COMMERCIAL HARDSHIPS VS THE DOCTRINE OF IMPOSSIBILITY IN INDIAN CONTRACT ACT, 1872: A CRITICAL APPRAISAL

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ABSTRACT

The purpose of this article is to shed some light on the "doctrine of Frustration of Contract" and its corollary "doctrine of Impossibility" under the Indian Contract Act of 1872, as well as its implications for contract termination. The article begins with a brief introduction before discussing how the concept arose and became a part of our legal systems, as well as its relevance to the "principle of judicial non-interference". The article then discusses the concept's legal status under English law, as well as its legal recognition in Indian law under the name "the doctrine of impossibility". When it comes to its exceptions, the article focuses mostly on its inapplicability to commercial challenges and, as a result, the repercussions and difficulties that may ensue. A recent case law, SEAMEC Ltd v Oil India Ltd, has been analyzed to show the degree of applicability of the concept and the inevitable repercussions that result from it. Various risk-assignment techniques which are the outcomes of restricted application of the doctrine have also been considered, such as force-majeure clauses, price fluctuation clauses, and so on. The impact of this on contractual responsibilities was also examined in this paper. Furthermore, comparable ideas of impracticability and hardships as acknowledged by legal systems in other nations throughout the world have been considered in order to make a fair comparison with the origins and effects of the notion of impossibility in Indian law. Given the increased difficulties in the commercial sector as a result of the current pandemic, and the fact that most countries' economies are being crushed, the article discusses the need for a revised look at the doctrine, as well as whether it would be beneficial to include commercial changes that alter the contract's foundation within the doctrine's domain. This paper is just a humble

attempt to shed some light on various suggestions that could be considered in this context, and it is just a reflection of the effort to give a comprehensive idea of the "doctrine of impossibility."

***Keywords*:** Doctrine of frustration, Doctrine of impossibility, Hardship rule, Principle of judicial non-interference, Indian Contract Act.

INTRODUCTION

Contracts, this term is quite common in our day-to-day lives. In contracts, one party takes the obligation of performing a certain act in consideration of something coming from the other party or any third person. This mutual obligation between the parties under the contract cannot be for time indefinite. There has to be a point at which the purpose of the contract is met and the parties are thereby discharged from their obligation. Carrying out of the respective obligations per se the terms of the contract is a very common instance of the termination of the contract. Since we all are aware, non-performance of a contract's promise constitutes a breach, and the appropriate compensation, whether liquidated or punitive, follows. However, owing to an act of force majeure, the parties or one of the parties may be prohibited from carrying out the contract's obligations without wrongdoing on the part of any of the parties. In that instance as a general rule the contract will frustrate thereby terminating all the further rights and obligations of the parties. However, the concept of Force-majeure or supervening impossibility, as defined by the Indian Contract Act of 1872, is a broad term that encompasses a multitude of elements such as the destruction of the subject-matter, the object of the contract, a change in the law, or the outbreak of war, among others. In this article, we'll look at how market fluctuations, inflationary pressures, and economic downturns affect the concept of supervening impossibility, as well as on the carrying out of respective contractual obligations.

ORIGIN

The idea is derived from Latin legal maxim "Ultra posse nemo obligatur," which implies that no one may be held accountable for deeds that are beyond his potential. The maxim has its

origins in Roman law, as stated in Justinian's Digesto[i]. The foundation of this idea may be found in Roman Contract Law, where the parties were emancipated from the contract because the contract's object had become unlikely to attain[ii]. The rationale that subsequent happenings should not affect executed contracts or the concept of "judicial non-interference"[iii] was recognized in the case of Paradine v Jane[iv]. In this particular case, Paradine brought an action against Jane for rent arrears under a three-year lease. Defendant argued that he was driven out of possession as a result of the German Prince's siege, and so was unable to reap the benefit. As a response, he declined to pay Plaintiff rent for the time he was evicted. However, the court ruled in favour of the Plaintiff, and the defence was found to be ineffective since the contract's duty was absolute and without exceptions. In all cases, the judge held, the contract's responsibilities should be honoured. Over time, the norm evolved into the "Doctrine of Frustration of Contracts" as a stimulus to the hardships which was the outcome of rigidity and stringent nature of the above rule. Sometimes due to change of circumstances subsequent to the formation of contract is so impactful that the contract either loses its purpose or becomes impossible to execute. Hence, the doctrine evolved as an exception to the preceding ruling where prospective contractual obligations are extinguished due to a change in circumstances beyond the parties' influence or cognition.

