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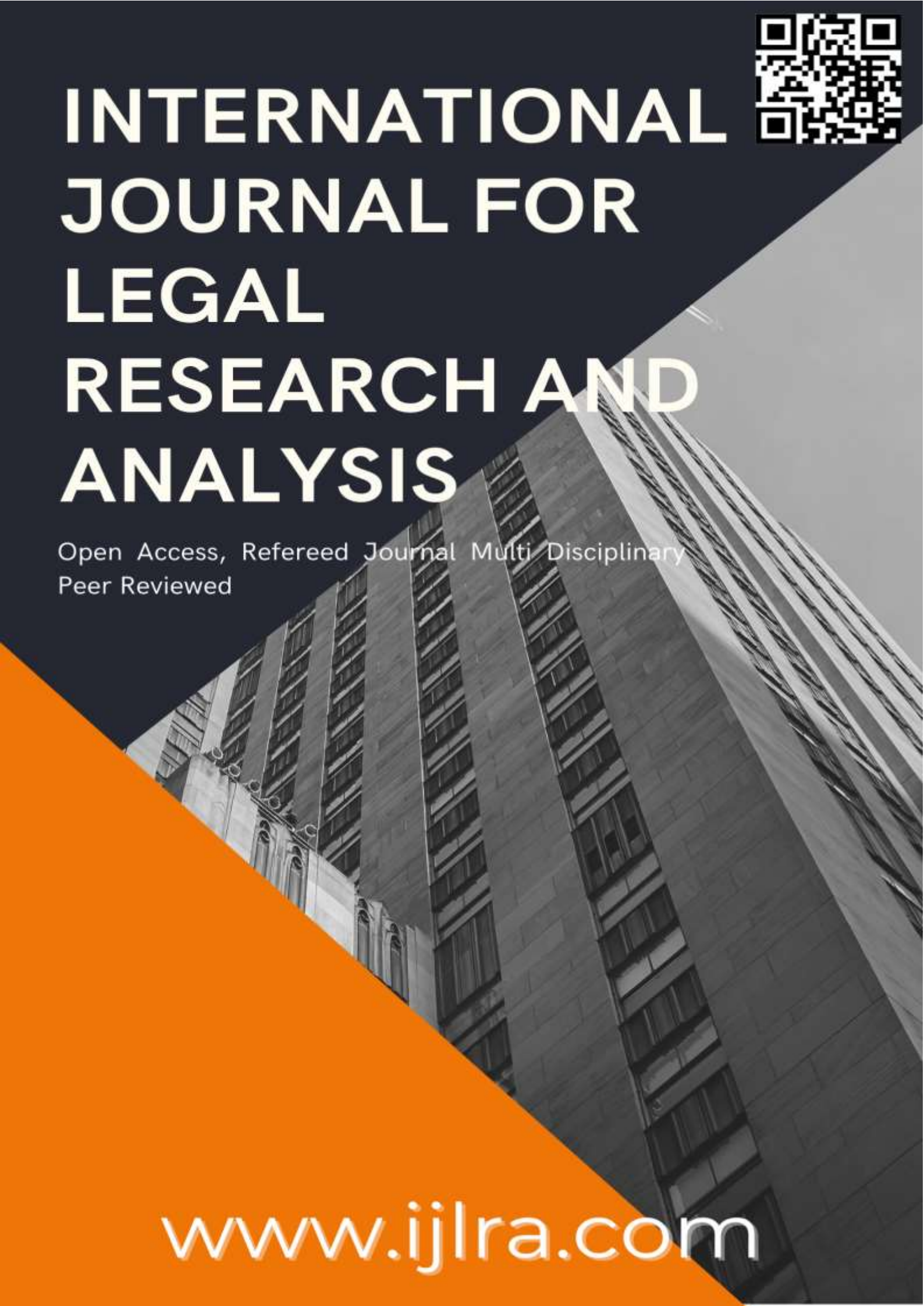

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"A CRITICAL ANALYSIS OF THE DOCTRINE OF FRUSTRATION UNDER THE INDIAN CONTRACTS ACT, 1872"

AUTHORED BY - GOURI SHRIVASTAVA

ABSTRACT

The execution of contractual duties may be hampered by unanticipated supervening circumstances, resulting in contractual uncertainty. The theory of frustration lays the path for an equitable outcome to such an unpleasant incident that occurred without the contractual parties' fault. Based on fairness and equitable principles, the doctrine fills the vacuum in a contract about supervening occurrences. Given the significant consequences for the obligatory and binding character of a legal contract, it is essential to examine the criteria that lead the courts in determining its applicability. Unlike common law, the idea of frustration is specifically included into Indian contract law under Section 56 of the Contract Act. However, English law has had a significant impact on the formation of this concept in India. This study seeks to restate the law of frustration as it applies in India. The author of the paper has made an attempt to analyse and understand the origins of Doctrine of Frustration, grounds on which this doctrine can and cannot be applied and the aftermath of this doctrine.

