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"APPLICATION OF FORCE MAJEURE TO THE LAW OF LIMITATION"

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ABSTRACT

The *Force Majeure* and Hardship provide a legal instrument to deal with the effect of unexpected future events and unforeseen changes in circumstances, particularly when the contracts are long-termed. Looking at the current and unprecedented dimensions, it seems that the post-pandemic period would get burdened with the litigations dealing with these two concepts. Such an epidemic has occurred for the first time in the history of mankind which led the entire world at standstill, and therefore, measures not only for tackling such a situation but also for dealing with its aftermath are necessary. A principle of law (*Force Majeure Clause*) which was almost forgotten or was often overlooked since a long period has now started gaining importance, rather it can be said that the principle which was an exceptional legal remedy has now become a normal law and is referred to on the regular basis. Due to the nationwide lockdown on account of COVID 19 pandemic, the performance of the contract is hindered because either the contracting parties are unable to fulfill their contractual obligations or such is delayed until the situation returns to the state of affairs that existed pre-pandemic. And this is where the parties rely upon the force majeure clause to conclude such delay or non-performance of the contract. But the difficulty arises when such a clause is absent in the contract. The law exempts the performance of the contract upon the frustration of the contract. But while considering the application of force majeure clause, one has to carefully understand whether the contract is indeed frustrated or not because sometimes despite the frustrating event, the object and purpose of the contract is capable of being performed substantially. These are the few aspects that the article intends to through light upon.

INTRODUCTION

The Force Majeure (meaning superior force)[1] clause is frequently present in contracts but is often overlooked. According to the current situation, wherein the entire world is facing an environmental crisis along with the coronavirus pandemic known as (COVID 19), makes the analysis of this clause's applicability apposite because something bewildering and exceptional circumstances has occurred. Therefore, unusual consequences have followed from it. However, negligence of parties or commission of wrong, predictable natural events is outside the ambit of the Force Majeure Clause. Before studying the history or evolution of the doctrine and its application to the law of limitation, it is imperative to understand the intricacies of the document.

EVOLUTION OF THE DOGMA OF FORCE MAJEURE

In **Lebeaupin v. Crispin**, *force majeure* was held to mean all the circumstances beyond the will of a man, which is not in his power to control.[2] Therefore, it includes *vis majors* like floods, earthquakes, epidemics, tsunamis, wars, and strikes. Nevertheless, issues regarding what could legitimately be encompassed as "force majeure" have always arisen and Judges have agreed that strikes, breakdown of machinery, which, though normally, are not included in "vis major" are included in "force majeure". However, there are several cases where financial crises or financial crashes were denied by the courts from being included as force majeure. On analysing the choices on this subject it's clear that where reference is formed to "force majeure" the intention is to save lots of the performing party from the results of anything over which he has no control.[3]

Therefore, the rudiments of force majeure are that the event must be beyond the reasonable control of the affected party and must affect the ability to perform contractual obligations by dint of prevention, impediment or hindrance by the event. Furthermore, the affected party must have taken all reasonable steps to avoid or mitigate the event or its consequences. An illustration has been provided for a further understanding of the concept. A's entry in his own

[1] BLACK'S LAW DICTIONARY 718 (9th ed. 2009).
[2] (1920) 2 KB 714 at 719.
[3] Gokaldas Images Ltd. And Ors. v. Union of India And Anr., (2005) 99 ECC 523 para 17.

rental office is currently prohibited due to the lockdown. Could 'A' take shelter under this principle? Since his entry has been hindered and that is beyond his reasonable control also such a consequence could not be prevented by him by the reason of such lockdown being a 'law' for the time being in force (within the scope of Article 13 of the Constitution of India). Therefore, under such a situation, 'A' could claim a rental waiver or suspension or postponement of the performance of the contract via a notice sent in this behalf to his landlord. This ensures that the due process of law has been followed when such a notice is issued to the landlord and his reply is received thereof. However, considering the decision in **Satyabrata Ghose v. Mungneeram Bangar & Co.**, The court concluded that a contract isn't frustrated merely for the circumstances during which it had been made are altered which the courts haven't any general power to absolve a celebration from the performance of its a part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.[4] However, it is wrong to assume that the court would act sympathetically towards the non-performing party and rule in their favor because it is necessary to prove that the event was unforeseeable and was reasonably mitigated but the consequences could not be still avoided. Assuming, a contract was entered into on the 01st of March 2020, the parties cannot claim protection under this clause because by March, epitomizing the situation in Italy, every reasonable or prudent human tended to foresee the event that would affect the performance of the contract. But if it was made in March 2019, then probably this provision would come to the rescue, provided that the force majeure clause was included in the contract. And in case of absence of such clause, perhaps one could find shelter under the doctrine of frustration stipulated by the Indian Contract Act, 1872, provided the party claiming frustration shall show the direct correlation between the non-performance and the said event i.e. the COVID 19 pandemic and the lockdown and also that the non-performance was not due to any other reason such as lack of funds or economic crisis. Therefore, the consequence of the absence of the act of god clause is that the burden of proof shall be much above if the act of god Clause was present.

To support the illustration, a judgment's reference is given - in the case of **Energy Watchdog v. Central Electricity Regulatory Commission**[5] the judges were of the view that neither was the basic basis of the contract dislodged nor was any frustrating event present, apart from an increase within the price of coal, and where alternative modes of performance were available,

[4]Energy Watchdog v. Central Electricity Regulatory Commission (2017) 14 SCC 80 (India).
[5] Ibid 4.

albeit at a higher price. This, therefore, doesn't lead to the contract, as a whole, being frustrated. Similarly, here, the rental contract can be postponed instead of terminating it as a whole, awaiting the resumption of the situation which was prevalent before the attack by the virus. It is also pertinent to note where the lockdown does not frustrate the object and purpose of the contract but merely leads to delay or inconvenience to the contracting parties, the parties are not capable to take shelter under Section 56 of the Indian Contract Act.

