Court held that, the doctrine of frustration is very narrow in its application and mere onerousness or increase in price cannot absolve the parties from performing. [25]

The court upon the evidence adduced before the court, also found that the risk of price increase was always there and foreseeable and the claimants assumed the risk by quoting a non-escalabletariff. Now that they have suffered for their own fault, they cannot seek the shelter of Section 56.[26]

[24][2017] 14 SCC 80

[25]Alopi Parshad & Sons Ltd. v. Union of India 1960 (2) SCR 793, Travancore Devaswom Board v Thanath Int'l [2004] 13 SCC 44

[26] Davis v Fareham UDC [1956] AC 696, Lucky Bharat Garage Pvt Ltd v South Easterm Coalfields Ltd [2011] 2 CGLJ 483

The Court cited almost all the authorities including the above cases restated the principles reached by the court in implementing the doctrine of frustration. The Supreme Court also held that like the invocation of frustration, the enforcement of the force-majeure clauses cannot either be sought lightly. The doctrine of narrow limits applies to force-majeure clauses too. The terms of the contract, its matrix or context, the knowledge, expectation, assumptions and the nature of the supervening events have to be considered and upon a true construction of the terms of the contract, the court will, if it thinks fit, enforce the force-majeure clause.[27]The approach of the Supreme Court in this case in coming up with a test for deciding whether the case is a fit one for granting excuse of performance is similar to the multi-factorial approach used in The Sea Angel. The decision even quoted the observation of Rix, LJ.

This decision, although restated the position of the Supreme Court of India on Satyabrata, Alopi Prasad, Naihati Jute Mills, that the provision of S. 56 is a positive law, and the construction of the intention of the parties is not necessary in the same way it is needed in English law, rather the Indian Courts need to just look at S. 56 and decide whether it applies and English decisions are not authoritative, the Court did eventually revert back to the Sea Angel to formulate and articulate the approach to be taken by the Indian Courts.

The Difference between English law and S. 56

From the cases discussed above, it is hard to conceive how exactly our law on frustration is any different from the English law. We do have a statute where the Common Law doctrine of frustration has been incorporated as a positive law in our jurisdiction. But there has been no single decision of the Supreme Court of Bangladesh that has made any decision or comment on this issue. We are inclined to look at Indian decisions as Bangladeshi Courts have a long history of following Indian decisions, though Indian decisions are by no means authoritative. It is noticeable how the Indian Supreme Court even after declaring English Law not applicable and merely persuasive, in essence still follow the English decisions in a more or less authoritative manner and we follow the Indian decisions as infallible rules of law.

What at a first glance seems to be a very insightful and important distinction between the English law and our domestic law on frustration identified and addressed Satyabrata, but upon some pondering exposes itself as a meandering trail of confusion is the “implied term debate”. By this time, we all know that the English courts based the rationale on implied terms when they first started granting exemptions. Though

[27] Energy Watchdog v Central Electricity Regulatory Commission [2017] 14 SCC 80

construction of the terms of the actual contract is more favored, the implied term theory still applied in the sense that in English law where the Courts upon construction find any implications, still the doctrine of frustration would apply. But according to the Contract Act, 1872, a promise may be express or implied[28]. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 altogether, they would be dealt with under section 32 of the Contract Act, 1872, which deals with contingent contracts or similar other provisions contained in the Act.[29] In our jurisdiction, since terms can be both express or implied, in both cases, S. 32 would apply. But in cases where there is any implied term found, the consequences of the term must be constructed by the Courts the same way, that is upon the material on record before it.

The principles have been reaffirmed in Energy Watchdog v CERC [30] and a plethora of both remarkable and unremarkable generic cases but not one single decision made it clear how the provisions of S. 32 will apply or come into operation. In most cases including the Energy Watchdogs, the contractual terms that provide for the performance in changed circumstances have been observed to be treated under S. 32. But these clauses inserted into the contract are what are popularly known as force-majeure clauses and are not quite in the nature of "contingent contracts" as is the subject of the provision of S. 32.

