FRUSTRATION OF CONTRACT UNDER THE CARRIAGE OF GOODS BY SEA: AN APPRAISAL

Chhote Lal Yadav[60]

Introduction

Frustration of contract under the carriage of goods by sea is concerned with the situation where, following the formation of a valid contract, an event occurs which is not the fault of either party but which has a significant impact on the obligations contained in the contract. The frustration can, from one point of view be looked at as something that vitiates a contract, whereas however vitiating factor generally relate to things which have happened or state of affairs which exist, at the before the time contract is made frustration deals with event which occur subsequent to the contract coming into existence. Since frustration has the characteristics of an event which discharge parties from their obligation under the contract. Situation with which the doctrine of frustration is concerned is where a contract as a result of some event outside the control of the parties the object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what was reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances Whilst the doctrine has seen expansion from its inception, it is still narrow in application; Lord Roskill stated that it is: "not lightly to be invoked to relieve contracting parties of the norm all consequences of imprudent bargains Frustration occurs whenever a contract, after its form action, becomes impossible to perform without default of either party; the doctrine is often called subsequent or supervening impossibility, and its effect is that the parties are released from their contractual obligations.

Origins Pardine v Jane[61] Absolutism Until the nineteenth century the common law adopted a doctrine of absolute obligation to perform a contract. Hence, in: A tenant was sued for arrears of rent and in defence pleaded that for the last three years he had been dispossessed of his farm by the King's enemies. The court rejected his plea and The tenant was liable for the rent, even though he was unable to take the benefit of the lease. The Doctrine was first developed in English Law when it was stated ‘In common rule of contract was that a man was bound to perform the obligation, which he had undertaken, and could not claim to be excused by the mere fact that performance had subsequently become impossible ; because the party could expressly provide in their agreement, the upon fulfilment of a condition or occurrence of an event, either or both of them would be discharged of some or all of their obligations under the contract. Then in 1863, the decision of the Queen’s Bench in Taylor v

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[61] (1647) Aleyn 26;82 ER 897

Caldwell[62] introduced an exception to this rule by using the device of implying of a term; and where the plaintiff had sued the defendant for damages for breach of contract. Frustration signifies a certain set of circumstances arising after the formation of contract, the occurrence of which is due to no fault of either party and which render performance of the contract by one or both parties physically and commercially impossible. Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration. Lord Radcliffe in the leading case, Davis contractors Ltd v Fareham Urban District Council, described the concept as follows: frustration occurs whenever the law recognise 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 -things radically different from that which was under taken by the contract. Non haec in foedor veni-it was not that I promised to do.[63]

The result of frustration related impossibility of performance supervening illegality and delay in time charter parties, Delay and strike clauses finally the effect of frustration in the common law effect on freight and hire and effect on advance freight and the provision of law reforms (frustrated Contract) Act 1943 the Indian law regarding the contract of frustration. Indian context the doctrine of frustration defined under section 56 of the Indian Contract Act 1872. The decision as to whether or not the contract has been frustrated is question of law but 'that conclusion is almost completely determined by what is ascertained as the mercantile usage and the understanding of commercial men.'[64]

Frustrating factors

The innocent party who wishes to rely on frustration will be responsible for proving it in considering the matter court may be guided by a number of potential factors which be now considered. However always a frustration cases, it is difficult to lay down any general principles generally it is depend upon the facts.

A) **Frustration of the Commercial object**- One of the Important factor which the court will look at is whether performance has been rendered either impossible or to radically different that it would be unjust to hold the parties bounds to the terms of the contract. In the case of Tsakiroglou & Co Ltd v Noblee Thorl GmbH[65]

[62] (1863) 3 B & S 826; 122 ER 309.
[63] [1956] AC 696,
[64] BTP Tioxide Ltd v Pioneer Shipping Ltd (the Nema) [1982] AC 724, 752 (Lord Roskill).
[65] [1962] AC 93.

There was written contract by which the sellers of Sudanese groundnut agreed to ship them c.i.f. Hamburg in November/December 1956. However, owing to the Suez crisis, the Suez Canal was closed to navigation on 2 November and the only possible route was there from around the cape of the God Hope. This route was more than twice as long and would have incurred enhanced freight charges. The seller did not ship the goods and when the matter went to arbitration it was held that the performance of the contract by the shipping the goods on a vessel routed by the Cape of Good Hope was not commercially or indeed fundamentally difference from the performance of the contract via Suez. The House of Lords agreed.

