

IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION

Section 56 first lays down the simple principle that "an agreement to do an act impossible in itself is void". For example, an agreement to discover a treasure by magic, being impossible of performance, is void. The second paragraph of Section 56 lays down the effect of subsequent impossibility of performance. Sometimes the performance of a contract is quite possible when it is made, but some event subsequently happens which renders its performance impossible or unlawful. In either case the contract becomes void. Where, for example, after making a contract of marriage, one of the parties goes mad, or where a contract is made for the import of goods and the import is thereafter forbidden by a Government Order, or where a singer contracts to sing and becomes too ill to do so, the contract in each case becomes void. Indian Contract Act 1972 provides Legal Provisions as follows :-

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—
A contract to do an act

which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non- performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void.

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C and being forbidden by the law to which he is subject to practice polygamy. A must make compensation to B for the loss caused to her by the non-performance of the promise.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at the theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void. In the first well-known English case of *Paradine v Jane* it was pointed out that subsequent happenings should not affect a contract already made. There the defendant had taken an estate on lease from the plaintiffs. The defendant was dispossessed of it by alien enemies for some time and, therefore, refused to pay the rent for the period of dispossession. It was held that "when the party by his own contract 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 sea, or made barren by wildfire, yet the lessor will have his whole rent". In the subsequent case of *Taylor v Caldwell*, BLACKBURN J laid down that the above "rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied".

In this case the defendants had agreed to let the plaintiffs the use of their music hall between certain dates for the purpose of holding a concert there. But before the first day on which a concert was to be given, the hall was destroyed by fire without the fault of either party. The plaintiffs sued the defendants for their loss. It was held that the contract was not absolute, as its performance depended upon the continued existence of the hall. It was, therefore, "subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible by the perishing of thing without default of the contractor". With this decision began the struggle between the two principles, namely, the principle of sanctity of contract which supports the principle of absolute liability and the principle that a contract be discharged when the shared contractual assumption has been destroyed by change of circumstances.

Loss of Object or Frustration

In this case the performance of the contract had become physically impossible because of the disappearance of the subject-matter. But the principle is not confined to physical impossibilities. It extends also to cases where the performance of the contract is physically possible, but the object the parties had in mind has failed to materialize. The well-known coronation cases of which *Krell v Henry*⁶ is one, illustrates this. The defendant agreed to hire from the plaintiff a flat for June 26 and 27, on which days it had been announced that the coronation procession would pass along that place. A part of the rent was paid in advance. But the procession having been cancelled owing to the King's illness, the defendant refused to pay the balance. It was held that the real object of the contract, as recognised by both contracting parties, was to have a view of the coronation procession. The taking place

of the procession was, therefore, the foundation of the contract. The object of the contract was frustrated by non-happening of the coronation and the plaintiff was not entitled to recover the balance of the rent. Thus the doctrine of frustration comes into play in two types of situation, first, where the performance is physically cut off, and, second, where the object has failed. The Supreme Court has held that Section 56 will apply to both kinds of frustration. Referring to the section, B K MUKHERJEA J observed in *Satyabrata Ghose v Mug-neeran Bangur & Co* : 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. Explaining the concept "frustration of the contract" in *Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd*, VISCOUNT SIMON LC said that it means "the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the contract". Similarly, Lord WRIGHT observed⁷¹ that frustration means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed ; there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance.

This principle was applied in *Parshotam Das v Batala Municipal Committee?*

A Municipal Committee leased out certain tonga stands to the plaintiff for Rs 5,000. But no tonga driver came forward to use the stand throughout the year and the plaintiff could not realize anything. He sued for the refund of his money. It was held that "the plaintiff obtained the lease and the committee granted the same to him on the assumption that the tonga stands would be used by the drivers and the plaintiff would recover fees from them, but for reasons which both sides could not help, the drivers did not use the stands, the doctrine of frustration applied with full force". A contract for sale of land for non-agricultural use was held to have frustrated when the application for such use was rejected by the authorities.

Commercial Hardship

The alteration of circumstances must be "such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree". This makes the court rather cautious in discharging parties from their contract. An illustration is *Sachindra Nath v Gopal Chandra*. The plaintiff let certain premises to the defendant for a

restaurant at somewhat higher rent. The defendant agreed to pay high rent because the British troops were stationed in the town and a clause in the agreement specially provided that 'this agreement will remain in force so long as British troops will remain in this town'. After some months, the locality was declared out of bounds to the British troops. It was held that though it was possible that the defendant would not have paid such a high rent apart from the expectation of deriving high profits from the British troops, that was not sufficient to make out a case of frustration. A situation like this has often been described as one of commercial hardship, which may make the performance unprofitable or more expensive or dilatory, but is not sufficient to excuse performance, for it does "not bring about a fundamentally different situation such as to frustrate the venture". Such cases may not fall within the purview of Section 56 and this is amply shown by the Privy Council decision in *Harnandrai Fulchand v Pragdas*.