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CHAPTER-1

Introduction to the Doctrine of Frustration of Contracts

A contract is an agreement between two or more parties that creates legally enforceable or otherwise recognised responsibilities. Unforeseen or supervening events, i.e., occurrences that are unexpected or cannot be predicted in advance by either of the parties and eventually release the parties from their contractual duties, may have an impact on the execution of these obligations. The concept of frustration is a "doctrine" of a specific situation of contract discharge due to an inability to execute it. The term frustration is not defined under the Indian Contract Act of 1872 (the "Contract Act"). The frustration of purpose, as defined by Black's Law Dictionary, is "the theory that if a party's primary purpose is significantly thwarted by unforeseen changing circumstances, that party's responsibilities are discharged and the contract is deemed ended." In India, courts are more nuanced:

“The phrase ‘contract frustration' is an elliptical term. The wider and more correct phrase is "frustration of the adventure or of the business or practical aim of the contract." This concept is a tool for reconciling the norm of absolute contracts with a specific exception that is required in certain circumstances in the interest of justice. The theory falls under the ambit of Section 56 of the Contract Act since it dissolves the contract due to the supervening impossibility or illegality of the agreed-upon act. A contract is also considered frustrated under Section 32 when the condition on which the contract is based is not met or cannot be met due to impossibility (paragraph 1 and 2 of section 32, respectively). Nonetheless, the theory is connected with section 56 in Indian law. Section 32 only applies when contracts are discharged and parties are relieved of their duties in accordance with the provisions of the relevant contract. Section 56 applies when contracts are discharged and parties are relieved of their duties as a consequence of subsequent impossibility caused by external forces and causes. When analyzing the doctrine's legal implications, the courts have used the phrases "frustration" and "impossibility to perform" interchangeably. 7 To establish whether the intervening incident rendered the performance “impossible” under section 56, it is necessary to set out several considerations used by the courts, including the recently created “multifactorial approach.” Courts in India and England have recognised a variety of reasons that may or may not render a contract unenforceable. The question of whether the supervening event is a frustrating event is one of degree, that is, how significantly the supervening event has harmed performance. This paper mainly focuses on doing an in-depth analysis of the Doctrine of Frustration of Contracts in India and having a different perspective on this important topic.

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RESEARCH OBJECTIVES:

- To analyze the inception and origins of Doctrine of Frustration.
- To study the grounds on which the Doctrine of Frustration can and cannot be invoked.
- To study the aftereffects or aftermath of the Doctrine of Frustration in the legal context.

RESEARCH QUESTIONS:

- What are the origins of the Doctrine of Frustration?
- Can commercial difficulty be deemed as impossibility?
- What are the conditions required to invoke the Doctrine of Frustration?
- What are the grounds on which the Doctrine cannot be invoked?

RESEARCH METHODOLOGY:

The author in this research project has referred to secondary sources of data like journal articles, research papers and case laws. Though the author has also referred to primary sources of information such as books, the major part of the data of this research paper comes from secondary sources. The author has done critical thinking and has analyzed the case lawson different parameters. Therefore, the research methodology used in this paper is analytical. Primary sources of data could not be used due to lack of time.

HYPOTHESIS:

"Commercial Difficulty in the Doctrine of Frustration may be deemed as impossibility"

REVIEW OF LITERATURE:

- **M. P. Ram Mohan, Promode Murugavelu, Gaurav Ray and Kritika Parakh (2020): Doctrine of Frustration under Section 56 of the Indian Contracts Act[1]**

The performance of obligations under a contract may be hindered by unexpected supervening events, leading to contractual uncertainties. The doctrine of frustration paves the way for a just consequence of such an unfortunate event, which has happened without any fault of the contracting parties. The doctrine fills the void in a contract regarding supervening events, based on principles of fairness and equity. Considering the large implications on the obligatory and

[1] M. P. Ram Mohan, Promode Murugavelu, Gaurav Ray and Kritika Parakh (2020) : Doctrine of Frustration under Section 56 of the Indian Contracts Act, 1872

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binding nature of a valid contract, it becomes important to analyse the factors that guide the courts to determine its application. Unlike common law, the Indian Contract law explicitly incorporates the doctrine of frustration under section 56 of the Contract Act. However, the evolution ofthis doctrine in India has been greatly influenced by English law. This paper attempts to restate the law on the doctrine of frustration as applicable in India.

