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COVID-19 and Impossibility of Contracts in India with Special Reference to *Force Majeure*

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Abstract

Since March, 2020 the world is struggling with the disastrous COVID-19 pandemic. Presently, around more than 200 countries are passing through the global crisis due to COVID-19 Pandemic. COVID-19 or corona virus has been officially announced as a pandemic by the World Health Organisation (WHO) on 11th March, 2020. In these extraordinary times, the businesses across the globe are finding themselves in trouble and are in great losses. Some of the business are about to end up into bankruptcy. In some situations, the outbreak may render the performance of contracts impossible as a result of governmental restrictions in the form of national lockdowns to curb the spread of Pandemic. Due to the unprecedented lockdown situation, some of the commercial activities have been stopped and the activities of manufacture and distribution of essential goods and services are permitted to continue. Consequently, COVID-19 pandemic situation has adversely impacted possibility of performance of contractual obligations resulting into loss of commercial activities. This uncertain situation has taken us back on the ancient concept in the commercial field called as the 'force majeure'. The contracts which do not contain a 'force majeure' clause or any such similar provision shall still be governed by Section 56 (Doctrine of Frustration) of the Indian Contract Act, 1872. The present article deals with the problems relating to specific performances of commercial contracts and the legal provisions for the win-win situation of both the contractual parties in context with Covid-19 Pandemic situation.

Keywords: Contractual obligations, COVID-19 pandemic, Specific performance, *Force majeure*.

INTRODUCTION

Since March, 2020 the world is struggling with the disastrous COVID-19 pandemic. In these extraordinary times, the businesses across the globe are finding themselves in trouble and are in great losses. Some of the businesses are about to end up into bankruptcy. The pandemic situation may render the performance of contracts unmanageable due to frequent lockdown orders from the government in order curb the spread of Covid-19 Pandemic [1]. With the lockdown, everything has come to a halt except for the manufacture, supply and distribution of essential commodities and services. COVID-19 situation has already impacted adversely the execution of some of the contractual commitments rendering the prices to shoot up and changes into various other situations resulting into the commercial performances almost impossible [2]. This uncertain situation has taken us back on the ancient concept in the commercial field called as the '*force majeure*'. The parties who need to protect themselves from the consequences over which they do not have any control would be required to reconsider the concept of '*force majeure*' clauses in their contractual documents or may save themselves under the statutory safeguard, if needed. However, the contracts which do not contain a '*force-majeure*' clause or any such similar provision shall still be governed by Section 56 (Doctrine of Frustration) of the Indian

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Contract Act, 1872 [3]. The present article deals with the problems relating to specific performances of commercial contracts and the legal provisions for the win-win situation of both the contractual parties in context with COVID-19 Pandemic situation. The *force majeure* is a civil law concept and similar to the provision for frustration in contracts under the Indian Contract Act, 1872.

The problem lies in the terms agreed upon by the parties before the uncertain COVID-19 Pandemic arose in March, 2020. There circumstances there were there before the outbreak of the Pandemic situation have been changing since then and hence there is a problem of specific performance. Under such changed circumstances, businesses are either not able to perform their obligations under the contracts or finding it hard to perform the same, which has resulted in several delayed projects accompanied by losses. Therefore, in these conditions, the contracting parties need to look into the possibilities of including '*force-majeure*' clause in their agreements, to ascertain the future course of action during the inevitable situation of COVID-19 pandemic. However, if there is no such clause in their contracts or any similar provisions, they can still be governed by Section 56 (Doctrine of Frustration) of the Indian Contract Act, 1872 which says that the agreement to do impossible act is itself a void agreement. The provision further provides that any act to a contract that may become impossible to perform after the contract is entered into in such circumstances becomes void as soon as the performance becomes impossible to be complied with.

About the Concept of Force Majeure

The concept of force majeure, a French term and its Latin term is *vis majeure*, which means "*superior force*". Black's Law Dictionary defines force majeure clause as "a contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled [4]." As per the Cambridge Dictionary Force Majeure means, "an unexpected event such as a war, crime, or an earthquake which prevents someone from doing something that has been mentioned in the agreement in written [5]". As per the Black's Law Dictionary '*force majeure*' is an effect that is beyond the control of any of the parties involved in an agreement. It includes both acts of nature (for example, earthquakes, floods, tsunamis or storms, etc) and also acts of people (for example, strikes, riots, stampede or wars). A company may include a *force majeure* clause into a contract in order to free itself from the possible liability in case if it is unable to fulfill the terms of the contract or for the reasons beyond its control, or if it tries to fulfill its part of the contract, it may result into damages to its business. The *force majeure* provision exempts a party from a contractual obligation that becomes impossible to perform due to reasons beyond the control of the party due to the intervention of some kind of superior force. The concept of *force majeure* has gained a significant momentum in the present COVID-19 Pandemic situation.