By a contract in writing the plaintiffs bought of the defendants a number of *dhotis* to be manufactured by specified mills and to be delivered as and when the same may be received from the mills. The sellers delivered only part of the goods owing to the mills failing to perform their contract with the defendants as they were engaged in fulfilling certain Government contracts. The defendants pleaded frustration.

It was held that the bargain was not frustrated, as the stipulation as to delivery did not make delivery by the mills a condition precedent. It was a simple case of breach. 'The closing or even the destruction of the mills would not affect a contract between third parties, which is in terms absolute.' Referring to the words "as and when", their Lordships held that the words certainly regulated the manner of performance, but they did not limit the sale of such goods as the mills might deliver. The Supreme Court acted on this principle in *Ganga Saran v Ram Charan Ram Copal*. A contract was made for supplying certain bales of cloth manufactured by the New Victoria Mills, Kanpur. The contract added : 'We shall go on supplying goods to you of the Victoria Mills as soon as they are supplied to us by the said mills.' The mill failed to supply the goods to the sellers and, therefore, the sellers pleaded frustration. But they were held liable. The words "prepared by the mills" are only a description of the goods to be supplied, and the expression "as soon as they are prepared" and "as soon as they are supplied to us by the said mills", simply indicate the process of delivery.

Another illustration is *Samuel Fitz & Co v Standard Cotton Co*.

The defendants placed an order with the plaintiffs for the supply of tapestries of certain kind, making it clear that they intended to sell them in Australia. But the Australian Government prohibited the import of such goods. The defendants lost their market and cancelled their order.

It was held that the courts should not read into a contract an implied term that the enforceability of the contract was dependent upon the ability of the purchaser to find customers for the goods. "We are unable to say that the foundation of the contract was that these goods should be resold by defendants to their clients in Australia."

A contract by a Hindu father to give his daughter in marriage to the plaintiff was held to be not frustrated simply because the girl had expressed her unwillingness to marry the plaintiff. The defendant had to pay damages for the breach. Where the performance of a contract for the sale of grain was made more difficult by Government restrictions on sale and storage imposed subsequently ; a franchise given by an authority to a contractor of (he right to collect tolls at the *ghats* of a bridge and the Government subsequently prohibited the traffic of food grains over the bridge resulting in loss to the plaintiff ;the temporary suspension of traffic on a bridge owing to breakdown ;failure to supply the contracted quantity in assorted variety of eucalyptus firewood owing to the forest, which was under the supplier's lease, not helping him with the requisite quantity aggravated further by shortage of labour and transport facility in the area, all these being things which the supplier should have assessed before giving commitments, in all these cases the performance was held not to have become impossible. "Disappointed expectations do not lead to frustrated contracts."

Specific grounds of frustration

The principle of frustration of contract or of impossibility of performance is applicable to a great variety of contracts. It is not possible to lay down an exhaustive list of situations in which the doctrine is going to be applied so as to excuse performance. The law upon the matter is undoubtedly in process of evolution. Yet the following grounds of frustration have become well established.

1. Destruction of Subject-Matter

The doctrine of impossibility applies with full force "where the actual and specific subject-matter of the contract has ceased to exist". "*Taylor v Caldwell*" is the best example of this class." There, a promise to let out a music hall was held to have frustrated on the destruction of the hall. Similarly, where the defendant contracted to sell a specified quantity of potatoes to be grown on his farms, but failed to supply them as the crop was destroyed by a disease, it was held that performance had become impossible. Similarly, a contract to exhibit a film in a cinema hall was held to have become impossible of performance when on account of heavy rains the rear wall of the hall collapsed killing three persons, and its licence was cancelled until the building was reconstructed to the satisfaction of the chief engineer. The owner was under no liability to reconstruct the hall and even if he did reconstruct and it took him about some time, by that time the film would have lost its appeal.

The same result followed where a ship ran aground. The result would also be the same where the subject-matter of the contract though intact has ceased to be available to the parties. Thus, where a ship was chartered for twelve months to run from April to April and before it could be delivered, it was requisitioned and was released only in September, the House of Lords held that the charterparty had frustrated, for a September to September term was not contemplated by the parties.

Where the parties can still perform their main obligation despite the fact that the subject-matter has gone out of their hand, frustration may not follow. Thus, where a ship was chartered for five years and three years after that, it was requisitioned by the Government, the latter paying more money than the freight agreed between the parties, it was held that the contract was not frustrated. The charterer was bound to pay the freight and that he could still pay and, therefore, he was entitled to collect the money from the Government. Similarly, an agency for dealing with the goods "manufactured or sold" by the principal was not frustrated when the principal's factory was destroyed, for the agent could still deal with the goods sold by the principal.

In a contract for carriage of goods by sea, the vessel sank with cargo. There was evidence to show that the vessel started taking in water. When the vessel was discovered to be tilting, the water in the bilge was pumped out but no action was taken to go to the nearest port to have the vessel berthed and the condition of the vessel checked. Instead of that, after pumping out water, the vessel attempted to continue on its course. The court said that the sinking of the vessel could not be described as an inevitable accident. Reasonable care had not been taken to prevent the sinking of the vessel. The defence of frustration failed.