Lord Reid pointed out that '.all commercial contracts ought to be interpreted in light of commercial considerations. I cannot imagine a commercial case where it would be proper to hold the performance is fundamentally different in a legal though not in a commercial sense. Whichever way one takes it the ultimate question is whether the new method of the performance is fundamentally different and that is the question of law.'

The issue arose again in Ocean Tramp Tankers Corp v V/O Sovfracht (the Eugenia)[66] The Eugenia was let to the charterers 'for a trip out in India via Black Sea' and it was intended that the risk of any prolongation of the voyage, such as the closure of the Suez Canal, should fall on the charterers.[67] Clause 21 of the charterparty provided that the vessel, unless with the consent of the owners, was not to be ordered nor to continue to any place which would bring her within a zone which was dangerous as a result of any actual or threatened act of war, war hostilities, or warlike operations. The vessel was delivered at Genoa and then embarked on a voyage from Odessa vis Suez for India. when the Eugenia arrived at Port Said, Suez was 'dangerous' within the meaning of clause 21 but the Eugenia nevertheless proceeded on her journey and was eventually prevented from proceeding south. She was ultimately able to return to Alexandria in January 1957. The charterers means while claimed that the charter party was frustrated by the blocking of the canal. The owner denied the frustration. The court of appeal found that the charterer were in breach of clause 21 in ordering the vessel to the Suez Canal. Further, they held, applying Lord Radcliffe in Davis Contractors Ltd v Fareham Urban District Council[68]. That the blocking of the Suez Canal had not brought about so fundamentally a different situation as to frustrate the venture.

[66] [1964] 2 QB 226 (CA)
[67] As to such 'trip' charter parties.'
[68] [1956] AC 696.

b) Contract Transformed by some radical event –

If there is some radical event which transformed the obligation of the parties in a way not contemplated by them when they entered into the contract, it may be regarded as having been frustrated. Thus in WJ Tatem Ltd v Gamboa.[69] The claimant chartered the Molton, to the defendant for the evacuation of the civil population from northern Spain. Following delivery at Santander the Molton was seized by a Nationalist ship inside territorial waters off Santander and then taken to Bilbao.

Following her release the Molton sailed for Bordeaux where she was redelivered to the plaintiffs. The defendant had paid in advance for hire of the Molton he but thre after declined to pay on the basis of frustration of the venture. Goddard J found that the foundation of the contract was destroyed as soon as the Molton was seized.

c) Contractual Provision –

It would be possible for the parties to make express provision in their contract for the occurrence of the particular event as frustrating the contract. If this is the provision would be strictly construed by the courts. An example is Jackson v the Union Marine Insurance Co Ltd [70] where, as we have already seen, the phrase 'all and every the dangers and accidents of the seas expected' was insufficient to cover the fundamental alteration in the nature of the contract.

A similar point was made in Bank line Ltd v Arthur Capel & co.where the Lord Haldane LC stated that '…….what, where the people enter into a contract which is depend for the possibility of its performance on the continued availability of the subject- matter, and that availability comes to an unforeseen end by reason of the circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so.'[71]

d) Self- induced frustration

The normal rule is that frustration must not arise through the default of either party.[72] In Maritime National Fish Ltd v Ocean Trawlers Ltd[73] appellant chartered the St Cuthbert for the period of12 months, subject

[69] [1939] 1 KB 132
[70] (1874) LR 10 CP
[71] [1919] AC 435
[72] In Bank Line Ltd v Arthur Capel & co, Lord Sumner stated that 'reliance cannot be placed on self induced frustration' [1919] AC 435.
[73] [1935] AC 524 (pc)

to a right of three months termination from either party. The vessel was equipped with and otter trawl. The charter party was renewed for a further period of 12 months and, at this time, the parties knew that legislation made it is punishable offence to leave a Canadian port with intent to fish a vessel using an otter trawl- unless the licence for the purpose has been granted. The charterers applied for licences for five vessels which they were operating, but only three were granted. No licence was granted to the st Cuthbert because she was not named by the charterers. Then they tried to claim for thy were no longer bound were no longer bound by the charter party and in an action for charter hire by the owners claimed that the charter party become frustrated.

The Supreme Court of Nova Scotia found that the contract had not been frustrated because the frustration was due to the act of the charterers who had failed to nominate the St Cuthbert for one of the three licences granted.

