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Introduction

It is assumed in all contracts, that the parties will perform their obligations in good faith. However, certain events which are beyond the control of the parties may take place, which serve to make such performance impossible. When such events occur, the contract is said to have been 'frustrated'. Thus 'frustration' is a general term covering all events which serve to make performance of contractual obligations impossible. The doctrine of frustration (as it is commonly referred to) has become more and more complex over the years and an examination of all the issues concerning the doctrine is necessary.

Evolution of the Doctrine

In England, the basis of the law of contracts is the principle of absolute liability.[1] The Common Law Courts generally believe that, come what may, the contracting parties are absolutely liable to perform their obligations under the contract.[2] This theory of absolute liability of the contracting parties was enunciated in the classic case of *Paradine* v. *Jane*.[3] The Courts were reluctant to interfere with the contract as they felt that:

1. The sanctity of the contract would be violated as it is essentially a code created by the contracting parties themselves.

2. The contracting parties were competent and intelligent enough to realise the full import of the obligations created by themselves, for themselves.[4]

It was in order to rectify the deficiencies of the principle of absolute liability that the doctrine of frustration was evolved. The modification of this theory began

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1 Jack Beatson and Daniel Friedman (Ed.), *Good Faith and Fault in Contract Law* 338 (1995).

2 This is unlike the civil law view that fault is a pre-requisite for liability in the event of non-performance of the contract. *Ibid*, at p. 337-8.

3 (1647) Aleyn 26 cited from A.G. Guest (Ed.). *Anson's Law of Contract* 495 (1977). Here, the tenant was held liable for payment of rent though an alien enemy had invaded the premises and had expelled the tenant.

4 M.A. Sujan, *Law Relating to Building Contracts* 185 (1990).

in 1809 in the case of *Atkinson* v. *Ritchie,*[5] where the Court recognised that a charter-party under which a British ship was to load at a foreign port would be frustrated by the outbreak of war between UK and the foreign country. This marked the first instance of a court acknowledging that subsequent illegality of performance would frustrate the contract. The second modification took place in *Taylor* v. *Caldwell*[6] where the defendants were held to be absolved from the liability as performance of the contract was impossible; the contract was held to be frustrated. The basis of this decision was that it would be unjust for the promisor to pay damages as external forces had rendered the performance impossible.

The Courts went a step further in *Krell* v. *Henry*[7] where frustration was extended to cover cases where the commercial object of the contract was destroyed. In this case there was a contract to hire a flat on the days of the coronation of King Edward VII, and the coronation was cancelled. It was held that the plaintiff could not recover the rent as the coronation was the foundation of the contract, and it was destroyed. This decision represents the boldest step taken by the English Court.

Over the years various instances have been held to render performance impossible, including:

1. Destruction of subject matter.[8]
2. Death or incapacity of the party.[9]
3. Intervention of war.[10]
4. Government or legislative intervention which makes performance illegal.[11]
5. Non occurrence of contemplated events.
6. Change of circumstances.[12]

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5 (1809) 10 East 530, *supra* n.3.

6 (1863) 3 B and S 826. In this case, there was a contract that permitted the plaintiffs to use a music hall for concerts on four specified nights. Before the first night, however, the hall was destroyed by a fire, for which nether parties were at fault.

7 [1903] 2 K.B. 740.

8 The best example would be *Taylor* v. *Caldwell, supra* n.6.

9 This is applicable largely in cases of personal contract, *i.e.* a contract that involves the performance by one party due to his special skill, such as an artist. *Robinson* v. *Davison*, [1871] LR 6 Exch 269 cited from G.P. Tripathi, *Implied Term as a Basis of the Doctrine of Frustration in India and England*, 7 Law 1975 (175).

10 *Supra* n.3.

11 *Union of India* v. *C. Damani*, AIR 1980 SC 1149.

12 If the basis on which the parties contract suddenly changes, performance may be of no use to the parties and the Court would then hold the contract as frustrated because the purpose of the contract would not be achieved in the manner intended by the parties.

7. Delays in cases where time is the essence of the contract.[13]

What emerges is that contract law has developed from viewing a contract as a private law created by and binding, under all circumstances, only the contracting parties, to a complex commercial code into which courts have read terms and conditions.