DOCTRINE OF FRUSTRATION OF CONTRACT: ENGLISH LAW

The case of **Taylor v Caldwell**[v] was the first to recognize the claim of frustration of contract as a norm. The defendant in this case committed to let the plaintiffs utilize their concert hall for a set period of time to hold a series of performances. However, before the first concert, the venue was wrecked by a fire that was beyond the parties' control and least anticipated. The eminent justice, Blackburn J. penned down that the contract has turned void frustrating thereby the rights and obligations of the parties. The "Judicial Non-interference" rule[vi], as per Blackburn j., pertains to absolute contracts that are not subject to any stated or inferred stipulations. The contract in this case was not unconditional and was contingent on the music hall's ongoing existence. As a corollary, the "Doctrine of Contract Frustration" emerged.

The doctrine however has dimensional ramifications. The applications of the doctrine is restricted to following instances which are recognized as striking to the base of the contract and thereby the contract loses its individuality or turns out to be impossible to perform.

- **Destruction of the subject matter of the contract:** If the subject revolving which a contract is executed perishes, the contract no longer remains valid as in the case of Taylor v Caldwell[vii].
- **Failure of the object of the contract:** Example: A hires a flat from B with the sole purpose of witnessing the coronation procession of a King. Thereafter, due to the king fallen sick, the event got cancelled. And A refused the payment of rent to B as his purpose of hiring flat turned out to be meaningless. It was held that the cancellation of the event was out of the contemplation of both the parties with no one to be blamed for it. The contract was held to be frustrated due to the object being failed[viii].
- **Death or incapacity of parties:** When one of the parties' personal talents are indispensable for contract performance, the contract is terminated when that party dies or becomes incapacitated. For example, A's wife, an accomplished pianist, offered to perform at a performance on a specific day. However, owing to a later illness that rendered her unable to play piano for the event, she was unable to fulfil her contractual commitments. The contract, which was based on the pianist's good health, was found to be invalidated by her later sickness, and she was therefore not obliged to recompense.[ix]
- **Legislation variations/ Commencement of Warfare:** If legislation transforms in such a way that the contract's bedrock is altered or the contract becomes unlawful as a result of the changes, the parties' contractual obligations are dissolved. For example, A, a resident of England, executes a contract with B, a Russian resident. One of the parties was hesitant to fulfil his responsibilities, while the other party, rather than alleging anticipatory breach, pressed on contract performance. Following that, the Crimean War erupted, making it illegal for England to do business with Russia. As a result, the contract is frustrated, and the non-performing party is not held liable for the damages incurred by the other party as a result of the contract's non-performance[x].

DOCTRINE OF SUPERVENING IMPOSSIBILITY: SECTION 56 OF THE INDIAN CONTRACT ACT, 1872

"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 contract."[xi]

This section is only a mirror image of the philosophy of contract frustration. The doctrine of supervening impossibility, as defined by section 56 of the Act, is a direct reiteration of the essence of the doctrine of frustration. Explaining the spirit of section 56, eminent justice. Mukherjee J. envisioned in the case of Satyabrata Ghose v Mugneeram that: "The essential idea upon which the doctrine of frustration is based is that of the responsibility of performance of the contract; in fact, impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from their further performance of it as they did not promise to perform an impossibility…. The doctrine of frustration is really an aspect or part of the law of discharge of the contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Contract Act"[xii].

Domains not covered by the Doctrine:

- If one out of several objects of the contract is not met with due to supervening events and thereby the contract is not altered fundamentally, the protection under the doctrine cannot be invoked[xiii].
- Mere commercial hardship or inability to derive higher profits due to change in market mechanisms cannot be brought under the purview of this specific doctrine. The rationale being the blanket of is doctrine cannot be sought as to excuse the carrying out

contractual commitments merely because the transaction has turned out to be more onerous or where higher profits are not met with etc.