In agreeing with this on appeal to the Privy Council, Lord Wright made observed that the essence of the frustration is that it should not be due to the act or election of the party. If it be assumed that the performance of the contract was depend on a licence being granted, it was that the election which prevent performance, and on the assumption it was the appellants' own default which frustrated and adventure: the Appellant cannot rely on their own default to excuse them from liability under the contract.[74]

This issue was considered again by the court of appeal in J Lauritzen AS v Wijsmuller BV (the Super Servant Two)[75] more commonly known as The Super Servant Two was a Court of Appeal case in English contract Act The case is one of the leading case law authorities relating to frustration of contract in English contract law.

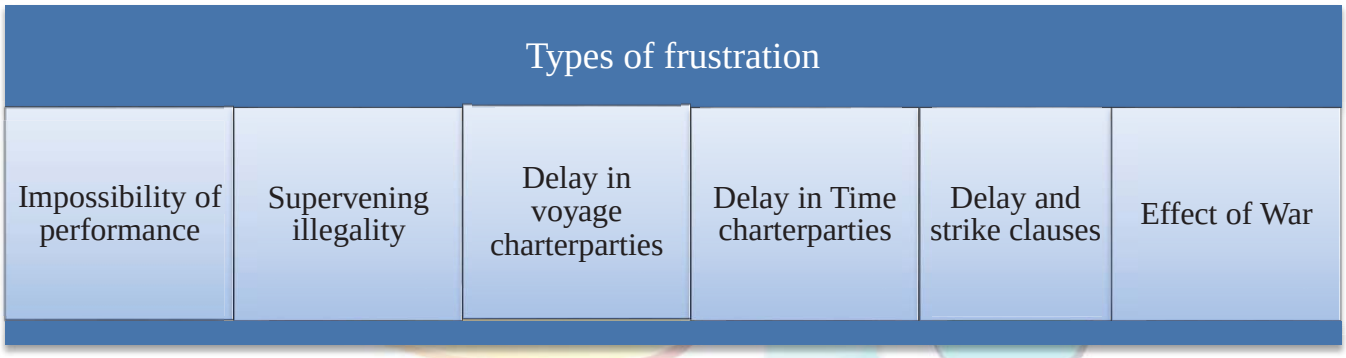
The claimants in the case Lauritzen were the owners of an oil drilling rig that the defendants Wijsmuller had agreed to transport from Japan to Rotterdam. Under the terms of the contact the defendants were able to transport the oil rig using one of either two ships known as *The Super Servant One* or the *Super Servant Two*. The defendants decided to use the second ship as the first ship was being used for other contracts. However, in July 1981 the *Super Servant two* was sunk in Ziare (now the Democratic Republic of Congo) while transporting another rig. The defendants argued that the contract has been frustrated as they were incapable of transporting the

[74] [1935] AC 524 (PC) 530.
[75] [1990] 1 Lloyds Rep 1(CA)

drilling rig and the claimants argued that the impossibility of performing the contract had been self-induced and that therefore they should not be discharged the need to perform the contract.

The Court of Appeal ruled that the claimants could not rely on the doctrine of frustration and that the claimants would have to bear the additional costs of transporting the ship

Types of Frustration:



Impossibility of Performance- One of the most common kinds of frustration occurs when performance become impossible owing to the actual loss or the constructive total loss of the ship.[76] Some time charters, such as NYPE93, provide expressly that, in the event of hire having being paid in advance, this will be returned in such an event should it not have been earned:

Total Loss

Should the vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the charterers at once. The constructive total loss is the case of Blane Steamship v Ministry of transport (the Empire Gladstone)[77] Here the Empire was demise chartered from the ministry of transport for a period of five years. As is typical with such charters, the charterer bears were all risks and were responsible for insuring her. Clause 11 stated that the charterers had the option to purchase the ship, to be exercised not later than three month before the expiration of the charter party'. In september1950 the ship owners on the voyage from Sydney to Adelaide when she stranded the charterer duly gave notice of abandonment to the underwriters and a day later purported to exercise their option to purchase. The owners refused to accept for the reason that the ship was about to become the constrictive total the option to purchase had been validly exercised.

[76] A marine insurance terms, defined section 60 of the marine insurance Act 1906 in Benntt (2006) para 21
[77] [1951] KB 965.

The court of appeal unanimously found that, at the time they purported to exercise their option, the charterer no longer enjoyed the right to exercised it.

Supervening Illegaliity

A contract of affreightment will be frustrated should a change in the law regardless of whether this is of the UK or the country where the contract is to be performed render performance under the contract illegal. It was commonly occur where an outbreak of war render further performance illegal.