Also in the **Satyabrata** case[6] (*supra*), due to the absence of definite period within which the construction work was to be finished, the court considered the temporary requisition of land by the government as a ground not rendering the contract impossible as a whole because when the contract was made, there existed conditions of war prevailing which indicates that the parties had enough foresight at the time of making the contract. Consequently, the requisition would only delay the construction work, but it certainly doesn't make it impossible. This shows that the courts are vigilant in ensuring that the non-performing party does not claim defense under this clause at the disadvantage of the other party, where the event merely leads to delay without rendering such performance impossible.

APPOSITENESS OF THE DOCTRINE OF FORCE MAJEURE IN INDIA

France and China have the provision of force majeure codified but unfortunately, India and England do not have any codified provision for this doctrine. Nonetheless, the doctrine is embodied under Sections 32 and 56 of the Indian Contract Act, 1872 which deal with contingent contracts and frustration of contracts respectively, wherein happening or non-happening of an event renders the performance of the contract impossible. The occurrence of an act of god event protects a party from the liability arisen because of the party's failure to perform a contractual obligation. Here, the motive is to save the performing party from being punished for an act wherein he exercised zero control. Therefore, it acts as an exception to what would otherwise amount to a breach of contract. But an imperative *caveat* is that the parties cannot invoke this clause while depending upon their acts or omissions. Furthermore, such an event must be a legal or physical restraint and not merely an economic one[7] which has already been stated earlier.

[6] Satyabrata Ghose v. Mugneeram Bangur & Co. (1954) AIR 44.
[7] Yrazu v. Astral Shipping Company (1904) 20 TLR 155; Lebeaupin v. Crispin (1920) 2 KB 721.

Here, there seems to be no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because no party thinks or possibly has any intention with regards to any such event. This is positive law and intrinsically comes within the purview of Section 56 of the Indian Contract Act. However, the burden of proving its existence lies on the party who asserts such a defense.

As the doctrine of frustration does not apply on the parties who themselves agreed to an implied clause which operated to release them from the performance of the contract, the court can provide relief on the basis of subsequent impossibility when it finds that the unabridged purpose or the base of a contract was frustrated by the intrusion or occurrence of an unexpected event or due to the change of circumstances which was beyond what was envisaged by the parties while entering into the Agreement.[8] Let us say for example that, 'A' is a manufacturer of certain goods and 'B' is the owner of a shop where such goods are sold. On the 18th day of February 2020, 'A' contracts to deliver a certain quantity of goods to 'B' by 30th April. But later on, due to the lockdown which was enforced by the Prime Minister from 24th March to 14th April, successively gets extended by 3rd May. Under these circumstances, 'A' is unable to make the delivery in compliance with the contracted date, and therefore, in the absence of the doctrine of frustration or force majeure clause, 'A' would become liable for the breach of contract which would inflict great injustice to 'A'. Hence, to save the genuine and *bona fide* party from such grave injustice, the theory of frustration of contract comes to rescue for the reason that occurrence of such force majeure event *dehors* the contract.

IS THE CORONAVIRUS PANDEMIC A FORCE MAJEURE SITUATION?

This question becomes crucial while invoking the force majeure clause. On 19th February 2020, the Finance Ministry vide Office memorandum[9] declared the present pandemic as a natural calamity and within the ambit of the term 'force majeure'. Consequently, all those contracts with force majeure clause have been excused for its non-performance and those not including such a clause would have to prove frustration under Section 56 of the Indian Contract Act. In the current situation, due to lockdown, all the work is in dilemma and a stalemate situation

[8] The Naihati Jute Mills Ltd v. Hyaliram Jagannath (1968) AIR 522.

[9] Office Memorandum No. F18/4/2020-PPD, Government of India, Ministry of Finance, Department of Expenditure Procurement Policy Division.

prevails. However, this does not excuse the non-performance by the parties entirely, but merely suspends it for the period for which such events extend. The notification also stated that if the performance is prevented or delayed due to such events for a period exceeding ninety days, then either party may cancel the contract without any financial repercussions.

SUPREME COURT ON CURRENT PANDEMIC AND LAW OF LIMITATION

The Supreme Court of India considering the gravity of the situation took up *suo moto* cognizance and given the difficulties faced by the litigants and lawyers in the filing, passed an order stating that *a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not shall stand extended with effect from 15th March 2020 till the further order of the court*.[10] On 6th May the Honourable Supreme Court ordered that in cases of expiration of limitation period after the 15th day of March, the limitation stands suspended until the lockdown is lifted in the jurisdictional area and shall extend for 15 days after such lifting.[11]

CONCLUSION

The expression *Salus Populi Suprema Lex Esto* is the paramount concern of all the governments throughout the world under the contemporary situation and after analyzing this clause, it can safely be concluded that the force majeure is a weapon for general welfare which not only benefits the non-performing party of a contract but also ensures that the other party does not suffer a loss due to the occurrence of an unfortunate event. Therefore, the contract does not directly get terminated, but merely a delay in such performance is permitted, until the extension of the period of such event and not further.

Thus, this clause is not made to the detriment of the other party. If on one hand, it protects the rights of one party then on the other hand it also imposes an obligation to perform or fulfill the terms of the contract after a reasonable period has expired.

[10] Suo moto W.P. (C) 3/2020 (SC).
[11] Ibid 10.