Origin and Development of *Force-Majeure*

The origin of the *force majeure* concept can be traced back to Roman Law. The Romans recognized that he principle of purity of contract can be strengthened by a principle '*clausula rebus sic stantibus*', means the obligations under a particular contract are binding only as long as the circumstances remain similar as there were at the time of parties entering into a contract [6]. In India the first decision that dealt with the concept of *force majeure* was in the case of *Edmund Bendit vs Edgar Raphael Prudhomme, AIR 1925 Mad 626*. In this case the Madras High Court adopted the definition of '*force majeure*' given by a famous Belgian lawyer which says that *force majeure* means the events which you cannot prevent and those for whom you cannot be held responsible.

Force majeure is a common known clause often included in a contract agreement. It essentially frees both the parties to the contract from the liability or an obligation when any unexpected and uncertain events or circumstances occur which are beyond the control of any of the parties to the contract such as strike, war, riots, criminal activities, epidemic or may be a sudden change in the law in force that may prevent anyone of the parties or both the parties from fulfilling their part of the contract. However, in practical aspects, most of the activities relating to the force majeure does not prevent a party from non-fulfilling his part of the contract forever, but it only suspends the performance until the duration or the impact of the force majeure is in force [7].

Indian Jurisprudential Aspects of *Force Majeure*

The *force majeure* is often confused with the doctrine of frustration of the law of Contract [8]. However, they are totally different concepts. The concept of *force majeure* has not been defined in any legal provisions in Indian laws. But as per Section 32 of the Indian Contract Act, 1872 makes a passing reference of *force majeure* clause while dealing with the contingent contracts provision [9].

Section 32 of the Indian Contract Act, 1872, provides that the enforcement of a contract that is based on an happening of a contingent event, unless and until that event happens the contract cannot be enforced by law. But if an event becomes impossible to be performed, such contracts become void in nature [10]."

Similarly as per Section 56 of the Indian Contract Act, 1872, in a contract if an act which after the contract is made becomes impossible or unlawful, then such contract becomes void or unlawful. It further provides that if a person has promised to do something which he knew and which the promise did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss that such promisee may sustain through the non-performance of the promise [11].

Section 56 of the Indian Contract Act, 1872 deals with two distinct stages:

1. It declares all agreements consisting of doing impossible acts are all void, and
2. It also visualizes a situation where a lawful act has successively become impossible to or unlawful to perform due to the uncertain event.

Grounds of Frustration Which are Responsible for Possibility of Performance [12]

1. If there is a destruction of subject matter of the contract in hand as held in *Taylor v. Caldwell (1863) 3 B & S 826*;
2. In case of death or incapacity for personal service as held in *Stubbs v. Holywel Railway Co. (L.R. 2 Exch 311)*[13];
3. Absence of or non-occurrence of a particular event of things as held in *Krell v. Henry (1903) 2 KB 740*;
4. If there is an intervention by legislative or executive authority as held in *Metropolitan Water Board v. Dick Kerr & Co. Ltd. (1918) AC 119* [14];
5. If there is an intervention due to a war situation as held in *Basanti Bastralaya v. River Steam India Navigation AIR 1987 Cal. 271*; and
6. If there is a change in circumstances of particular state of things as compared to in the past.

***Essential Ingredients to Qualify for Force Majeure Clause are as follows* [15]**

1. That an unexpected/uncertain and unforeseen event has taken place;
2. The parties to the contract presumed that such an event may not take place;
3. Occurrence of such event has rendered the specific performance of a contract impossible or impracticable;
4. That the parties to the contract have taken all necessary due diligent steps to perform the obligations promised in the agreement or at the most they have attempted to reduce the possible damages; and
5. That the aggrieved party that is claiming relief under the *force majeure* clause should have burden of proof to convince that the *force majeure* event has adversely impacted the party's performance of his part of the contract.
6. That the establishment of the causal connection between the *force majeure* uncertain event and possible hindrance to the performance of the contract must be made.
7. And the possible compliance with the pre-condition that contained in the *force majeure* clause of the contractual agreement.

As per the contractual perspective, the *force majeure* clause allows temporary pardon to a party to the contract from performing his part of the contract in the case of happening of a *force majeure* event.