Fibrosa Spolka Akcyjena v Fairbrain Lawson Combe Barbour Ltd [78] the respondents had contracted to delivered certain flax- hackling machines at a sum of £800 c.i.f.(cost, insurance, freight) Gdynia. The contract provided that if the despatch was hindered in any way by any cause outside the vendor's reasonable control (such as war) a reasonable extension of the time should be given. Further one third of the purchase price was to be paid at the time of the giving of the order. The appellant paid marginally less than the one third of thereof the outbreak of the war in September 1939.

It was contended that, notwithstanding the express clause in the contract, the contract had been frustrated by the German occupation of Poland. Further the appellants asserted that the amount already (£1, ooo) should be repaid to them. On appeal to House of Lords, Lord Atkin stated that: I have no doubt that the contract in the case come to an end before the time for complete performed had arrived by reason of the arising state of war which cause an indefinite delay not contemplated by the parties the eventually account of the legal impossibility of delivering of the goods at port occupied by the enemy……..in other words the commercial adventure was frustrated. The appellants were held entitled to a return of the £1,000 which they had paid advance because this was money paid a consideration which failed.

Delay-

If there is delay in performance of a contractual obligation, then the contract may be frustrated although this is depend on whether the delay is so prolonged as to defeat commercial object of the adventure. This would be decides on the fact of the each case, although the test is usually difference between time and voyage charter parties.

[78] [1943] AC32.

The text was explained in case Anglo Northern Trading Co Ltd v Emlyn Jones & Williams. The parties must have the right to claim that the charter parties are determined by frustration as soon as the event upon which the claim is based happens. The question will then be what estimate would a reasonable man of business take of the probable length of withdrawal of the vessel from such service with such material as are before him, including, of course, the cause of withdrawal and it with be immaterial whether his anticipation is justified or falsified by the event.[79]

Delay in Voyage Charter parties

Jackson v The Union Marine Insurance Co Ltd[80] involved a voyage charter party between new point and San Francisco. 'All and every dangers and accidents of the seas' were accepted. While on the voyage to the loading port the Dawn ran onto rocks in Carnarvon Bay. She was so badly damaged that the charterers gave the owner notice rejecting the charter party and chartered another ship to carry their cargo. The majority of Court of Exchequer chamber held that a condition had to be implied into the charter party that the ship should arrive at Newport at a reasonable time in order to commence the voyage to San Francisco. As this obligation was not full filed by charterers' obligation to load the vessel was discharged and further, as the delay was caused by excepted peril of the sea, no action lay against the charterers for recovery of any freight.

Delay in time Charter parties

The case of Nitrate Corp of Chile Ltd v Pansuiza Compania de Navigation SA (the Hermosa)[81] involved a sub-time charter to nitrates for a period of two years. The chreterparty was on NYPE form. During her first voyage from chile to Terneuzen carry a cargo of nitrate and iodine, it was found that the cargo had been badly damage by the sea waters. During the ballast voyage the Hermosa collided with another vessel and sustained damage to her bows. She sent to curacaco for repair and nitrates eventually repudiate the sub- charter. Some month later the head charterer accepted Nitrates refusal to take the vessel back in to service as a repudiation of the sub- charterers. One of the issue in the case was whether the charter party had been frustrated. After reviewing the authorities, Mustill J emphasized that what was essential was that it was the consequences of the events, not their origins.

Delay in strikes clause

[79] [1917] 2KB
[80] [1874]LR 10
[81][1980] 1 Lloyd's rep 638.

In the Penelope[82] a clause into time charter party provided that, in the event of any stopped arising from strikes, lockouts, …….continuing for a period of six running days from the time of the vessel bring to load, the charter should, provided that, no cargo had been shipped on board the vessel previous to such stoppage become null and void. During the course of 1926 there was general coal strike which prevented the vessel loading ship coal from the named ports. The ship then performed two voyages with the assent of the claimant and one to which they did not assent. At the end of the December 1926, the claimants ordered the vessel to the Mumbles Roads await further orders. The defendant refused on the grounds that the strikes had frustrated he commercial object of the adventure. Lord Merrivale, taking into accounts the words of Viscount Summer in Bank line Ltd v Authur Capel & Com. Come to the conclusion there are unforeseen compulsory change of circumstances not contemplated by the parties. he further found that charter party as varied by two substituted voyage was not further varied are prolonged by the third voyage it was his change of the circumstances which prevented performance of the charter party and so the action of the breach of the contract by the charterers of the Penelope failed.