2. Change of Circumstances

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

A contracted to supply to B certain classes and quantities of American piece-goods. The contract was c.i.f. Karachi. The goods arrived there after some delay. B refused to accept on the ground that both the qualities and quantities offered for delivery were not according to the particular contract. A called upon B to refer the dispute to the nominated arbitrator who was residing at Karachi. Then came partition which made it impossible for non-Muslims to go to Karachi.

It was held that the contract was frustrated, because the arbitrator could proceed without the parties' presence. As against it, where a ship was chartered to load a cargo but on the day before she could have proceeded to her berth, an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage at the scheduled time, the House of Lords held that frustration had, in fact, occurred in the circumstances.

"But there is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of un contemplated turn of events, the performance of the contract may become onerous." The

parties to an executory contract are often faced, in the course of carrying it out with a turn of events which they did not anticipate—a wholly abnormal rise or fall in price, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. The Supreme Court laid down this principle in *Alopi Prashad v Union of India*.

The plaintiffs were acting as the agent to the Government of India for purchasing *ghee* for the use of army personnel. They were to be paid on cost basis for different items of work involved. The performance was in progress when the Second World War intervened and the rates fixed in peace time were entirely superseded by the totally altered conditions obtaining in war time. The agents demanded revision of rates but received no replies. They kept up the supplies. The Government terminated the contract in 1945 and the agents claimed payment on enhanced rates.

They could not succeed. "*Ghee* having been supplied by the agents under the terms of the contract, the right of the agents was to receive remuneration under the terms of that contract."

Escalation.—*Law* has to adapt itself to economic changes. Marginal price rise may be ignored. But when prices escalate out of all proportion than could have been reasonably expected by the parties and make performance so crushing to the contractor as to border virtually on impossibility, the law would have to offer relief to the contractor in terms of price revision. The Supreme Court has recognised this in *Tcimpore & Co v Cochin Shipyard Ltd*.

In this case there is no room for doubt that the parties agreed that the investment of the contractor (for import of equipment and know-how, in foreign exchange) would be two crores and the tendered rates were predicated upon and correlated to this understanding. When an agreement is predicated upon an agreed fact situation, and that situation ceases to exist, the agreement, to that extent, becomes irrelevant or otiose. The rates payable to the contractor were related to the investment of Rs 2 crore by the contractor. Once the rates became irrelevant on account of circumstances beyond the control of the contractor, it was open to him to make a claim for compensation.

Another case of commercial hardship of this kind was before the House of Lords in *Davis Contractors Ltd v Fareham Urban District Council*.

There was a contract to build certain houses for a council for a fixed price and to be completed within eight months. Bad weather and labour strikes intervened and it took twenty-two months to complete and at a cost much more than the contract price. The contractor claimed that the contract was discharged on account of inordinate delay and, therefore, he should be paid on *quantum meruit* basis, that is, his actual costs should be paid. But the House of Lords did not agree with

him. It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. If this is the law, the appellants' case seems to be a long way from a case of frustration.

Thus where there was a 400% escalation of prices owing to a war as compared with the original price on which certain transformers were undertaken to be supplied on a firm basis, the contract was held to -have ended.

Foreknown chances of alteration.—Where the possibility of alteration of circumstances was within the contemplation of the parties at the time of the contract, they can hardly complain of any such alteration. Thus, where a railway company accepted goods for transport and happened to convey them to a wrong destination, which on account of partition fell in Pakistan and the railways could not bring them back into India, they were not permitted to plead frustration to their liability to pay for the loss of the goods.

3. *Non-occurrence of Contemplated Event*

Sometimes the performance of a contract remains entirely possible, but owing to the non-occurrence of an event contemplated by both parties as the reason for the contract, the value of the performance is destroyed. *Krell v Henry*¹ involved a situation of this kind. There, a contract to hire a room to view a proposed coronation procession was held to have frustrated when the procession was postponed. For this result to follow it is necessary that the happening of the event should be the foundation of the contract. This is shown by *Berne Bay Steam Boat Co v Hutton* which also arose from the postponement of the coronation. The Royal Naval Review was proposed to be held on the occasion. The defendant chartered a steamboat for two days "to take out a party of paying passengers for the purpose of viewing the naval review and for a day's cruise round the fleet". But the review was cancelled and the defendant had no use of the ship. Yet he was held liable to pay the unpaid balance of the hire less the profit which the plaintiff had made by the use of the ship in the ordinary course. The court said that the contract does not differ from a case where, for instance, a person has engaged a brake to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed.

4. *Death or Incapacity of Party*

"A party to a contract is excused from performance if it depends upon the existence of a given person, if that person perishes" or becomes too ill to perform. Where the nature or terms of a contract require personal performance by the

promisor, his death or incapacity puts an end to the contract. *Robinson v Davison* is the well-known illustration :

There was a contract between the plaintiff and the defendant's wife, who was an eminent pianist, that she should play the piano at a concert to be given by the plaintiff on a specified day. On the morning of the day in question she informed the plaintiff that she was too ill to attend the concert. The concert had to be postponed and the plaintiff lost a sum of money.