❖ **S.S Rana and Co. Advocates (2017), "India: Frustration of Contracts"[2]**

This paper authored by S.S Rana and others studies in detail the concept of the Doctrineof Frustration and its implications. The doctrine of frustration comes into play when a contract becomes impossible of performance, after it was made, on account of circumstances beyond the control of parties. Contracts entered into between parties impose contractual obligations on both the parties for the performance of such contract.However, many times unforeseen or unforeseeable supervening events occur which make the performance of the contracts impossible due to no fault of either party. In suchcases, the contract is said to be frustrated. Frustration of contract results in involuntaryextinction of the contractual obligations of both parties and consequently, the parties are relieved from their rights and liabilities.

❖ **Varun Singh, "Frustration of Contracts: The Indian Perspective"[3]**

This paper written by Varun Singh analyses the doctrine of frustration from the Indian perspective with the help of Indian and International case laws. The doctrine comes within the purview of section 56 of the Contract Act as it discharges the contract by reason of supervening impossibility or illegality of the act agreed to be done. A contractis also frustrated under section 32 when the condition, on which the contract is contingent, is not fulfilled or cannot be fulfilled because of impossibility (paragraph 1 and 2 of section 32, respectively). Nevertheless, the doctrine under Indian law is associated with section 56. As section 32 only applies when contracts are discharged and parties absolved of their obligations as per terms already contained in the relevantcontract. Section 56 applies when contracts are discharged and parties absolved of theirobligations as a result of subsequent impossibility due to outside forces and factors.

[2] S.S Rana and Co. Advocates (2017), "India: Frustration of Contracts
[3] Varun Singh, "Frustration of Contracts: The Indian Perspective"

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❖ **Aditya Mehta, Arjun Sreenivas and Sameer Bindra (2020), "Frustration (of Contracts) in the times of SARS Cov. 2[4]**

This article authored by Aditya Mehta, Arjun Sreenivas and Sameer Bindra on Frustration of Contracts throws light on the impossibility to perform contracts at the time of difficult situation such as the Covid-19 Pandemic. On March 11, 2020, the World Health Organization (WHO) declared the novel coronavirus disease a pandemic.On the same day, the Government of India imposed visa and other travel restrictions. Soon thereafter, many states in India declared a 'lockdown', an emergency measure [under the Epidemic Diseases Act, 1897 and the Disaster Management Act, 2005 ("Disaster Management Act")] to prevent and contain the spread of SARS-CoV-2, andalso issued prohibitory orders under Section 144 of the Code of Criminal Procedure, 1973. A stricter lockdown was then imposed by the Central Government, which will presently remain in effect till May 3, 2020. During the lockdown, whilst certain commercial activities have been classified as essential and are permitted to continue operations, subject to following preventive measures (including social distancing), several others remain stalled and suspended.

❖ **G.M. Sen (1972): Doctrine of Frustration in the Law of Contracts[5]**

The performance of obligations under a contract may be hindered by unexpected supervening events, leading to contractual uncertainties. The doctrine of frustration paves the way for a just consequence of such an unfortunate event, which has happened without any fault of the contracting parties. The doctrine fills the void in a contract regarding supervening events, based on principles of fairness and equity. Considering the large implications on the obligatory and binding nature of a valid contract, it becomes important to analyse the factors that guide the courts to determine its application. Unlike common law, the Indian Contract law explicitly incorporates the doctrine of frustration under section 56 of the Contract Act. However, the evolution ofthis doctrine in India has been greatly influenced by English law. This paper attempts to restate the law on the doctrine of frustration as applicable in India.

[4] Aditya Mehta, Arjun Sreenivas and Sameer Bindra (2020), "Frustration (of Contracts) in the times of SARS Cov. 2

[5] G.M. Sen (1972): Doctrine of Frustration in the Law of Contracts

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CHAPTER-2

The Origin of the Doctrine of Frustration

This chapter starts the research analysis of the paper. The section of the study introduces the reader with the origins of the Doctrine of Frustration that analyses the **Objective 1** of the paper i.e., Analyzing the Inception and Origins of the Doctrine of Frustration.