Pioneer Shipping Ltd v BTP Tioide Ltd also involved a strike clause[83]

The Nima was chartered for seven consecutive voyages between Sorel and Calais or Hartlepool in 1979 clause 15 provides that time lost in strikes was not to be computed in the loading or discharging following the first round trip, there was a strikes when the strike continued into july 1979, a charterers agree to pay the owners compensation at the rate of € 2,000 a day until the strikes ended or the nema obtained an intermediate voyage. She was released to the owners and sailed on an intermediate voyage to Glasgow August 1979.the charterers then wished her to return to sorel, but owners had meanwhile fixed for further immediate. At the arbitration hearing, the Arbitration found that the whole of the chrtere party contract was frustrated. He did not give any consideration to the seven consecutive voyage which had been arranged for 1980. The House of lords took the view that the charter party voyage for the 1979 and 1980 seasons were separate, distinct, and independent adventure.

Much of the ground on this issue of this issue of the appeal was considered in Lord Roskill who concluded that ‘no reason in principle why a strike should not be capable of causing frustration of an adventure by delay ….. It is not the nature of the cause of delay which matters so much as the effect of that cause upon the performance of the obligations which the parties have assumed one towards the other.

[82] [1928] P 180
[83] [1982] AC724

Effect of War

IN FA Tamplin Steamship Co Ltd v Anglo- Mexican petroleum Products Co Ltd [84] the FA Tamplin was time chartered for a period of 60 months for the carriage of oil. However following the outbreak of the first World War, when the charter party had still another three years to run, the vessel was requisitioned and certain alterations to enable her to carry troops. The majority of the House of Lords found that the charter party did not come to an end when the steamer was requisitioned and consequently this did not suspend the charter party or indeed affect the rights of the owners or charterers under it. This case may be contrasted with Bank Line Ltd v Arthur Capel & Co.[85] the defendant owners had let the Quito for a period of 12 months from the time that the vessel could the delivered and placed of 12 months from the time that the vessel could be delivered and placed at the disposal of the charterer at a coal port in the UK. Although the Quito was not delivered by the express cancelling date, the charterers did not exercise their right to cancel. The House of Lord so held, Lord Porter concluding that the Quito destroyed the identity of the chartered service and made the charter as a matter of Business a totally different thing. It hung the performance for the time, which was wholly indefinite and probably long.[86]

Theories of Frustration

Many possible explanations have been put forward as a justification for the doctrine of frustration as the part of the law of the contract two theories are most well- known.

1- Theory of Implied term

2- Just and Reasonable Solution

Theory of implied Term --- this theory explained by Lord LOREBURN in F.A.Tamplin Steamship Co Ltd v Anglo- Mexican Petroleum Products Co Ltd in words:

A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but to explain it, in order to see whether or not form the nature of it the parties must have made their bargain on the footing that the particular thing or state of things would continue to exist.

If they must have done so, then a term to that effect will be implied, though it be not expressed in the contract ……...it is my opinion the true principle, for no court has absolving power, but it can infer from the nature of the contract and surrounding circumstances that a condition which was not expressed was a foundation on which

[84] [1916] 2 AC 397
[85] [1919] AC435
[86] [1919] AC 435.

the parties contracted …….were the altered condition such that, had they thought of them, they would have taken their chances of them, or such that as sensible men they could have said : If that happens, of course, it is all over between us'?

But this theory also criticised Lord WRIGHT said in a case [87] 'To my mind the theory of implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as the ground of decision, but it is merely stated as a theoretical explanation.'

"The court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rule of liability for the negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment.

In find the theory on the basis of the rule in the pregnant statement of the Lord SUMNER that the doctrine of frustration of really a deice by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands'.[88]

In Lordship said: In ascertaining the meaning of the contract and has to decide, not what the its application to the actual occurrences, the court has to decides, not what the parties actually intended but what as reasonable men they should have intended. The court personification for this purpose the reasonable man'

2- Just and Reasonable Solution.

In a subsequent case[89] DENNING LJ attempter to the explain the doctrine of frustration of different basis. He said : 'the court really exercise a qualifying powers – a power qualify the absolute, literal or wide terms of the contract – in order to do what is just and reasonable in the new situation. The day is done when we can excuse an unforeseen in justice by saying to the sufferer 'it is your own folly; you ought not to have put in clause to protect yourself.'