Force-Majeure Clauses

Where "a promisor does not wish to assume an absolute risk, he is free to delimit the extent of the obligation in any way he chooses, subject, of course, to the agreement of the promisee and to mandatory rules of law. As we have already seen, the justification given in Paradine vs. Jane for the imposition of strict liability in contract was that the promisor could have limited his obligation by agreement if he had so wished. In many cases the promisor may be especially unwilling to accept the risk of events over which he has no control, and a contract may typically provide that "the promisor shall not be responsible for any losses occasioned by any Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire or any cause contemplated in the term force-majeure ...". Such clauses are known generally as force-majeure clauses. It should be pointed out, however, that force-majeure

[28] The Contract Act, 1872, s. 9
[29]Supra, n 19.
[30][2017] 14 SCC 80

clauses come in a multitude of forms and, as with all contractual terms, each must be read in the context of the contract as a whole."[31]

Difference between S. 56 and S. 32

S. 56 applies to what is usually termed as "absolute contracts" that is when performance is not subject to a condition precedent. S. 56 applies when the performance of an absolute contract becomes subsequently impossible or illegal.

On the other hand, S. 32, which is part of Chapter III, deals with contingent contracts, which are basically conditional contracts, where the performance of a contract is entirely depended on the happening or non-happening of any future event. S. 32 in particular, deals with a contract which was contingent upon the occurrence of an uncertain but foreseen future event. The contract cannot be performed unless and until that event occurs. Let's take for example, an insurance policy that A will be entitled to the policy if his house is washed away by the Padma River. A cannot avail the policy unless and until he loses his house to the river.

This is in essence completely different from when A and B enters into a contract for the sale of a house and before the delivery of possession, the house is washed away in Padma. In this case, the contract was not dependent on any future event happening or non-happening, rather the basis or foundation of the contract was removed or destroyed.

If we follow Satyabrata, would it be that an implied term can be gathered from the facts that the parties are to be discharged if the house got washed away? Should this case fall within S. 56 or S. 32?

As we discussed earlier, when the contract itself provides some clause or clauses to deal with the changed circumstances, that is a force-majeure clause. In light of that understanding, what Mukharjae, J. in 1954 did not term as force-majeure clause, the Indian Courts have subsequently treated as such, and the Courts kept on dragging S. 32 to deal with such clauses in the contract.

Despite the above differences, frustration under Section 56 can be claimed even in cases where the parties have inserted force-majeure clauses, as Section 56 works dehors the contract, similar to the common law doctrine. Where the actual event and the consequences were unprovided for in the contract, Section 56 can still be successfully invoked given all the conditions for its application are met.

Consequences of Frustration in English law and Domestic Law

In English law, if the Court is satisfied as to the applicability of the doctrine of frustration and when the facts of the case are satisfactorily

[31]William Swadling, *The Judicial Construction Of Force-Majeure Clauses* (*Force-Majeure And Frustration Of Contract*, 2nd ed. Edited by Ewan McKendrick ,1995)

proved to warrant excuse from performance, the result is discharge of the parties, both of them, from further performance. The contract is void from the moment the supervening event occurs and onwards.

However, the doctrine did not traditionally allow compensation or reimbursement to the aggrieved party. But in Fibrosa SA vs. Fairbairn Lawson Combe Barbour Ltd[32], the Court allowed reimbursement of the advanced sum when the contract was frustrated as a result of the German Invasion of Poland. Later, a statutory change was brought which incorporated the principle in Fibrosa and made provisions for recovery of money in different circumstances based on the stage of performance when the contract became frustrated.

Law Reform (Frustrated Contracts) Act 1943 made provision for recovery of money advanced and when the performance has not begun, but work has been done to begin, the cost of such preparation.[33]When the performance has been carried on to some extent, the Act makes provisions of payment based on part performance.[34]

It is very interesting that the British law makers had made a provision for compensation to the aggrieved party in the Contract Act, 1872, though they only started granting compensation in 1943.