The doctrine's origins may be traced back to a Queen's Bench decision in the case of *Taylor v Caldwel*[6]*l* in England in 1863. Prior to this decision, the rule governing commercial obligations in both Roman Law and Common Law was highly strict. Unforeseen occurrences that made the performance impossible or more onerous were not accepted as a justification for non-performance. As the theory has evolved, “loss of object,” “radical change in the obligation,” “implied condition,” and the necessity to find a “just and reasonable” remedy have become recognised reasons for excusing contract performance, as detailed below.

Prior to Caldwell, it was assumed that the parties might have included such provisions in their contract if they so desired. This notion of “absolute contracts” was reinforced in the well-known case of *Paradine v Jane*[7], in which a lessee was held obliged to pay rent arrears even though he was evicted as a foreign enemy. According to the rationale, “when the party by his own contract establishes an obligation upon himself, he is obligated to make it good, if he may, notwithstanding any accident by inescapable necessity, because he may have guarded against it by his contract.”

Caldwell softened the rigour of Common Law. In one example, an opera house was hired for concert purposes, but it was destroyed by fire before the event. In this case, Blackburn J developed the theory of "implied condition" or "implied term," holding that "in contracts in which the performance is dependent on the perpetuation of a specified person or group of people, a criterion is implicit that the unlikelihood of performance emerging from the human or thing's perishing will henceforth excuse the performance."

The courts implemented this implicit condition from the start since the parties had agreed to it, although unconsciously, when they signed the contract. This idea was heavily criticized since the suggested requirement was nothing more than a court-created fiction. The argument to the implicit condition hypothesis was based on the parties' intentional nature of risk in not

[6] Taylor v Caldwel [1863] 3 B&S 826
[7] Paradine v Jane [1647] EWHC KB J5

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integrating any conceivable intervening conditions in their contract, implying that no matter of an exemption clause could ever arise. In *National Carriers Ltd v Panalpina (Northern) Ltd*[8], the House of Lords dismissed the implicit requirement argument, stating that "the problem of the implicit term hypothesis is just that it produces once more the dark shape of the overbearing spectator encroaching on the parties at the time of agreement." The growth of the theory through the aforementioned ideas demonstrates the courts' efforts to provide a more pragmatic solution to the management of performance inability. Without delving into the merits, the Law Reform (Frustrated Contracts) Act 1943 defined many of the rights and obligations of parties to frustrated contracts in the United Kingdom. This Act was passed in response to the historic decision of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[9], in which the House of Lords overturned Chandler v Webster and determined that advance payment was recoverable if the payee had acquired nothing before the frustrating occurrence.

Analyzing the Doctrine of Frustration under the Indian Contract Act, 1872

The concept of frustration is well established in India under section 56 of the Contract Act, which eliminates the need to rely on various theories to explain the doctrine's applicability. It establishes a positive norm pertaining to contract frustration and so does not allow the subject to be resolved by the parties' intentions or the court's choice of theory to be used. The court grants remedy under this provision on the basis of subsequent impossibility when it discovers that the entire purpose or foundation of a contract was thwarted by the intervention or occurrence of an unforeseen event or change of opinion outside the control of the parties.

- Section 56 of the Indian Contract Act stipulates that a commitment to perform an act that becomes impractical or illegal is null and void.The renowned and pivotal judgement of *Satyabrata Ghose v Mugneeram Bangur and Co.*[10] provides a comprehensive interpretation of the provision. In this case, therespondent firm agreed to sell the plaintiff a parcel of property after it had been developed by building roads and drainage. However, a section of the scheme's territorywas requisitioned for military uses. While applying the concept, the Supreme Court determined that the requisitioning of the region had not significantly hampered the fulfilment of the contract overall, and

[8] National Carriers Ltd v Panalpina (Northern) Ltd [1981] 1 All ER 161
[9] Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122
[10] Satyabrata Ghose v Mugneeram Bangur and Co Satyabrata (n 1) [9]

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thus the contract wouldn't become impossible within the ambit of Section 56.

- The word "impossible" has not been used in the sense of literal or physical impossibility. The completion of an act may not be literally impossible, but it may be impractical and ineffective in light of the aim and objectives that the parties had in mind. As a result, if an unfavourable occurrence or change in circumstances completely upends the backbone upon which parties based their agreement, it is quite likely that the offeror will find it difficult to do the deed that he pledged to perform.