- The fulfilment of one of the parties' obligations is sometimes contingent on the performance of a third party. In building contracts, for example, A, a contractor, agrees to build a flat for B. A's performance is dependent on the work of labourers and subcontractors who are not parties to the main contract, and their failure to perform does not absolve A of his duty to B in the event of a breach.

RISK ALLOCATIONS AGAINST CHANGE IN MARKET MECHANISMS VS SUPERVENING IMPOSSIBILITY

Force-Majeure clause is a type of risk-allocation mechanisms. The 'Force Majeure' provision is supposed to tackle the risks of contract non-performance due to unanticipated situations such as warfare, terrorist acts, or outbreaks, among many others. However, force majeure provisions are employed in contracts since the only analogous common law notion - the doctrine of frustration - has limited application, as it requires that a contract's fulfilment be significantly different from what the parties expected. Considering force majeure provisions are contractual in nature, they will be interpreted according to standard contractual specifications. Force majeure provisions will be strictly enforced, and the contra proferentem norm will operate if there is any controversy. The Latin phrase "contra proferentem" means "against the side putting forward." It signifies that the phrase will be read against the wishes of the party who authored it in this case. This regulation can be circumvented if the parties are willing. The ejusdem generis rule, which literally means "of the same class," may also be applicable. In other words, when generic terminology follows a particular sequence of events, the generic terminology is evaluated in relation to the specific sequence of events. When a broad "catch-all" phrase follows a list of more specific force majeure occurrences, such as "anything beyond the reasonable control of the parties," the catch-all phrase is confined to circumstances equivalent to the listed events. Crucially, parties cannot lean on their own conduct or inaction to trigger a force majeure provision. It is possible that, due to the high volatility nature of the business, such as in the oil and gas sectors, commodity prices vary to such an extent that they defy the

contract's goal at the time it was entered into. When it comes to business, neither party wants to be on the losing end of a deal. However, a widespread misunderstanding of frustration is that it occurs when a contract becomes unprofitable to fulfil. In actuality, frustration has a limited range of applications. Let us consider a case law on this point. In **Gold Group Properties Limited v BDW Trading Limited**[xiv], according to a developer, the slump in the property market in the UK induced by the crisis meant that minimum prices for property contained in the contract were woefully inadequate, and so the agreement was frustrated. The court took a different stand and contended that the parties might have anticipated the economic downturn and hence the agreement stipulated what should happen if the minimum prices were not met. Thus, the court upheld that there was no justification for the law to terminate the contract because no injustice had occurred.

A contract isn't broken just because it's turned into a lousy deal for one side.

If an alternative mode of execution is available[xv], if the contract is simply more burdensome to execute[xvi], if the seller under a sale of goods contract is let down by its own supplier[xvii], or if economic conditions change[xviii], the contract will not be frustrated.

INDIAN PERSPECTIVE

India's courts are no exception to the aforementioned trend, holding that the doctrine of impossibility cannot be invoked as a defence against purely commercial constraints. Neither the force-majeure clause can list the events like price fluctuation, shortage of labour, change in market mechanisms etc. as an excuse of non-performance of the contract. The rationale behind such a vision of the courts that holding the market as against any changes in it making the bargain an onerous one is the real deal of the parties signing a commercial contract. Besides to invoke the force-majeure or catch all clauses and in its absence the doctrine of impossibility as an excuse to dissolve the future performance of the contract, the test of reasonable foreseeability is applied. But, in the case of market mechanisms it is assumed the parties should anticipate such changes while signing a contract and thereby securing respective rights and obligations thereunder.

The Indian courts are inclined to believe that the parties to a contract that has yet to be performed are frequently confronted in the course of their business with unexpected circumstances, such as anomalous price escalation, currency depreciation, or other similar situations. However, this does not change the contract's foundation, making performance impossible rather than difficult[xix].