The plaintiff's action for breach of contract failed. The court said that under the circumstances she was not merely excused from playing, but she was also not at liberty to play, if she was unfit to do so. The contract was clearly subject to the condition of her being well enough to perform.

Similarly, where a 16 years old boy was engaged for five years to perform as a drummer for all the seven nights in a week whenever the band had business and, on account of illness, he was certified to be able to perform only 4 nights, the contract was held to have been frustrated. In another case :

A person entered into service as manager for ten years, and undertook not to undertake any professional engagement without the consent of the employer. Before the expiry of ten years he was called up for military service. After the war he undertook professional engagements and was sued by the employer for breach of contract.

It was held that the contract of service had frustrated when his services were requisitioned for military purposes and thereafter he was free from the covenants of the contract.

Application to industrial relations.—The application of the doctrine of frustration to industrial relations was examined by the (English) National Industrial Relations Court in *Marshall v Harland and Wolff Ltd.*

M was in a company's employ since 1946. In 1969 he fell ill and did not attend till April 1971 when the company retrenched him after giving usual benefits. *M* had still to undergo an operation before he could resume work.

Even so it was held that the contract of service had not frustrated. The President of the court pointed out that in considering whether further performance has become impossible, regard must be had to the terms of the employment, the nature of the illness, its duration, prospects of recovery, and the period of past employment.

In a similar case before the Court of Appeal. *S* was employed as a works manager under a five-year contract. After two years he became ill and was absent from work for five months. The employer terminated the employment after four months of

absence and S sued for breach of contract. It was held that a five-years term contract of service could not be deemed to have frustrated by five months' illness.

5. *Government or Legislative Intervention*

A contract will be dissolved when legislative or "administrative intervention has so directly operated upon the fulfilment of the contract for a specific work as to transform the contemplated conditions of performance". Where a vendor of land could not execute the sale deed because he ceased to be the owner by operation of law, it was held that the contract had become impossible of performance. A contract by the State to give a monopoly was held to have become void on the enforcement of the Constitution. A contract between certain parties for the sale of the trees of a forest was discharged when the State of Rajasthan forbade the cutting of trees in the area. A well-known English authority is *Metropolitan Water Board v Dick Ken & Co Ltd*. By a contract made in July 1914, a firm of contractors contracted with a Water Board to construct a reservoir to be completed within six months. But by a notice issued under the Defence of the Realm Act, the contractors were required to cease work on their contract and they stopped the work accordingly. They claimed that the effect of the notice was to put an end to the contract. The House of Lords held that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, and that the contract had ceased to be operative. In another case of the same kind, the contract was for the sale of a specific parcel of wheat lying in the seller's warehouse. The property in the goods had not yet passed to the buyers that the Government seized the stock under its power of supervision. The buyers sued for non-delivery. But they could not succeed. The sellers were excused from delivering the goods because of the Government takeover of their stock. The State Trading Organisation, though a Government monopoly, was somewhat independent of the State. Its export contracts were held to have frustrated by Government intervention imposing a ban on exports. But an intervention of a temporary nature which does not uproot the foundation of the contract will not have the dissolving effect. This is shown by the decision of the Supreme Court in *Satyabrata Ghose v Mugneeran Bangur & Co*. The defendant company started a scheme for the development of a tract of land into a housing colony. The plaintiff was granted a plot on payment of earnest money. The company undertook to construct the roads and drains necessary for making the lands suitable for building and residential purposes and as soon as they were completed, the purchaser was to be called upon to complete the conveyance by payment of the balance of the purchase money. But before anything could be done, a considerable portion of the land was requisitioned by the State during the Second World War for military purposes. MUKHERJEA J held that the contract was not frustrated. He said : "Undoubtedly the commencement of the work was delayed but was the delay going to be so great and of such a character that it would totally upset the basis of the bargain and commercial objects which the parties had in view ? The requisition orders, it must be remembered, were, by their very nature, of a temporary character...." The court

relied upon the fact that there was no time-limit agreed to by the parties within which the construction work was to be finished. The effect of an administrative intervention has to be viewed in the light of the terms of the contract, and, if the terms show that the parties have undertaken an absolute obligation regardless of administrative changes, they cannot claim to be discharged. This has been so held by the Supreme Court in *Naihati Jute Mills Ltd v Khyaliram Jagannath*. There was an agreement to purchase raw jute to be imported from East Pakistan (now Bangladesh). The buyer was to supply the import licence within November, failing which it was to be supplied within December at the pain of a little more price and if he failed in December he was to pay the difference between the contract and market prices. The buyer applied for a licence which was refused because he had stock in his mill sufficient for two months. He applied again. He was advised this time that the rules have been changed and to obtain a license he must show that he has 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 Government policy only was that the licensing authority would scrutinise the case of each applicant on its own merit. Where the intervention makes the performance unlawful, the courts will have no choice but to put an end to the contract, This kind of situation was before the Supreme Court in *Boothalinga Agencies v V T C Poriaswami Nadar*. The defendant had a license to import chicory for manufacturing coffee powder. The licence was subject to the condition that he would use it only in his factory. He agreed to sell the whole shipload. Before the arrival of the ship, the sale of such imported goods was banned. The contract was accordingly held to have become void.