The question here is how far the unmistakable deviation from the rule of literal interpretation can be reconciled with the design of section 56. The second paragraph ofSection 56 addresses two conditions: *(I) impossible; (ii) illegality as a result of an incident that the promisor could not avert.* While the second criterion clearly states that the illegality must emerge from an occurrence within the control of, and as a result ofthe fault of, the parties, the first criterion does not.

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CHAPTER-3

Grounds on which Frustration of Contracts can be invoked

This chapter serves the **Objective 2** of the research project i.e., understanding the grounds on which frustration can and cannot be invoked.

Physical destruction of the subject matter, loss of the object, subsequent illegality to execute, delay, death or incapacity of a party in a contract requiring physical performance, and so forth are among the reasons that bring the requirements of section 56 into play. An incident may be affected by one or more of these variables. The following are among the most widespread and important factors pertaining to frustration of contracts:

1. When the Contract's Subject Matter is Physically Destroyed

The destruction of the specified subject matter required for the contract's execution will declare the contract null and void. This category also includes the seminal case Caldwell, which established the concept in the United Kingdom. This element is heavily weighted ininstances where the industrial premises where the equipment was to be put is set afire, or when a wall of the theatre collapses due to severe rain and the contract is rendered null andvoid. Even when the subject matter is not totally destroyed but is greatly damaged, the contract can be terminated.

It was determined in one example that even if the cargo of dates was sold on the market forother uses, it lost its commercial character when it sunk and was contaminated by water and sewage. As a result, the cargo owner's obliged to pay the freight was discharged. The items destroyed must be exactly the subject matter of the contract; hence, if the contract was not limited to those specific products, it may not be dismissed. A contract of agency tosell products made by defendant was not null and void whenever the facility destroyed because of the fact that the contract was not limited to products produced by defendant at that specific plant.

2. Legal Changes that Lead to Subsequent Illegality

It is assumed that the parties are willing to contract in accordance with the law in effect atthe time of making the contract. Nevertheless, a change in the legislation or in the legal situation influencing a contract and preventing the contract's execution is a well-establishedcause for frustration under Section 56. Unless expressly specified in the contract, the term"law" may

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include foreign law. The Supreme Court ruled in Energy Watchdog that, unlessthe contract states otherwise, “this would be true as a general statement of law if performance of a contract is to be done in a foreign country, what law would be relevant would be foreign law,” and that if the performance has become illegal under foreign law, the contract will be discharged. To discharge the contract, the change in the law must be such that it strikes at the heart of the contract rather than just suspending performance underit.

The Supreme Court's decision prohibiting stone crushing activities may have caused such a change in legislation, and while the contract required the provider to supply crushed stones from its own stone crusher, the change in legal status rendered it impossible to furnish crushed stones. The Government's Import Control Order of 1955 included a positive restriction prohibiting the sale of imported products, making it impossible for appellant toprovide chicory of a certain variety to the respondents. Furthermore, any government restriction order that makes performance illegal will render the contract null and void.

3. Loss of Object

As previously stated, the term "impossible" in section 56 of the Act does not refer to actualor literal impossibility. The actual execution of a contract may be feasible if it has becomeobsolete in relation to the goal and purpose of the parties due to an unfavourable event or change in circumstances. The seminal case of Krell v Henry illustrates this; despite the factthat the room could be leased, the court deemed the contract null and void since the objective of leasing the space (viewing the coronation parade) was lost.

As a result, the contract's object or purpose may also be lost due to the non-occurrence of an expected event or the absence of a condition of things. A contract in which the purchaser's intention was to sell the products on his own terms to a person of his choosingwas thwarted by an order issued by the General Manager authorizing the district officer to propose the person/persons to whom the plaintiff had to sell the items.

However, the court would not accept a party’s plea for impossibility of contract if, even after the supervening event, the main objective of the contract does not sound redundant and there is still a chance of performing the contract with the original or the main intent ofthe parties albeit not literally in accordance with the language.

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4. Inability to Perform the Contract due to Death, Delay or Incapacity

Contracts are also frustrated as a result of delays and laches. Though determining whethera contract has been frustrated by an occurrence or change in circumstances that creates an unanticipated delay in its execution is sometimes challenging. The delay must be so significant and of such a kind that it completely disrupts the basis of the contract and the economic aim that the parties had in mind. Such a delay must be so unusual in terms of its source, consequences, or predicted length that it could not have been reasonably anticipatedat the time of contracting.