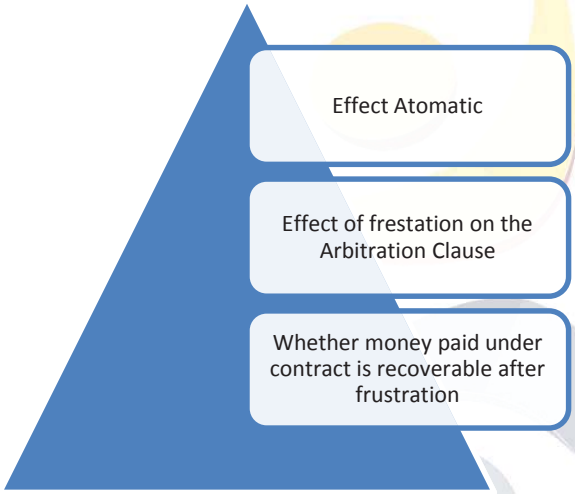
Theories are not applicable in India-referring to the theories B.K.MUKHRJEA J

[87] Denny, Mott &Dickson Ltd v James B fraser& Co Ltd (1944) AC 265
[88] Hirji Muliji v Cheone Yue S.S. Co Ltd,(1926) AC 497
[89] British Movietonews Ltd v London & District Cinemas Ltd (1951) 1 KB

'These differences in the way of formulating legal theories really do not concern us to long as we have statutory provision in Indian contract act 1872.in deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as lays down in section 56 of the contract Act taking the word 'impossible 'in it practical not in 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.

Effect of Frustration

After the frustration of the contract then the next question will come what are the effect of the contract the major three cases given in the diagrams'



Effect Automatic

In the instances the effect of frustration is automatic Independent of parties, acts or state of mind. In this respect it is to be contrasted with a breach of condition, such as the deviation, which gives the party aggrieved the right to rescind the contract but does not by itself dissolve it. Frustration 'skill the contract itself the discharges both parties automatically. The plaintiff sues for breach at a past and the defendant pleads that at the date not by contract existed.'

Throughout the line of cases, now a long one in which it has been held that certain events frustrate the commercial adventure contemplated by the parties when they made the contract, there runs an almost continuous series of expression to the effect that such a frustration bring the contract to an end for with without more and automatically……

Language is occasionally used in the cases to show that frustration assimilated the speakers mind to repudiation or rescission of contract. The analogy is false one. Rescission (except consent or by the competent court) is the right of one party arising the conduct upon other, by which he intimates his intention abide the contract no longer. It is right to treat the contract as at and end if chooses, and claim damage for total breach, but it is right in his option and does not depend in theory on any implied terms providing for it exercise, but it is given in law vindication of a breach.

Frustration on other hand, is explained theory as a condition or term of the contract, implied by law ab initio, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract..... it is irrespective of the individual concerned, their temperament and feelings, their interest and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.[90]

Effect of Frustration on Arbitration Clause

The general rule appears to be that an arbitration clause covering disputes under the contract survives its frustration for the purpose of settling (inter alia) whether the contract has in fact been frustrated.

In Scott v. Del Sel[91] a claim for damage for breach of contract was defended on the ground (inter alia) of frustration. The question arose whether that was dispute under the contract within the submission to arbitration. Lord Dunedin, in the House of Lords was of opinion that it was. Lord Buck master took the same view. The other members of the House decided the case on other ground.

Hirji mulji v. cheong Yue Co.[92] a ship under the time charter party requisition before the term of the charter had begun. She was released two years later but the charterer refused the take delivery. The charterer contained a clause: "that any disputes arising under this charter party had been requisitioned, the charters had by better entered into a subsequent agreement to take delivery when the ship was released and therefore awarded the ship-owner damages for breach of contract. The Privy Council held that the charter had been frustrated by the requisition, and that the arbitrator had therefore no jurisdiction to make it was one arising under this charter; since that had

[90] Per Lord Summer in Hirji Mulji v Cheong Yue SS.Co.[1926] AC 497
[91] [1923]SC(H.L.) 37
[92] [1926] AC 497

terminated by frustration a years before.[93] In Constantine Line v. Imperial Smelting Corporation [94] Lord Maugham gave his unqualified approval to judgment delivered by Lord Summer in the Hirji Mulji caseit apperent from their opinions that the case is not any authority for the general proposition that an arbitration clause in a contract does not embrace a disputers as to whether or not the contract has been dissolved by frustration.[95]

Whether money paid under contract is recoverable after frustration

The question whether money which has already been paid under a contract is recoverable after the contract is frustrated, or whether money due to paid before the contract was frustrated remain payable afterwards, raises particular difficulties. The general rules are that any obligation which accrued before the abrogation of the contract by frustration remains alive afterwards.

"Though the contract comes to an end on the happening of the event, right and wrongs, which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them".

In General, that money paid under a contract before frustration is not recoverable, and that money due to paid under the contract before the frustration continues afterwards to be payable.