6. *Intervention of War*

Intervention of war or warlike conditions in the performance of a contract has often created difficult questions. The closure of the Suez Canal following the Anglo-French war with Egypt, for instance, interrupted the performance of many contracts. One such case is *Tsakiroglou & Co Ltd v Noble Thorl G m b H*.

The appellants agreed to sell to the respondents three hundred tons of Sudan groundnuts c.i.f. Hamburg. The usual and normal route at the date of the contract was via Suez Canal. Shipment was to be in November/December 1956, but on November 2, 1956, the canal was closed to traffic and it was not reopened until the following April. It is stated that the appellants could have transported the goods via the Cape of Good Hope. The appellants refused to ship goods via the Cape. The question now is whether by reason of the closing of the Suez route, the contract had been ended by frustration. The appellants' argument was that it was an implied term of the contract that shipment should be via Suez. But it was held that such a term could not be implied. The customary or usual route via the Suez Canal being closed, the appellants were bound [by the Sale of Goods Act, 1893, 32(2)] to ship the

groundnuts by a reasonable and practical route and, though the appellants might be put to greater expense by shipping the groundnuts via the Cape of Good Hope, that did not render the contract fundamentally or radically different, and there was not, therefore, frustration of the contract. If the intervention of war is due to the delay caused by the negligence of a party, the principle of frustration cannot be relied upon. If there are more than one ways of performing a contract and the war cuts off only one of them, the party is still bound to perform by the other way, however inconvenient or expensive. This is further shown by the decision of the Privy Council in *Twentsche Overseas Trading Co Ltd v Uganda Sugar Factory Ltd*. There was a contract for supplying "Krupps" steel rails. The rest of the facts appear from the following words of Lord WRIGHT:

The appellants claimed that the rails specified under the contract were to be rails manufactured by a German firm and by that firm only. On this they based their claim to be excused from their failure to deliver the goods because to do so would have involved a dealing with alien enemies due to the outbreak of World War II and hence the performance of the contract became impossible and illegal. Their Lordships held that it was not open to the supplier to invoke the doctrine of frustration. There was nothing in the contract which called for the rails to be obtained from Germany only. The reference to "Krupps" did not indicate a source of supply, but merely a specification of the rails. There were many other sources of supply, and the contract left the supplier with a free hand in the matter. In a case before the Patna High Court, the further 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 firm of chartered accountants. The assured was allowed to recover the money paid under the policy.²⁰ In a Calcutta case a contract of carriage by river was intercepted by the enemy seizing the boat along with cargo during hostilities between India and Pakistan. The court allowed the carrier the plea of impossibility.

7. *Application to Leases*

In the leading case of *Cricklewood Property & Investment Trust Ltd v Leighton 's Investment Trust Ltd* :

A building lease was executed for ninety-nine years, more rent being payable after erection of buildings. But, before any could be erected and while the lease had still 90 years to run, building activity was suspended by the Government because of the war. VISCOUNT SIMON LC said : "The lease at the time had more than ninety years to run, and though we do not know how long the present war, and the emergency regulations which have been made necessary by it, are going to last, the length of the interruption so caused is presumably a small fraction of the whole term. Here, the lease itself contemplates that rent may be payable although no building is

going on, and I cannot regard the interruption which has arisen as such as to destroy the identity of the arrangement or to make it unreasonable to carry out the lease according to its terms as soon as the interruption in building is over."

His Lordship was not prepared to accept the view that frustration does not apply to leases. Where the subject-matter of the lease is swallowed by some vast concussion of nature or buried in the depth of the sea, or that legislation were subsequently passed which permanently prohibited private building in the area, or dedicated it as an open space forever, why should this not bring to an end the currency of a building lease, the object of which is to provide for the erection on the area, for the combined advantage of the lessor and lessee, buildings which it would now be unlawful to construct. In *Matthey v Curling* :

There was the lease of a house for twenty-one years. The lessor had to keep the building in repair, to insure and in case of any destruction by fire, etc. to expend the insurance money in rebuilding. In 1918 the military authorities took possession of the premises and remained in possession until the expiry of the lease. In February 1919, the house was destroyed by fire and in March the term of the lease expired. It was held by the House of Lords affirming the majority decision of the Court of Appeal (ATKIN LJ having dissented) that the lessee was liable both for repairs and for rent even during the period of dispossession. Commenting upon this case VISCOUNT SIMON LC said : "The decision there was that requisitioning by the Government was no answer to a claim on the covenant for rent, any more than ouster by a trespasser would be : the remedy of the tenant was against the Government for compensation. Equally, destruction by fire, after the Government had requisitioned the place, left the tenant still liable on his covenant to deliver up in proper condition, for the tenant could have covered the risk by insurance." This decision was considered to be no authority for the proposition that frustration does not apply to leases. In his dissenting opinion Lord RUSSEL emphasized that a lease is not a mere contract but an estate. It may well be that circumstances may arise during the currency of the term which render it difficult, or even impossible, for one party or the other to carry out some of its obligations as landlord and tenant—circumstances which might afford a defence to a claim for damages for their breach—but the lease would remain. In a still subsequent case the House of Lords re-emphasized that the doctrine of frustration was in principle applicable to leases, though the cases in which it could properly be applied were likely to be rare. In this case a warehouse was leased for a ten-year period. The only passage to the warehouse was obstructed for about 20 months by the Municipality by demolishing a dilapidated warehouse in the area. This was held to be not sufficient to cause frustration of the lease. In India the question was considered by the Supreme Court in *Raja Dhruv Dev Chand v Raja Harmohinder Singh* where SHAH J (afterwards CJ) at once observed that the courts in India have generally taken the view that Section 56 of the Contract Act is not applicable when the