When the delay is over, fulfilling the duties will not achieve the goal that both parties to the contract had in mind when they entered into the deal. Such a delay will drastically alterthe conditions, making it difficult for the parties to fulfil their initial responsibilities. Therecan be no frustration if the delay was within the business risks assumed by the parties and did not frustrate the commercial objective of the contract. In one example, a delay in cargo shipment did not disappoint the charter-party because such a delay was explicitlyanticipated in the contract's conditions.

Grounds on which Frustration of Contracts cannot be invoked

The doctrine's applicability is constrained by contractual restrictions as well as the ideals of fairness and justice. It is not used in instances when the causes do not amount to contract dissatisfaction, as described below.

1. Risks that are Foreseeable or Inherent

A contract may openly or implicitly include some inherent or predictable hazards that mustbe addressed when applying the concept. Its applicability cannot be attempted in instanceswhere the parties have or should have recognized the danger of a supervening event occurring because such risk has been voluntarily accepted by the parties. Certain hazards are thought to be inherent in contracting. In one example, a common carrier was required to secure the protection of cargo against all external factors, save acts of God or state adversaries.

The big issue is whether the contract includes a provision for such occurrences. Only whenthe supervening occurrence is one that any person of ordinary intelligence would view as likely to

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occur, or the contingency is one that the parties might fairly be understood to haveforeseen as a real possibility, would foreseeability support the assumption of risk- assumption. Similarly, the contract's design is important in deciding whether the omissionto include a provision for unanticipated circumstances means that the risk should be sharedby both parties.

2. When the Performance of the Contract Becomes Onerous

In the process of conducting the performance, a party might encounter unexpected occurrences, such as an abnormal rise or decrease in prices, a rapid depreciation of the currency, any unforeseen impediment to execution, and so on. However, these do not, on their own, undo the deal that has been struck. The Supreme Court has stated that courts donot have the broad authority to release a party from obligation simply because performanceof the contract has become onerous due to an unexpected change of events. The contract ceases to bind only when a review of the terms of the contract in light of the circumstancesthat existed at the time it was created reveals that they never committed to be bound in a fundamentally different scenario that had unexpectedly developed. As a result, a contract is not discharged simply because it is difficult or onerous to fulfil. The difficulty mentioned in section 56 is more than just a commercial impossibility. Any economic circumstance, regardless of its gravity or impact, cannot be equated with impossible. There is noimplication of “commercial” impossibility.

Treitel underlined that a simple price increase that makes the contract more expensive to fulfil does not constitute a "hindrance." For example, in a contract, the phrase "hinders delivery" should not just refer to a price increase, but to a severe impediment to the contract's overall performance. The burdensomeness of the doctrine is not a required element; the actual criteria is the difficulty of fulfilment. The reduction in payment makesthe contract more onerous, but not impractical or impossible. *M/s Alopi Parshad & Sons Ltd v Union of India*[11], a frequently cited Supreme Court decision, ruled that the executionof a contract is never discharged just because it becomes onerous to one of the parties. In this instance, the court denied the rate augmentation request on the grounds that performance at the contract's reduced rates was not practicable owing to the continuing ofWorld War II hostilities.

3. Self-created Frustration or Frustration that might have been avoided

A party is exempted from non-performance if it can demonstrate that “(1) *the non- performance*

[11] M/s Alopi Parshad & Sons Ltd v Union of India (1960) 2 SCR 793

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was caused by a hindrance beyond its control, (2) the hindrance could not have been reasonably predicted at the time of contract, and (3) it could not avoid or overcome the impediment or its consequences. A party is not permitted to rely on its own fault to absolve itself of contractual obligation."

The burden of demonstrating that the dissatisfaction was self-inflicted falls on the party that asserts it. A party is not needed to establish affirmatively that the occurrence was not caused by him. In one occasion, the charter-party performance was rendered impossible due to a severe explosion in the boiler of the rented ship. The ship's owners were not obligedto establish their innocence, but the side asserting self-inflicted frustration bore the burdenof evidence.

4. Executed Contract

When an obligation that has yet to be completed becomes impossible or impractical to perform, the theory of frustration comes into play. The concept can only apply to executorycontracts, not completed contracts or transactions that resulted in a demise in praesenti. Toillustrate, a division bench of the Delhi High Court used the example of a merchant purchasing items from a manufacturer and delivering agreed-upon amounts with partial payment. If the market was saturated with cheaper imported products as a result of the change in import policy, the retailer could not allege frustration, forcing the Court to lowerthe price and release him from the responsibility to pay the remainder of the sale consideration to the wholesaler. A completed conveyance is distinct from an executory contract, and a completed transfer cannot be nullified by subsequent occurrences. Section 56 applies to a lease agreement but not to the lease deed because the lease deed is a completed transfer. The lease deed takes the place of the lease agreement as soon as it is completed.