Recently, the Supreme Court in India has envisioned the same principle with respect to price escalations in the case of **SEAMEC Ltd v Oil India Ltd**[xx]. Here, SEAMEC Ltd. ("**Appellant**") was awarded the work order dated 20.07.1995 pursuant to a tender floated by the Oil India Ltd. ("**Respondent**") in 1994. The contract agreement was for the purpose of well drilling and other auxiliary operations in Assam, and the same was effectuated from 05.06.1996. During the subsistence of the contract, the prices of High-Speed Diesel ("**HSD**"), one of the essential materials for carrying out the drilling operations, increased by Government Order. Appellant raised a claim that an increase in the price of HSD, triggered the "change in law" clause under the contract (i.e., Clause 23) and the Respondent became liable to reimburse them for the same.

The arbitral tribunal's majority judgement upheld the Appellant's assertion and granted a sum of Rs. 98,89,564.33 plus 10% interest. While an increase in HSD pricing through a circular published under the authority of a State or Union is not a "law" in the literal sense, the Arbitral Tribunal found that it had the "force of law" and so comes within the scope of Clause 23. Following the respondent's appeal to the high court, the arbitral judgement was reversed, with the court ruling that the award was against public policy and that the Change in Law clause was tantamount to a Force Majeure provision. The Supreme Court emphasised that the Tribunal had interpreted the Government Circular as a change in law, not only on the premise of interpretative rules, but also on the information of the Respondent's witness. This testimony established that the Respondent was conscious - even at the time of joining the Contract - that a variation in cost of fuel was always brought about by a Government Order, etc., rather than a statutory law. As a result, the new statute could be interpreted broadly to encompass the government circular. The Court, on the other hand, believes that the Tribunal should have considered all of the Contract's terms. After reviewing all of the evidence, the Court concluded that the parties had not consented to a wide idea of the Change in Law provision, and that the Tribunal should have constructed the contract as a whole in a harmonious manner. The Court

further noted that the contract was granted based on SEAMEC's bid, and that the contract's prices, terms, and conditions were to remain in effect until the last well was completed. To this end, the Court determined that the contract was granted on a fixed price basis with no room for price variation, and that the contractor consented to include in the contingency into the contract price when submitting its final bid to limit the risk of the employer bearing price variations.

ASSESSMENT

This limited application of the doctrine of impossibility and force-majeure clauses and its stringent construction against the commercial hardships sometimes turns out to be a major trouble for the parties who is on the losing side of the deal. Though the exorbitant price variations in the market especially in the oil and gas industry is somewhat anticipated as a matter of law, it may sometimes exacerbate the problems between parties that frequently share uneven bargaining power while determining contract conditions. Besides, COVID-19 has a significant influence on worldwide markets. The global oil and gas market is one of the most affected. Drastic cutbacks in global energy demand, along with a slew of storage problems, sparked a panic among producers. In court, claiming force majeure in the event of a market collapse is likely to be challenging. Though it is undeniable that a worldwide pandemic has a significant impact on domestic and international markets, this impact is not given much weight in court. Courts are reluctant to find for performance excusal in the absence of specific enumeration of an economic slump as a force majeure occurrence. "Price-variation Clauses" are used to rectify the problem. It is a risk allocation method that assures that the price of the commodities upon which a contract is based is modified to reflect changes in market dynamics. However, including a good pricing clause into a contract might be difficult. One party or the other will always find a way to get out of performing the contract or to get a good deal for themselves, putting the other party on the losing end of the arrangement. There's also a considerable potential of misunderstandings, such as not being on the same page about the pace at which a price fluctuation should be measured. There will not be an equal measure of justice for either party.

Besides if parties have to secure individual clauses for each and every adversity such as indemnity clause, force-majeure clause, price-variation clause etc. the contract becomes unnecessarily lengthy and thereby adding more complexities.