So money is paid in advance under a contract which was frustrated was held in Chandler v. Webster[96] to be irrecoverable even thought the payer received no benefit from it. But that decision was overruled by the house of lord in Fibrosa Spolka v. Fairbairn [97] in which it was decided that such payment are recoverable as money paid for a consideration which has totally failure of the consideration.

Freight. Freight contracts, however, are in a special position and were left unaffected by the last- mentioned decision.

Advance freight not reclaimable. Which fright due in advance has been paid it cannot be recoverable again from the ship-owner upon the frustration of the voyage, although the goods be lost. The irrevocable nature of the payment is there determined by custom of law, unless the contract provides for the contrary.[98]

[93] [1926] A.C.497
[94] [1942] AC 154
[95] Viscount Simon L.C.at p. 366 Lord Wright [1942] AC 356.
[96] [1904] 2 KB 493.
[97] [1943] A.C. 32
[98] Fibrosa Spolka v. Fairbairn [1943] AC 32.

In Greeves v. West India Co.[99] the agreement was for a transit consisting of several parts, to colon (Aspinwall) by the packet of one company, thence to panama by rail, and then to San Francisco by the packet of another company, and freight for the whole was payable advance, and was to be 'considered as earned, ship lost or not lost. 'It was held that no part of the freight could be reclaimed by the shipper upon a loss of the vessel, with all her cargo, on the voyage to colon.

Hire in Advance under a Time charter.

In French Marine v. Compagnie Napolitaine[100] a time charter of a ship was frustrated during its currency. Hire was payable monthly in advance. The House of Lords held that the charterers were bound to pay a full month's hire for the month in which the charter was frustrated. Lord Dunedin said that the effect of the frustration was: there is no liability in respect of non- performances in the nature, but accrued rights remain untouched and enforceable."

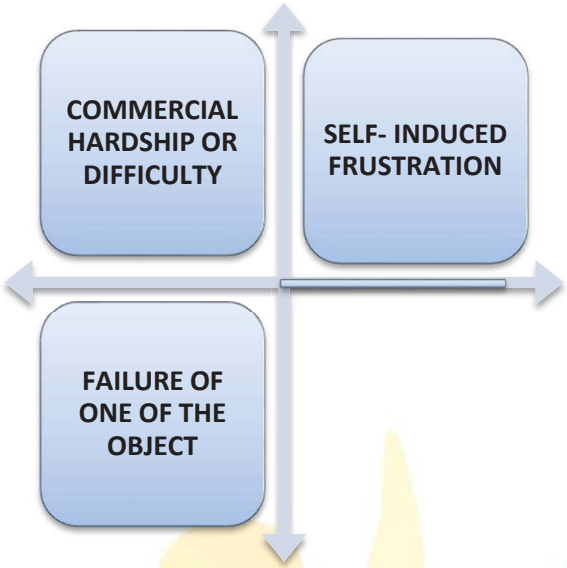
But hire not yet due when the charterer was frustrated would not have been payable, and if hire had been paid in advance for a period which had not begun to run, it would appeared to follow from the fibrosa case that it would have been recoverable money paid for a consideration which had wholly failed.

In the French Marine case [101] there was no total failure of consideration but a partial failure only, for which in law no pro rata payment could be claimed' the provision for an extension until the end of *the* voyage on which the ship was engaged at the end of the charterer, and such extension had taken effect when the hire in question became due. But it is *clear* that the freight rule does not apply generally to time charters, whether or not it applied in cases of frustration.

Exception of the Doctrine

Cases Not Covered by doctrine of frustration 'Impossibility of performance is as a rule, not an excuse for non-performance of a contract'. some of the cases where impossibility of performance is not an excuse are :

[99] [1870]22 L.T. 615
[100] [1921] 2 AC 494.
[101] [1921] 2 AC



1. Commercial Hardship or difficulty- 'Commercial hardship' may make the performance unprofitable or more excuse performance, for it dose 'not bring about a fundamental different situation such as to frustrate the venture' thus merely because the strike of the contract difficult to perform or that is rise in prices, or there is sudden depreciation of currency, or a person will not able to earn the expected profits, or there is an unexpected obstacle to execution or the like, it is not to enough to frustrate the contract.

2. Self- induced frustration - The doctrine of frustration does not apply to case of non- performance of the contract due to the events happing because of the default of the contracting party himself. For example if the intervention of war due to delay caused by the negligence of a party, the principle of frustration cannot relied upon.