Features of the doctrine

While the doctrine appears to be flexible and broad, there are certain discernible features that seem to reduce its effectiveness:

1. *Conditions for the application of the doctrine*: The necessary conditions have been laid down under English law:
   a) There must be a valid and subsisting contract between the parties.
   b) Some part or whole of the contract must be unfulfilled.
   c) The contract becomes impossible to perform after it is made due to some supervening event.
2. *Frustration must not be self-induced:* The courts take great care to see that the frustration is not due to the default or negligence of the promisor.[14] This is illustrated by the classic case of *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[15] The Court held that the defendants were not absolved of their liability to pay the hire charges to the plaintiffs as the defendants had contributed to the non-performance. This seems only fair as the doctrine was evolved to prevent undue hardship and injustice being caused to the promisor. Abuse would also breach the principle of good faith existing between contracting parties.
3. *Frustration of part of a contract*: The general view taken by both English and Indian Courts is that the doctrine can be applied only to the whole performance and not if only a part of the performance is frustrated.[16] However this seems to be too general a proposition as the doctrine is essentially flexible.

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13 *Ved Prakash* v. *Shishu Pal*, AIR 1984 All 288. *See also, R.S. Gaur* v. *Ratiram*, AIR 1984 All 369.

14 V. Parabrahma Sastri, *The Doctrine of Frustration: Its Meaning and Basis*, 1967(1) SCJ 19.

15 [1935] A.C. 524. Here, the defendants chartered a trawler for their business and later claimed that they were not bound by the charter as they were unable to operate the trawler. The authorities informed the defendants that licenses would be given only for three trawlers, and the plaintiffs' trawler was not one of the three trawlers chosen.

16 *See generally, Eyre* v. *Johnson*, [1946] 1 All E R 719; *Denny Mott and Dickson* v. *Fraser and Co.*, [1947] 2 All E R 16; *P.D. Mehra* v. *Ram Chand*, AIR 1952 Punj 34.

4. *Contemplation of the contracting parties*: There is mixed opinion on this issue. While some English cases say that frustration relates only to events which are beyond the contemplation of the parties[17], a more progressive view has been taken in another case[18] where Lord Denning opined that the doctrine is inapplicable only when a provision has been made in the contract for the future event and is not merely because it was contemplated by the parties.[19] It is submitted that forseeability should not be the test of frustration as the courts should merely examine whether or not be the basis of the contract has been destroyed. Also, examining the extent of knowledge of the parties is of no help to the courts; if a frustrating event occurs it makes performance impossible whether or not the parties had contemplated it.[20]

5. *Question of law or of fact*: Despite conflicting opinions on the issue[21], it is submitted that frustration is a mixed question of law and fact. Facts constitute the event of frustration and law determines whether the event has caused frustration, deciding this point with reference to certain principles of contract.[22]

6. *Common intention of parties*: The event should defeat the common intention of both parties and not one party alone.[23] The Court while rendering justice to the promisor cannot do so at the cost of the promisee as that would defeat the very purpose of this doctrine.

7. *Effect of frustration:* Once the frustrating event occurs, the contract is terminated automatically and all future obligations under the contract stand discharged.[24] This is simply because if one of the parties is unable to perform his obligation, the other party's obligation must also end. Also, after 1943, under Common Law, money or goods received under the contract by either

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17 *See generally, Morgon* v. *Manser*, [1945] 1 All E R 252; *Circlewood Property and Investment Trust Ltd.* v. *Leightons Investment Trust Ltd.*, [1936] 3 All E R 135.

18 *Ocean TrampTankers Corpn.* v. *Sovfracht*, [1964] 1 All E R 161.

19 *ibid.*, at p. 166.

20 E.g., A contracts with B to have a house built in a region known to be highly earthquake prone, and an earthquake occurs when the house is only partially ready. If there is nothing in the contract to tackle such a case, the Court can assume that it was outside the contemplation of the parties.

21 *See, Tsakirogolou* v. *Noblee and Thorl*, [1966] 2 All E R 179. *See also, supra* n.21.

22 *Supra* n. 16, p. 23.

23 *Supra* n. 3.

24 Lihazur Rahman Khan, *Frustration: Legislative or Administrative Intervention*, 6 C.U.L.R. 96 (1982) .

party have to be returned.[25] A corresponding provision can be found in the Indian Contract Act, 1872.[26] Thus the effect that frustration has upon the contract is to place the parties, as far as possible, in the position that they were in, before entering into the contract.

In Indian law, an anomalous position has developed regarding the scope of Section 56, Indian Contract Act.[27]

The Anomalous Position in India

Before proceeding to examine the Indian law, two important features must be kept in mind:

1. India has inherited the basic Common law doctrine of absolute liability, so frustration is an exception.[28]

2. Unlike in England, frustration is governed by Section 56 of the Indian Contract Act, 1872, which, according to the Supreme Court "lays down a positive rule of law".[29]

It is significant that the doctrine of frustration is codified in India. This feature is the basis of the Court's observation[30] that English law has practically no value as Section 56 is exhaustive. It is submitted that this view has led to the stagnation of the doctrine in India because English cases would be useful in widening the extent of the term 'impossibility' to cover large number of cases of commercial sterility, and also to help define the scope of the term 'frustration'. The Indian courts have not kept in mind the crucial fact that the doctrine was developed in England and as contracts become increasingly complex, it will be useful to drawn upon English cases as guidelines.