rights and obligations of the parties arise under a transfer of property under a lease. It was one of the cases arising out of the partition of the country into India and Pakistan. The lease in question was that of an agricultural land for one year only. The rent was paid and the lessee was given possession. Before the land could be exploited for any crop, came partition which left the land in Pakistan and the parties migrated to India. The action was to recover the rent paid. But no such recovery was allowed. SHAH J pointed out that completed transfers are completely outside the scope of Section 56. In a case before the Allahabad High Court, the shops of a premises which were leased out collapsed owing to their dilapidated condition and heavy rain, requiring new construction, that was not taken to be a frustration of the lease. Where a shop held under a lease was demolished by the Municipal Corporation, it was the lessee who was held to be entitled to the vacant site as also the materials recovered from the debris and he was entitled to be restored to possession for that purpose as against the lessor who had evicted him. On the other hand, where on account of an event beyond the parties' control, the lessor is not able to transfer possession to the lessee, the lessee would be entitled to take back his rent. Under a lease of land there is a transfer of right to enjoy that land. If any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let out, because of fire, tempest, floods, violence of any army or a mob, or other irresistible force, the lease may at the option of the lessee be avoided. This rule is incorporated in Section 108(c) of the Transfer of Property Act. Where the property leased is not destroyed or rendered substantially and permanently unfit, the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let out to him. In the subsequent case of *Sushila Devi v Hari Singh*²⁹ the Supreme Court held that an agreement of lease ended by frustration where before completing it the parties had to run away and could not go to Pakistan to give or take possession. The Jammu and Kashmir High Court allowed in *Hari Singh v Dewani Vidyawati* the recovery of rent paid in advance under a lease which could not be completed on account of partition. The recovery was allowed under Section 65 as benefits received under a contract which became void.

Theories of frustration

Many possible explanations have been put forward as a justification for the doctrine of frustration as a part of the law relating to discharge of contracts. Two theories are most well-known.

1. Theory of Implied Term

The theory of implied term was explained by Lord LOREBURN in *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*. His Lordship emphasized that the courts do not have the power to dissolve a contract. But they can examine the circumstances of the contract to see whether the parties contracted on

the footing that a state of things would continue to exist. If so, a term to that effect would be implied. If that term fails the contract should be over. This theory has been criticized. It has been suggested that "the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands".³³ It has been said : "In ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man."

2. *Just and Reasonable Solution*

In a subsequent case DENNING LJ attempted to explain the doctrine of frustration on a different basis. He said : "The court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation." But this statement was not approved when the case went before the House of Lords. The observation of Lord LOREBURN that "no court has an absolving power", was re-emphasized. Referring to the theories B K MUKHERJEA J of the Supreme Court said in the *Satyabrata* case : "These differences in the way of formulating legal theories really do not concern us so long as we have statutory provision in the Indian Contract Act. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word 'impossible' in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties,"

Effects of frustration

"It is well-settled that if and when there is frustration the dissolution of the contract occurs automatically."

1, *Frustration Should not be Self-induced*

Explaining the principle that frustration should not be self-induced, Lord WRIGHT said in *Maritime National Fish Ltd v Ocean Trawlers Ltd*, that the essence of 'frustration' is that it should not be due to the act or election of the parties. Frustration should arise without blame or fault on either side. Reliance cannot be placed on a self-induced frustration. The facts were :

The appellants hired the respondents' trawler, called '*the St Cuthbert*' to be employed in fishing industry only. Both parties knew that the trawler could be used for that purpose only under a license from the Canadian Government. The appellants were using five trawlers and, therefore, applied for five licenses. Only three were granted and the Government asked the appellants to name the three trawlers and they named trawlers other than the *St Cuthbert*. They then repudiated the charter and pleaded frustration in response to the respondents' action for the hire. The Judicial