5. hen the Foundation has not been significantly damaged

As it has been established, the theory of impossibility, which is founded on justice and common sense, cannot be used to undermine the sanctity of contract. In one case, the Supreme Court ruled that if the leased property is not significantly destroyed or rendered permanently unsuitable, the lessee cannot avoid the lease on the grounds that he is unable to utilise the land for the purposes for which it was let to him. In another case, the SupremeCourt ruled that the contract is not null and void if there is still time to reapply for approval.To maintain the defense of impossibility, considerable damage of the contract's foundationis required. This concept does not provide relief if a party fails to demonstrate how two moderate cyclones damaged the

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fundamentals of the contract.

The above-explained elements contributing to and not amounting to frustration are fundamentally covered by Indian law on the theory of contract. As previously stated, this concept applies when the contract is silent on the implications of an unforeseen incident. A provision dealing with the repercussions of any occurrence that may impede performance may be included in a contract.

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CHAPTER-4

Aftermath of the Doctrine of Frustration and Observations of the

Chapter 4 of the research project studies the aftermath or the aftereffects of the doctrine of Frustration and thus serves the **Objective 3** and the Hypothesis of the of the study.

It is a well-established legal concept that if a contract is frustrated, the principle of restitution under Section 65 of the Contract Act[12] applies, and the consideration received must be restored. Any party who has benefited from a frustrated or void agreement or contract is obligated to return it to the person from whom he benefited. In addition, any consideration, part-payment, or earnest money received in advance for the execution of the contract that has now become void must be returned. For example, when a building contract was terminated due to a limitation, the Supreme Court ordered a return of the deposit plus interest. Similarly, when the property was transferred to the state with the passage of the Calcutta Thika Tenancy Act in 1949[13], the Supreme Court ordered a return of the consideration already paid, plus interest. If a party spent expenditures that it was not required to incur under the contract, it is not entitled to reimbursement for those expenses. After the above study on the Doctrine of Frustration, the author draws a number of observations that have been stated below:

Commercial Difficulty should not be deemed as Impossibility

- For example, when a construction contract was cancelled owing to a restriction, the Supreme Court ordered the deposit plus interest to be returned. Similarly, when the property was handed to the state under the *Calcutta Thika Tenancy Act in 1949*, the Supreme Court ordered a refund of the consideration already paid, plus interest. If a party incurred expenses that were not required under the contract, that party is not entitled to repayment for such expenses.
- A key consideration is the nature of the intervening event, as well as the parties' reasonable and objectively ascertainable projections of future performance under the new conditions.
- Because the subject-matter of the doctrine of frustration is contract, and contracts are about risk allocation, and risk allocation and assumption is not simply a matter of express or implied provision, but may also depend on less easily defined matters such

[12] Section 65 of the Indian Contract Act, 1872
[13] Calcutta Thika Tenancy Act, 1949

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as "the contemplation of the parties," application of the doctrine can be difficult.

- In such cases, the radically different test is critical: it informs us that the doctrine should not be invoked lightly; that a single incident of expense, delay, or onerousness is insufficient; and that there must be a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

It is apparent that there is a high bar for demonstrating that a contract has been breached. To (a) avoid going down this road and (b) be able to establish a case for contract dissatisfaction, if necessary, it is critical to be as proactive and careful as possible from thestart. The current crisis is exceptional, and while firms in many industries may benefit fromrelaxation of some duties, this cannot be assumed on an inter-party contractual level because parties on the receiving end of force majeure or frustration invocations would alsobe adversely harmed.

[Hypothesis Analysis: By analyzing and studying the above points, it can be inferred that the hypothesis we assumed in the beginning of the study is proved wrong as commercial difficulty cannot be deemed as impossibility.]

Suggestions and Recommendations

There are some steps that can be taken in order to avoid the delay or difficulty in performing the contractual obligations. These steps and recommendations have been given below in this section of the paper.