Steps Taken by the Government [16]

After the disturbance from COVID-19 situation, the Ministry of Finance, Department of Expenditure Procurement and Policy Division [17] immediately issued an Office Memorandum on 19th February, 2020. This memorandum was intended to clarify that the disturbances in the contractual dealings or any dealings for that matter in supply chains that is due to the spread of the COVID-19 virus must be considered as a natural disaster and for which a *force majeure* clauses may be adopted, with the help of appropriate due procedure in law. The memorandum considers COVID-19 pandemic situation as a 'natural calamity' and it must be covered under the *force majeure* clauses. But this interpretation may not be true in each and every kind of contract. Therefore, the *force majeure* clause in any contractual dealings whether it relaxes the liabilities of the parties or not depends upon the facts and circumstances of each contractual dispute.

Doctrine of Frustration, *Force Majeure* and Judicial Interpretation [18]

Frustration in an event in a contract law that signifies a set of uncertain events taking place after the parties enters into a contract. There is no fault of any of the parties to the contract for the occurrence of such unforeseen events. This situation renders the performance of the contract any one or both the parties absolutely impossible in any circumstances. It was held in *Dulipalla Ramachandra Koteswara Rao, (AIR 2004 AP 18)* that where the performance of the entire contract becomes significantly impossible without any fault on the part of any of the parties, the contract is dissolved by the doctrine of frustration [19].

In *Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 SC 588* [20], M/s Alopi Parshad and Sons Ltd. were the agents of Government of India. They used to purchase ghee for the army. The agents were supposed to be paid on the basis of the work. While the work was in progress, World War II interfered. Thereafter, the original agreement was, by way of mutual consent, got revised. The rates that were fixed in during peace time were totally changed due to war time circumstances. The agents demanded revision of the pay rates. However, the Government instead terminated the contract in 1945. The agents failed to claim their payment at the altered rates but they failed. Actually the terms in the agreement were already altered much before the hostilities and the agents continued supplying without insisting upon any modification of the agreement modified and hence the modified agreement was binding upon the agents. The Hon'ble Court declared that the contract is not unsatisfied merely because the conditions, in which the agreement was made, are changed. The obligation in a contract had not become impossible or unlawful to be performed.

In *Dhanrajamal Gobindram v. Shamji Kalidas & Co., AIR 1961 SC 1285* [21], Messrs Dhanrajamal Gobindram, there was a contract between a buyer with Messrs Shamji Kalidas & Co. who is a seller for a purchase of 500 bales of African raw cotton. The contract was written letter by the sellers and which was confirmed by the buyers. The contract was never fulfilled. The seller sent five letters to the buyer from 1st March, 1958 and 26th May, 1958, however he could get a reply only on 3rd June, 1958. By then the seller had already performed its right to resale after issuing a due necessary notice and had claimed Rs. 34,103.15/-for which a debit note had been issued. But the note was sent back by the buyer with his letter dated 3rd June, 1958 saying that the contract was void and illegal and that they were not liable to perform the same. In the contract in this case there was a use of words like usual *force majeure* clause [22]. There was no clear *force majeure* clause mentioned in contract and there was no indication of as to which events may constitute *force majeure*. The Hon'ble Court declared that "usual" refers to events that may be found in a particular types of contracts. Some commercial documents may not mention any clear meaning of a particular event on its face. It is the duty of the court to assign a suitable meaning to such clauses. The Hon'ble Court dismissed the present appeal made and consequently the uncertainty in the said terminology in the contract "usual *force majeure* clause", was therefore, rejected.

In *Naihati Jute Mills Ltd. v. Hyaliram Jaganath, AIR 1968 SC 522* [23], in this case there was an ordinary contract of sale and purchase wherein Naihati Jute Mills, the buyer agreed to purchase and

Hyaliram Jaganath, the seller agreed to sell 2000 bales of Sadipur N.C. Cuttings. The contract was prescribed by the India Jute Mills Association. One of the printed terms provided–"Buyers will not be held responsible for the delay caused by act of God, war, mobilization, demobilization, breaking trade relations, government interference or *force majeure* event. There was a sudden change in the policy of the Indian Government imposing complete ban on the import of Pakistan jute, due to which the contract was not possible to be performed by the buyer. An import licence also could not be issued by the buyer to the seller. Therefore, there was a contention by the buyer that the contract has become impossible to be performed due to the above uncertain event. They also argued that the contract became frustrated as per the provisions of Section 56 of the Indian Contract Act, 1872 and is therefore became void and should be rejected by the Hon'ble Court. It was held by the Court that the buyer was having the knowledge that licenses are not freely issued. The application of import license by the buyer was refused on account of personal disqualification and not by reason of any *force majeure*. It was therefore, held by the Hon'ble Supreme Court that there is no question of impossibility of performance of the contract by reason of the change of policy of the Government as the Government policy has banned import from Pakistan but had also advised for satisfying the jute demand from the Indian suppliers. The performance of the obligation in a contract cannot be discharged merely it has become onerous for one of the parties to perform.