ACROSS WORLD PERSPECTIVES

Although the majority of countries, such as Malaysia, Indonesia, and India, follow the same rules for contract frustration under the doctrine of impossibility, America's contract law tends to follow a slightly different concept known as "the doctrine of impracticability", in which the parties are excused from carrying out a contract if it becomes impracticable but not impossible. However, it is unclear how far this philosophy recognises commercial problems as a justification for breaching contractual duties. While the court can award rescission (or in circumstances where the contract was partially executed before the force majeure occurrence or if the force majeure does not completely or permanently preclude performance), it can also lessen or vary the promisee's duty under French law. It's possible that hardship and force majeure may collide. The main distinction is that under the force majeure system, a party may seek an excuse to terminate contract while parties seek renegotiating the contract under the hardship regime. Some legal systems have alleviated debtor performance when it has become unduly oppressive, e.g., Italian "essesivamente onorosa"[xxi], or when the economic foundation on which the contract was signed has lapsed, e.g., "Germany Wegfall des Geschäftsgrundlage"[xxii]. A hardship rule, comparable to the rule on "imprévision" in French administrative law, American business impracticability, and Common law frustration of purpose, can be found in Dutch law. "PECL35" and "UNIDROIT Principles" both give relief in the event of adversity[xxiii].

CONCLUSION

- The doctrine of impossibility has emerged from the idea of reducing the hardships of the contracting parties against the stringent application of "judicial non-interference rule". However, the blanket doctrine cannot be sought as an excuse of shrinking

contractual obligations, which is why the commercial hardships such as the economic downturn, price variations, other modifications of market mechanisms are not covered under the shadow of the doctrine. At the same time, it is true that occasionally a change in market mechanism is so profound that it contradicts the contract's goal, which was founded on the parties' agreement on their contractual responsibilities. In the case of **Tarapore & Co. v Cochin Shipyard Ltd.**[xxiv], it was asserted that the legislation should be flexible enough to adjust to economic peaks and troughs. When price escalation is so essential and outsized to the contract conditions from what they may have least envisaged, making performance not impossible but shattering to one of the parties, the law must grant remedy in terms of price revision.[xxv].

- Furthermore, given the global Covid-19 crisis, the pandemic's scourge has inexorably impacted the economies of countries all over the world. The domestic market chain has been severely harmed as a result of this negative impact. Supply-chain interruptions, 'unintentional' and impending delays in performance and fulfilment of 'contractual' duties were the immediate repercussions. The number of contracts that are expected to be affected by the expansion of COVID-19 is enormous, ranging from building contracts to manufacturing and supply agreements. In addition to, this new impossibility raises issues like as land acquisition, large-scale project funding, and delays in engineering and technology research and development.
- As a result, the idea of broadening the application of the doctrine of impossibility to include such rare cases of commercial hardships as a result of an economic downturn that was completely beyond the parties' control and comprehension is likely to serve the true purpose of the doctrine, which was to alleviate the hardships of contracting parties. The doctrine of impossibility must be modified to include within the rule of hardships as in the case of French, Italian, German law.
- It is remarkable that the Government of India is taking several initiatives to ease the burden of the contracting parties against the commercial hardships. Such as the Government of India has confirmed the 'Manual for Procurement of Goods, 2017' in an office memorandum dated 19.02.2020, stating that in the instance of any hindrance in supply chains owing to the spread of the corona virus, such a circumstance will be covered in the FMC in the contract. It is also stated that such a circumstance should be

treated as a natural catastrophe, and that FMC may be invoked, if necessary, following the proper procedure[xxvi]. The Ministry of New and Renewable Energy took a similar step with regard to "solar project developers"[xxvii]. However, given the dynamic changes in the nature of markets as a result of the present epidemic, as well as comparable events in the future that are beyond the comprehension of human brains, a revised provision in the related Act to this effect on a permanent basis is more desired.

The purpose of this article is to offer some insight on the Indian Contract Act's notion of impossibility. One of the most important elements of it is that it does not apply to cases of purely business difficulties. However, given the current fundamental upheaval in the globe and in each country's economy, a re-examination of the theory and its repercussions is possibly the most pressing requirement of the hour. This article is only a reflection of one of these efforts. Without a doubt, including a simple market change or a simple problem in carrying out the corresponding responsibilities, etc. under the blanket doctrine's protection is not appropriate. However, if we are to extend the blanket doctrine to commercial hurdles, incorporating the concept of hardships rather than impossibility, determining the degree of gravity of such hardships, nature of such market change, and its extent of impact on the contract, will be perhaps the most difficult task. And there's no question that, as a country with so many excellent and honourable justices, India can shoulder this obligation admirably.

The goal of this article is to instill a thorough grasp of "the notion of impossible" and its implications for business difficulties. I hope it is informative to the reader.

ENDNOTES

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