- ❖ If the performance issues are still in their early stages, consider contacting the counterparty and starting without prejudice talks for an extension of time for performance of obligations, suspension of obligations, or even contract revision.
- ❖ Notify the counterparty in writing of any circumstances that may prohibit you from executing your duties under the contract or cause them to be delayed. Set out the circumstances in full and indicate that these issues (arising from the outbreak of SARS-CoV-2 or the actions taken in response to it) are preventing you from fulfilling your duties, rather than any other ancillary considerations.
- ❖ Ensure that all available measures toward performance have been taken and continue to be taken, as well as that all viable alternatives have been considered. Include these in your contact with the counterparty, and if no other forms of performance exist, indicate this as well.

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- Provide frequent updates to the counterparty in the manner described above to ensure that the record is clear in terms of diligence and mitigation on your part.
- If there are any additional contract duties that can still be completed remotely (submission of reports and accounts, backend technical assistance, etc.), ensure that such responsibilities are met.
- If your company is unable to operate in India during the shutdown time and the contract demands delivery of products or execution of services during this period or soon thereafter, this obviously may not be achievable. If the above-mentioned without prejudice conversations were unsuccessful, you might write to the counterparty formally seeking an extension of time for completing your contractual duties, as well as a waiver/relaxation of the liquidated damages clause (if applicable) in such a circumstance. If your requests are denied and you want to argue that the contract is rendered null and void due to impossibility of performance, the fact that you made such requests and were denied may place you in a stronger position to defend your position and demonstrate impossibility.
- Examine the contract's dispute resolution process as well as the controlling legislation (if any). Arbitration must be called in line with the arbitration clause and/or the *Arbitration and Conciliation Act, 1996*,[14] or other institutional norms that have been defined in the contract if arbitration is the dispute resolution method. If there is no arbitration provision and the case qualifies as a business dispute under the *Commercial Courts Act, 2015*[15], pre-institution mediation must be completed before any proceedings may be filed, unless urgent interim relief is requested.
- Examine your insurance arrangements (if any), to see if such scenarios are covered by your policy (such as business interruption insurance). If such events are covered, insurance claims must be filed on time and in accordance with the policy's criteria.
- If it is financially feasible, consider renegotiating the contract conditions. This can be accomplished by modifying the contract to add, delete, or change terms/clauses (such as time for performance or fees), therefore eliminating the risk of contract frustration. Contract amendments are often carried out by completing a signed addendum.

[14] Arbitration and Conciliation Act, 1996
[15] Commercial Courts Act, 2015

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CHAPTER-5

Conclusion of the Study

The doctrine of frustration as mentioned under Section 56 of the Indian Contract Act,[16] offersa way out for a party where performance has become impossible due to any supervening circumstance that is not their fault. Under certain altered conditions, the application of the concept calls into doubt the sanctity of the contract. English courts developed numerous theories to justify the doctrine's application under specific situations, but Indian law, by codifying this concept in section 56, eliminated the necessity for developing and applying theories to justify the doctrine's use. This Paper discusses in detail the factors and situations that courts examine when evaluating the application or non-applicability of Section 56. Situations in which the subject matter of the contract has been destroyed; performance has become illegal; the reason for entering into the contract has been lost; performance has been excessively delayed; or the performer has died or is incapable of performing are examples of factors that would attract the provisions of section 56. While there have been several instances of Indian courts incorrectly applying section 56 to cases of contingent contract, if the factors and circumstances amounting to contract frustration are dealt with in a contract, such a contract should attract the provisions of Section 32[17] rather than Section 56. However, if the contract's provisions did not anticipate the degree of the factor and circumstances that really interfere with the execution of the relevant contract, then such intervening factors and circumstances may discharge the contract despite the express clause under Section 56. By including well-drafted and precisely stated clauses in the contract, such as a force majeure clause, the contracting parties can avoid the realm of uncertainty induced by any future occurrence. Such clauses may distribute the risks of any unforeseen incident among the parties. However, the scope of such a provision will decide whether it includes the supervening event; otherwise, Section 56 may be required. The clause's interpretation to establish its scope is primarily driven by business and market practices. The restricted application of both the doctrine and provisions such as force majeure clauses favours the enforcement of rights and duties under a contract, which is critical to preserving the confidence of contract parties.

While the theory of frustration has its roots in common law, its formulation in section 56 and evolution under Indian law is notable and consistent.

[16] Section 56 of the Indian Contracts Act, 1872
[17] Section 32 of the Indian Contracts Act, 1872

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1. Section 56 of the Indian Contracts Act, 1872
2. Section 32 of the Indian Contracts Act, 1872
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