The Supreme Court has stated that Section 56 deals only with cases of "subsequent impossibility" and has said that it covers only "events... which were

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25 The Law Reform (Frustrated Contracts) Act, 1943.

26 Section 65 reads, "Obligation of a 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 advantage under such agreement or contract is bound to restore it, or make compensation for it, to the person from whom he received it."

27 Section 56: "Agreement to do impossible act.- An agreement to do an act impossible in itself is void."

28 Anson *supra* n.3, p.189.

29 *Satyabrata Ghose* v. *Mugneeram Bangur and Co.*, AIR 1954 SC 44.

30 *ibid.*

beyond the contemplation of the parties at the time of entering into the contract".[31] As seen earlier, it makes no difference whether the parties had or had not contemplated the effect of the frustrating event; the result remains the same, i.e. it makes performance impossible. Thus the Court has needlessly narrowed the scope of Section 56 by excluding events which were contemplated by the parties but for which provision was not made in the contract. The Supreme Court has also stated that all matters of construction i.e. matters where the court has to read into the terms of the contract and infer or imply any condition or term, would be dealt by under Section 32.[32] This has added to the confusion as a case such as *Krell* v. *Henry*[33] could fall both under Section 32 and under Section 56. There the coronation ceremony could be said to be the event that the contract was contingent upon and therefore it would be covered by Section 32. (The Court gathers whether or not a particular term is an implied term by way of construction). But as the cancellation of the coronation was a subsequent event that created impossibility, it could also fall under Section 56. In the words of apex court in the very same case, Section 56 covers cases of "practical" impossibility and not merely literal impossibility.[34] That by itself illustrates that the scope of Section 56 cannot be artificially restricted. It is therefore submitted that the scope of Section 56 must be unfettered and allowed to cover all cases of impossibility in order to ensure the development of the doctrine. This is supported by the fact that Section 56 is the only provision in the Indian Contract Act, which expressly deals with impossibility. This would also avoid any confusion regarding the overlap between Section 32 and 56.

The most glaring evidence of the Court's confusion comes in subsequent cases where the Courts have read implied terms and conditions into the contract (matters of construction) under Section 56 itself.[35] This is clearly seen in *Punj Sons* v. *Union of India*[36] where the condition of supply of Tin ingots was implied by the court from the terms of the contract which dealt with an agreement for the

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31 *ibid.*

32 Section 32: "Enforcement of contracts contingent on an event happening:- Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that future event has happened. If the event becomes impossible, such contracts become void."

33 Anson *supra* n.3.

34 *ibid*, at p. 49.

35 In *Sushila Devi* v. *Hari Singh*, (1971) 2 SCC 288, the Court held that Section 56 covers events which strike at the very root of the contract (implied terms). See also *Tarapore* v. *Cochin Shipyard*, (1984) 2 SCC 680 where the Court went into facts to construe terms under Section 56 itself.

36 AIR 1986 Del 158.

supply of milk containers to be coated with hot dip tin coating. The contract was held to be frustrated as tin ingots were not available. These cases show that it would be futile to restrict the scope of Section 56 to exclude cases of construction. Indeed it would defeat the very purpose of the doctrine.

Suggestions & Conclusions

In order to fill these lacunae the authors make the following suggestions that may be incorporated into the Indian law of frustration.

1. Bringing all frustrating events within the scope of Section 56 and thereby removing the artificial categorisation created by the Supreme Court of cases as falling under Section 32 and 56 separately when all cases can be brought under Section 56. Section 56 should cover implied conditions as well. This would not affect the certainty of law but merely provide a just exception in case the conditions change as absolute liability to perform at all times is unjust.[37]

2. As mentioned earlier the theories regarding the doctrine should be utilised to ensure its development and expansion.

3. Special provisions must be made (like that of imprevision under French law) in cases of contracts where the interest of society is benefited by specific performance to ensure performance even in cases of drastic rise in prices and then make adequate compensation to the promisor at the new rates. This would secure the public interest and also prevent injustice being caused to the promisor.[38]

4. Most important, efforts must be taken by the Indian Courts to preserve the elasticity and flexibility of this doctrine as far as possible. This would ensure that the doctrine keeps pace with a rapidly changing and developing society where commercial transactions are becoming more and more complex and therefore more vulnerable to supervening events. It would eliminate the injustice of absolute liability being demanded at all times from the promisor and would facilitate the development of contract law.

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37 Beatson *supra* n. 1, p. 363.

38 Sujan *supra* n. 4, p. 198.