Committee of the Privy Council held that the frustration in this case was the result of the appellants' own choice of excluding the respondents' ship from the license and, therefore, they were not discharged from the contract. In another similar case, the contract was to export 1500 tons of sugar beet pulp pellets with a further option for the same quantity. The sellers obtained an export license for 3000. They also contracted with another buyer to supply him 1500. But the Government refused to grant any further license. They shipped the whole agreed quantity to the first buyer. They were now left with the export license for 1500 only, but were under two obligations, one to supply 1500 to the first buyer under the option given to him and other under the contract with the second buyer for the same quantity. As a face-saving device they apportioned the supply between the two buyers giving about half to either. The second buyer sued for breach of contract. The suppliers pleaded frustration. They were held liable. The Court of Appeal found no legal authority justifying the proposition that where a seller has a legal commitment to A and a non-legal commitment to B and he can honour the obligation to A or to B but not to both, he is justified in partially honouring both obligations. The court referred to the principle stated in the American Uniform Commercial Code that in such a situation the seller may allocate supplies in any manner which is reasonable and fair, but found no basis for importing the principle into English law. There is, however, an English authority to the effect that if the seller had been under a legal duty, he would have been justified in making fair apportionment. The court said that when a supplier has many contracts to fulfil, but only has enough of the goods to fulfil one of them, then, if he reasonably appropriates what he has to that one, he can rely on *force majeure* as to others. Thus there is no principle of law preventing one party to a contract taking advantage of its own acts to defeat the other's rights unless the party is in breach of duty in so acting. Thus where the defendant company having the right to do so and lawfully exercising that right, sold its subsidiary with the result that the employees' stock options lapsed, the defendant was held not liable for the lapse because it was under no duty not to sell its subsidiary.

2. *Frustration Operates Automatically*

Frustration operates automatically to discharge the contract "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances". "The legal effect of frustration does not depend on their intention or their opinions, or even knowledge, as to the event." This is particularly true of Indian law as Section 56 of the Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. A subsequent case, however, shows that in certain circumstances frustration may be waived by one party and then the other will be bound by the contract. In *H R & S Sainsbury Ltd v Street* :

There was the sale of 275 tons (5% more or less) of feed barley to be grown on seller's land. The crop amounted to only 140 tons. The seller resold it to

another and contended that he had the right to do so because the contract had ended by frustration. But he was held liable for breach of contract. There was frustration only to the extent of crop failure. The buyer could waive it and claim delivery of whatever little crop the seller's land had produced.

The Supreme Court has laid down that frustration puts an end to the liability to perform the contract. It does not exterminate the contract for all purposes. For example, whether the doctrine of frustration would apply or not has to be decided within the framework of the contract and, if the contract contains an arbitration clause, the arbitrator could decide the matter of frustration.

3. *Adjustment of Rights (Restitution)*

The rights of the parties are adjusted under Section 65.

65. 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.

Illustrations

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise, The agreement is void but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A deliver: 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two night in every week during the next two months, and B engages to pay her hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

The effect of the principle laid down in the section is that when the parties have entered into an apparently valid contract and some benefits have been passed under

it, and subsequently the contract is either discovered to be void or becomes void, the party who has received the benefits must restore them to the other. The section does not apply to a contract which the parties knew at the time of making it to be void. The section also does not apply to a case where the benefits are being passed at a time when the contract had, though unknown to the parties, already ceased to be enforceable. This was pointed out by the Calcutta High Court in *Jagdish Prasad Pannalal v Produce Exchange Corporation Ltd.* There was a contract for the sale of one wagon of maize starch at the rate of Rs 77 per cwt, the control price being Rs 78. The goods were delivered on January 3 and paid for. A few days earlier, viz. on December 16, a new order was passed by the Government making Rs 48 as the price and this was to apply to all contracts in which delivery was to be given on or after January 1. The buyer brought an action to recover the difference between the revised control price and the price he paid.

The court agreed with him to this extent that the contract had become void by the change in the control price and, therefore, neither party was compellable to perform, but that the buyer, having paid up, was not entitled to any refund under Section 65. For this section to apply the advantage must have been received under the 'contract', whereas, in the present case, the excess price was paid after the contract had already become void and ceased to be enforceable.

Discovered to be void.— The first part of the section is concerned with an agreement which never amounted to a contract, it being void *ab initio*. But the parties discovered this at a later stage. "The word 'discovered' connotes the pre-existence of that which is discovered." This will cover cases of "initial mistake". Where, for example, money is paid for the sale of goods, which, unknown to the parties, have already perished at the time, the money is refundable. The principle will apply whether the agreement is void by reason of law or by reason of fact.

Thus, for example, where a minor gave a shop under a partnership to the defendant, the agreement being void, it was held that he could recover back the shop. Consideration given on a promissory note which was not enforceable for inadequacy of stamps, was held to be refundable. Money paid under a contract with a municipality not executed in the manner laid down by the Municipal Act, was held to be refundable. Payment made in advance to a contractor under a contract which is not in accordance with Article 299(1) of the Constitution relating to Government contracts has been allowed to be recovered back under this section. Where a Government officer purchased goods on credit without having the authority to do so and they were received for official purposes, the price was held to be recoverable. Payment received by a person for purported sale of land which he had no right to sell, had to be returned by him to the other party.

Taxes realised by a contractor under the authority of State were held to be refundable to the taxpayers when it turned out that the levy itself was invalid. Money paid to a person for purchasing his right to reversion, which is not transferable, being merely an expectancy was held by the Privy Council to be refundable with 6% interest from the date of suit.