When there is no default on part of either party, and the contract is rendered void, the remedy lies in S. 65 of the Act. The expression used in S. 65, "becomes void" includes cases of the kind contemplated by the second clause of S. 56 and is sufficient to cover the case of a voidable contract which has been avoided.[35]

The Third Paragraph of S. 56

The language of the second paragraph of the Section may give the impression that though the illegality is not to be self-induced, the impossibility can be brought on by the acts of any party. If we read the third paragraph, we will find that if impossibility is brought on by the act of any party, he will be liable to compensate the other party. This third paragraph is not exactly a branch of what we usually identify S. 56 with. This provision has little relation with the doctrine of frustration, or excuse of performance owing to supervening impossibility or illegality. This is more about absence of good faith of one party resulting in loss to another and compensation.

[32] [1943] AC 32
[33] Law Reform (Frustrated Contracts) Act 1943, s. 1(2)
[34] Ibid, s. 1(3)
[35]Satgur Prasad vs. HarNarain [1932] 59 IA 147

Frustration and Force-majeure Clauses during Covid-19

The outbreak of Covid-19 not only disrupted our daily life but rendered our economies stagnant and many commercial contracts incapable of sound performance. The doctrine of frustration and the incorporation of force-majeure clauses to avoid the severe high standard of proving frustration gained renewed reputation.

Let's take a look at some cases to learn how the judiciary is handling frustration and force-majeure during Covid-19. One other thing to remember here is that, though Covid-19 have been declared a pandemic by the WHO and some countries have declared it as a force-majeure event, especially when regulating Government contracts, it, *ipso facto*, does not prove frustration, neither does it give the litigants a chance to invoke force-majeure clauses. The causal relationship between the pandemic and lockdown with the non-performability of the contract must be successfully established first. [36]

Halliburton Offshore Services Case (2020) Delhi High Court

In Halliburton Offshore Services Inc. vs Vedanta Limited and Anr[37], The claimant was due to complete performance on 16th June 2019. The original contract between the parties included a force-majeure clause which read as, *"Under the Contract, if either party is prevented, hindered or delayed from performing any obligation by an event or circumstances beyond the control of the party, then Force-majeure clause could be invoked."* The force-majeure clause of the Contract inter alia included an event that "prevented or hindered or delayed by any natural event including a pandemic or plague.

The Contract was time sensitive. The monthly progress report indicated that there was miniscule work/no work carried out during the period of November 2019 to March 2020, showing that the Contractor did not adhere to the deadlines for completion of the project and thus was in breach. The Court relied on the principles laid down by the Supreme Court in the case of Energy Watchdog.[38]

The Court observed that breach of contract must be examined on the facts and circumstances of each case. Breach or non-performance cannot be justified merely on the invocation of COVID-19 as a Force-majeure condition. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019.

[36]Halliburton Offshore Services Inc. vs Vedanta Limited and Anr. [LSI-360-HC-2020(DEL)]
[37]Ibid
[38]Ibid

It is the settled position that a force-majeure clause is to be interpreted narrowly and not broadly. Upon narrow construction, it was found that since the contractor was already in breach, he could not avail of the clause. It is also not the duty of the Courts to provide a shelter for justifying non-performance. There must be a 'real reason' and a 'real justification' which the Court would consider invoking a *force-majeure* clause. There is nothing on record to show the steps taken by the contractor towards mitigation, which were necessary as per the force-majeure clause.

The lockdown caused due to the pandemic of COVID-19 could invoke the force-majeure clauses in a contract, however, parties cannot take shelter under this situation to escape from their contractual obligations, or to hide contractual breaches that have occurred before. As held by the Delhi High Court, "Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations." [39]

Concluding Remarks

The periphery of the second paragraph of Section 56 is very wide, though apparently it covers only two specific areas, i.e., supervening impossibility and supervening illegality. The uniqueness of the Section is it is wide enough to tackle new situations such as any pandemic as we have experienced in Covid-19. Where the contract does not provide for any specific way to handle the changed circumstances or provides procedure for one particular occasion and not others, frustration can be successfully invoked. Though Covid-19 was not foreseeable and not provided for in any contract, as a pandemic of unprecedented scale it could very well be treated as a frustrating event under Section 56 provided all other conditions were satisfied.[40]

[39]Ibid
[40] Ibid

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