In *Energy Watchdog v. CERC, (2017)14 SCC 80* [24], there was a company who had willingly recited energy charges as non-escalable in nature, but, there was a change in the law in Indonesia in connection with the export from Indonesia to international market there was rise in the price. The company on account of this sought its release from performance of Power Purchase Agreement (PPA) and requested the restoration of the economic conditions existed prior to the amendment in the law. There was *force majeure* clause in the contract entered into between the parties. There was a clause No. 12.4 of the PPA entered into between the parties that had a mention of the *force majeure* clause. The issue raised before the Hon'ble Supreme Court was whether the price rise of coal imported from Indonesia would come under the Clause 12.4 of PPA? The Apex Court rejected the contention that the rise in the prices of coal imported from Indonesia would attract *force majeure* in respect of the PPA.

In *Coastal Andhra Power Limited v. Andhra Pradesh Central Power Distribution Co. Ltd., MANU/DE/0085/2019* [25], Coastal Andhra Power Limited (APL) entered into a Power Purchase Agreement with Andhra Pradesh Central Power Distribution Co. for setting up and operating an Ultra Mega Power Project at Krishnapatnam. In the agreement, the fuel that is to be utilised for generating electricity was the imported coal that needed to be arranged from Indonesia. The APL failed to perform its part of the contract. The arguments raised were that such failure of the obligations was due to the rise in the prices of coal. This was due to the amendment made in the Indonesian law and that such an event of price increase amounted to *force majeure* under the present Agreement. The Hon'ble High Court of Delhi rejected these contentions. The Hon'ble High Court applied the principles laid down in the case of *Energy Watchdog v. CERC* [(2017) 14 SCC 80], referred above and declared that the amendment introduced in the Indonesian law and consequential increase in the price of the coal does not prima facie amounted to attract *force majeure* under the APL Agreement.

The Hon'ble High Court of Delhi in *M/s Halliburton Offshore Services Inc. v. Vedanta Limited* [26] observed that the lock down declared by the Governments in view of the outbreak of corona virus was prima facie in the nature of a *force majeure*. In this case, the contract entered into between the parties contained the *force majeure* clause which was allegedly invoked by the petitioner. The Hon'ble Court therefore stayed the invocation of bank guarantees by Vedanta Ltd [27].

From the above judicial interpretation regarding the determination of applicability of the *force majeure* clause in a contract, it can be inferred that a party that is able to claim the *force majeure* clause is pardoned of his obligations of specific performance under a given contract during the subsistence of *force majeure* event. He can also claim to withhold the damages for the breach of contract due to the uncertain events for which he cannot be held responsible. The *force majeure* clause can also result into termination of a contract if the *force majeure* event lasts longer than a particular reasonable period as stipulated in the contract. If there is no *force majeure* clause in a contract, then Section 56 of the Indian Contract Act, 1872 gets attracted.

CONCLUSION AND SUGGESTIONS

One can conclude by saying that a party which is able to successfully establish the *force majeure* clause in a contract at the time of specific performance, then that party can be relived of the obligations to perform its part of the contract. This relief can be available during the subsistence of the *force majeure* event. The performance of the part of performance gets suspended during the period of the event and the affected party can be relieved from the burden of breach of contract. However, at the same, invocation of the above *force majeure* relief may result into the termination of a contract if the *force majeure* clause lasts longer than the reasonable time period as stipulated in the contract. As far as Indian legislative provisions are concerned, if there is no *force majeure* clause in a contract, then Section 56 of the Indian Contract Act, 1872 gets attracted.

The COVID-19 pandemic has caused the lock downs, restrictions on the movements of public as declared by the respective Government Authorities and as a result most of the economic activities have come to a standstill. These unforeseen activities cannot be predicted by any of the parties of the contract. Otherwise legally speaking such kind of situation may lead to many litigation filed by the aggrieved party to the commercial contracts. However, as yet another frustration to the contracting parties, the courts are also not functioning regularly, they are dealing with only urgent criminal matters. In these situations, it is the matter of interpretation by the courts to see whether a contract that contains the *force majeure* clause may include the incidents such as halt to the economic activity by way of lockdowns, etc. It is therefore, suggested to have a comprehensive legislation in place to cover incidences like lock down by the Government authorities to be part of *force majeure* and exempt the parties from performing their part of the contract if it attracts the *force majeure* clause instead of making the Courts to decide on those points. There should be a clause in the proposed law which may permit the party who is going to suffer more loss than the other party to terminate the contract to avoid the potential loss.

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