The principle has also been held to apply to cases where a contract is void by reason of "unlawful object", but the parties were not aware of it. Where the Orissa High Court found that the plaintiff who advanced money to the defendant for supply of paddy was not aware on the date of the agreement that it was in violation of law, his suit for refund of money was allowed. A lady Advocate acting as an Assistant District Counsel on the request of the District Magistrate was allowed to recover her remuneration for the working period even if the appointment was discovered to be void under Section 24(2) of the Criminal Procedure Code, 1973.

Quantum merit claims.—Claims under the well-known English law doctrine of *quantum merit* have been allowed by the courts under this section. The Supreme Court observed in *State of Madras v Dunkerley & Co* that claim for *quantum merit* is a claim for damages for breach of contract. The value of the material used or supplied is a factor which furnishes a basis for assessing the amount of compensation. The claim is not for price of goods sold and delivered but for damages. That is also the position under Section 65. In another case reasonable compensation was awarded on the implication of a contract. It will not displace an express stipulation on the point.

In a subsequent case, the Supreme Court explained the requirements of the claim. The original contract must be so discharged by the opposite party that the plaintiff is entitled to treat himself as free from the obligation of further performance and he must have elected to do so. The remedy is not available to the party who breaks the contract even though he might have partly performed it. The remedy is restitutory, it is a recompense for the value of the work done by the plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into. In this respect it is different from a claim for damages which is a compensatory remedy. The court accordingly did not allow the claim of a contractor for extra payment on the ground that he had to procure the raw material from a longer distance than that represented in the tender documents. The material was in fact available within the stated distance, but its removal required permission of Cantonment Authorities which the contractor could not manage to get.

Explaining the nature of justice that Section 65 strives for, the Supreme Court has observed :

We do not have the slightest doubt that net profits realised by the company as result of its various business activities can never be the measure of compensation to

be awarded under Section 65. It is not as if Section 65 works in one direction only. If one party to the contract is asked to disgorge the advantage received by him under a void contract, the other party may ask him to restore the advantage received by him. The restoration of the advantage and the payment of compensation have necessarily to be mutual. In *Govindram Seksaria v Edward Radbore* the Privy Council pointed out that the result of Section 65 was that each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract. As a result of the contract being void, the State could at the most recover from the contractor the value of the rough stone excavated from the quarries. But then it would have to make good to the company the expenditure incurred by it in quarrying operations and extraction of the rough stone.

The contract was for the grant of a quarry. It was found to be void because the parties were mistaken about the application of income tax laws in the area.

Becomes void.—The second type of situation covered by Section 65 is where a valid contract is made in the beginning, but it subsequently becomes either unlawful or impossible of performance. Any benefits which have passed under the contract from one party to the other must be restored. This is subject to the expenses which have already been incurred by the other party in the performance of the contract.

English Law

The principles of English law before the Law Reform (Frustrated Contracts) Act, 1943, were those laid down in the two coronation cases, one of them is *Krell v Henry* where the court held that the rent which had been paid before the contract to hire premises became void by reason of the postponement of the procession was not refundable and the outstanding rent was not recoverable. The courts left the parties where they were. They also did not like to disturb the rights which the parties had acquired before the contract became void. Of this the illustration is *Chandler v Webster*. The plaintiff sued for refund of the rent which he had paid in advance and the landlord counter-claimed for the balance which was due, ROMER LJ stated the principle and said ;

Applying this to the facts here, as soon as it was ascertained that the procession, through no fault of either of the parties, could not take place, they were immediately free from any subsequent obligation under the contract, but the contract could not be considered as rescinded *ah initio*. That being so, many legal rights previously accrued to either of the parties remained, and could not be disturbed, and one of those rights was the right of the defendant to be paid £ 141.15 s.

The hardship that this principle is likely to cause was to a certain extent mitigated by the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*. Lord RUSSELL OF KILLOWEN at once observed that *Chandler v Webster*

was wrongly decided. Their Lordships accordingly allowed the £ 1,000 to be recovered which were paid in advance for purchasing a machinery and the performance having been rendered illegal by the intervention of war. His Lordship continued : "The money paid was recoverable, as having been paid for a consideration which had failed. The rule that on frustration the loss lies where it falls cannot apply in respect of the moneys paid in advance when the consideration moving from the payee for the payment has wholly failed, so as to deprive the payer of his right to recover moneys so paid as moneys received to his use; but the rule will, unless altered by legislation, apply in all other respects."

The expected legislation came within a year. Now the rights of parties whose contract has ended by frustration are adjusted under the provisions of the Law Reform (Frustrated Contracts) Act, 1943. The main provisions of the Act are as follows ; All sums of money which have been paid under a frustrated contract shall be refundable and those which are still payable cease to be payable. If any party has incurred expenses before the time of discharge in the performance of the contract, the court may, if it thinks just to do so, allow him to deduct such expenses from the refundable deposit or allow him to recover. The same principle will apply to any benefits received other than money. In estimating the amount of expenses the court may take into account the reasonable overhead expenses and the work or services personally performed by the party. Benefits received under an insurance policy are not to be taken into account unless there is an express obligation to insure.

Illustrations

(a) A owes B, among other debts, 1,000 rupees upon a promissory note, which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.