3. Failure of one of the objects

Where there is several purposes for which the contract is entered into failure of one object is not determinate the contract. Thus where a ship was chartered by the defendant for two days for the purpose of viewing the navel review and for a day's cruise round the fleet, but the review was cancelled, the defendant was held liable to pay the hire amount.[102]

Burden of Proof

On the party making the allegation – It seems that the burden of proving the breach is self- induced will on the party makes the allegation. So, if the owners were to establish that prima facie the charter had been frustrated, the

[102] Herne Bay Steam Boat Co.v Hutton (1903) 2KB 683

burden should be on charterers to prove that this situation had been induced by the owners. This was the one of the issues which was considered by the House of Lords in Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp. Ltd.[103] The owners of the Kingswood chartered her for a voyage with a cargo of ores and concentrates from port Pirie in South Australia to Europe. Before they become an 'arrived ship' there was an explosion in the vessel's boiler room and there caused such damage to the vessel that she could not performed the, charter party. The charterer claimed damages, alleging that the owners had broken the charter party by their failure to load a cargo. The owners set up the defence that the contract was frustrated by the distractions of essential subject matter of the contract, the owner who relied on the frustration was not bound to proof the affirmatively that the distraction was not brought about by his neglect or default. The House of Lords therefore concluded that the ship owners having, established that the explosion was frustrated the commercial object of the adventure, were not bound to poof further that the explosion was not due to their neglect or default. According to the defence by the owner succeed.

Law Reforms of (Frustrated Contracts) Act, 1943

Section 2(5) (a) of the Law reforms of (Frustrated Contract) Act provides that the provision of this Act apply to time and demise charter parties. Section 1 (2) provides that all sums paid or payable before the frustrating events shall, if paid be recoverable and, and if not paid, shall case to be payable. The proviso section 2 (2) a court has a discretionary power to grant compensation for expenses which are incurred before the frustrating event, furthermore, where one party receives a valuable benefit, before frustration

Section 1(3) provides that the court can order that the suitable payment be made to the others parties.

Doctrine of frustration and Indian Legislation

The doctrine of frustration under English law is covered section 56 of the Indian contract Act 1872. Section 56 Agreement to do impossible act – An Agreement to do an act impossible itself is void (initial impossibility)

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

[103] [1942] AC 154.

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.

Satyabrata Ghose v Mugneeram Bangue & Co.[104]the case shows that an intervention of a temporary nature, which dose not uproot the foundation of the contract, will not have dissolving effect. The defendant company started a scheme for the development of the land tract into the housing colony. The plaintiff was granted a plot on payment of earnest money. The company undertook to do the development work, but a considerable portion of the land was requisitioned by the government for military purposes. The defendant attempted to conceal the contract on the ground that the reason of the supervening events its performance had become impossible Held that the contract was not frustrated.

Section 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.

The claim under the well-known English doctrine of Quantum or meruit has been allowed by the court under this section. The Supreme Court observed in the state of madras v Dunkerely & Com. that a claim for quantum meruit is a claim for damage for breach of contract the value of the material used or supplied is a factor which furnishes a basis for assessing the document of compensation. The claim is not for price of the goods sold and delivered but for damages. In another case [105]reasonable compensation was awarded on the implication of a contract. It will not displace an express stipulation on the point. 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.

Conclusion

[104] AIR 1954 SC 44
[105] Alopi Prasad v Union of India (1960) 2 SCR 793

Finally I would like concludes the doctrine of frustration under the carriage of goods by sea after the analysis of the doctrine the what are the factor which are subject of the frustrating events frustration of the commercial object contract, transformed and the radical events, contractual provision, self- induce frustration as well the frustration of contract different kinds of the frustration impossibility of performance, supervening illegality, delay in charter party, delay in time charter parties and effect of the war all these such case the frustration of contract take place. Generally there are two theories of the doctrine of frustration- the theory of implied terms and just and reasonable solution. Some of cases which subject matter of the limitation of this doctrine commercial hardship or difficulty, self- induce and failure of one of the object, question is coming burden of proof lies upon whom – the person who is alleging or claimant the burden of proof lies upon them. Basically the court has power to justified the implementation of the doctrine frustration occurs whenever the law recognise 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 -things radically different from that which was under taken by the contract. Non haec in foedor veni-it was not that I promised to do.[106] In the case of legislative provision the English law reforms of frustrated Act 1943 which are only applicable in the time charter party and demise charter party for rules regarding of the frustration of the contract in Indian context the doctrine of frustration is given under section 56 of the Indian contract Act 1872. Even the presently this doctrine is depend upon the judicial interpretation.

[106] [1956] AC 696,