



DOCTRINE OF FRUSTRATION UNDER INDIAN CONTRACT ACT & COVID-19

*By Rashika Bajaj and Divya Prakash Mishra
From School of Law, Presidency University,
Bangalore*

ABSTRACT

The year 2020 has been a turning point all over the world. COVID-19 outbreak has led all the miseries from loss of business to death of lakhs of people in various countries. Whole world is united to fight against this COVID-19 pandemic, lockdown, selfless work of the doctors, police, nurses, people supplying food to the needy ones are the situation which very well illustrates the unity among people to fight against this pandemic. Where all are fighting against this at the same time business is being affected globally. Nobody is unaware of the fact from where this pandemic originated and how it unstable the economy of many countries, but the question whether it was an Act of God or Force Majeure which lead a party non-performing its contractual obligation leading to Doctrine of Frustration. Many economic disparities have arisen due to the outbreak of this pandemic and various sectors are facing problems or we may say having an adverse impact of COVID -19. Starting from the Finance Department, Reserve Bank of India providing relief to financial service system, forbearance of loan etc., industrial sector, small scale business all have an adverse impact. All the obligations are now not fulfilled. The Ministry of Finance has come out with a notification dated February 19, 2020. It has been clarified that Force Majeure under Manual of Procurement of Goods 2017 would be applicable in this pandemic due to

disruption of supply chains like wise many others are focusing on Doctrine of Frustration as stated in Sec 56 of Indian Contract Act. Thus, in this paper researchers would try to analysis the impact of COVID-19 globally.

Keywords: *COVID-19, Force Majeure, Frustration, Business, Globally*

SYNOPSIS

This research paper deals with the role of doctrine of Frustration during pandemic. In this research paper, we will mainly focus on COVID-19 and how this pandemic effects the economy and various contractual agreements and how this simple doctrine plays a vital role in it.

Research Objective

The research paper is based on Doctrine of Frustration and COVID-19. And the keen objectives of the paper are as follows: -

1. Analysis of Doctrine of Frustration and COVID-19
2. Impact of COVID-19 on Doctrine

Research Methodology

The methodology used for this paper is purely doctrinal. Analytical and descriptive method is adopted for analyzing status of Doctrine of Frustration during COVID-19. The research is based on the primary sources like Statutes and International Conventions and secondary sources like books, journals and news in magazines/web portals/newspapers and websites.

Introduction

In the wake of the current corona virus outbreak, most businesses are looking out to re-align themselves with the economic disparity that is likely to arise. The World Health Organization has declared COVID-19



a global pandemic on March 11, 2020 which will have an adverse impact on the economy globally leading to the non-performance of the contractual obligations. The government of India confirmed India's first case of Covid-19 on 30 January 2020 in the state of Kerala, when a university student from Wuhan, China traveled back to the state. On 24 March, the Government of India ordered a nationwide lockdown for 21 days, as a preventive measure against the spread of the pandemic in India.¹

With this outbreak everyone is uncertain about their obligations and in question whether the situation will be normal again or not. The circumstances occurring all around the world has created a deterrent in the mind of the people that everybody fear to move on the road. Focusing on the virus symptoms the only safest zone is home. Talking, Sneezing or even shaking hands can cause virus. Doctors being so cautious while treating people still get affected by this virus. Seeing these circumstances people fear but stomach demand never ends. Resources are scares but demand is high. Similarly, with the supply, demand is there but supply is limited. If the situation remains same whole country will one day fight to fulfill their needs may even lead to robbery or worst situation death of

people. All are affected from this the poor, middle class and if continues for long richest of the richest people also need to think before spending. There are many issue concerned with.

With the outbreak of COVID-19 reaching pandemic scale, India is on high alert with most State governments calling for a short lived lock-down of nearly essential services. The growth rate (GDP) of the Indian economy has hit the record low of 6 years on 4.5%.² Sensex and Nifty have also taken a historic plunge and has since been showing increased volatility. Naturally, contracting parties are either unable to meet their contractual obligations or finding that these obligations would be delayed till the current lock down situation normalizes. In such a happening, contracting parties will need to depend upon the Force Majeure clause in their contract to reach the implications of such delay or non-performance of contract. And here the Doctrine of Frustration plays very important role which may bring the contract to an end.

Doctrine of Frustration is defined under Sec.56³ of Indian Contract Act, 1872. It means the essential idea upon which the

contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.² Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to

¹ Capital Law Chamber (Apr 14,2020); <https://www.irglobal.com/article/covid-19-and-frustration-of-contracts-an-indian-context>.

² COVID-19 as a Force Majeure Event (May 19,2020), <http://www.thelexrepositary.com/covid-19-as-force-majeure-event/>.

³ Agreement to do impossible act.—An agreement to do an act impossible in itself is void. —An agreement to do an act impossible in itself is void." Contract to do act afterwards becoming impossible or unlawful.— A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.1 —A contract to do an act which, after the



doctrine of frustration of contract is predicated is that of the impossibility of performance of the contract; after all, 'impossibility' and 'frustration' are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible, and therefore the parties are absolved from the further performance of it as they didn't promise to perform impossibility.

As per the S.56⁴ of Indian Contract Act, 1872 it is defined as "*Agreement to do impossible act - An agreement to do an act impossible in itself is void.*" The doctrine of frustration was developed in Taylor Vs. Caldwell⁵ within the year 1863 for the primary time, wherein Justice Blackburn reasoned that the rule of absolute liability only applied to positive, definite contracts, to not those within which there was an express or implied condition underlying the contract. As far as Indian law is worried, Section 56⁶ of the Indian Contract Act, 1872 is totally clear that an act, after the contract is formed, becomes impossible to perform or by reason of some event which a promisor party couldn't prevent becomes void and isn't capable of performance. COVID-19 pandemic also takes into account Force Majeure clause. According to Black's Law dictionary it is 'an event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.' It is a clause which temporary postpone the parties' obligation under the Contract.

be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

In the aftermath of the closedown, many suppliers would not be able to perform their contractual obligations and, to say the least, they would be delayed. The suppliers are seeking to delay and/ or avoid contractual obligations/ performance. They wish not to be held liable for their contractual non-performance. The companies might not be able to honor their customer agreements. The same is true for the consideration, which either of the party to a contract might not be able to fulfill under the terms of the contract. Under such scenarios, the force majeure clause would be a determining factor to understand the implications of these events.

The COVID-19 pandemic may be an unavoidable casualty event which will be coated below contracts however, not all contracts have a similar clause. For the coverage of this pandemic within the unavoidable casualty clause, it ought to cover inside its extent, 'prevention of fulfilment of obligations' because of governmental restrictions', 'any unforeseen circumstance that stops the fulfilment of obligations' or specifically mentioning a 'pandemic/epidemic' as an occasion that may return inside the extent of unavoidable casualty. however, some clauses don't have a similar verbiage and are restricted to many circumstances solely, within which case invoking the clause wouldn't do a lot of sensible unless each the parties to the contract reciprocally conceive to suspend the operation of the contract for a particular amount of your time. The Court must consider whether or not the party seeking to

⁴ idbi

⁵Taylor Vs. Caldwell, 3 B&S 826 (1863).

⁶ Supra note 3



invoke frustration has established that the outbreak of the pandemic, and the associated government restrictions renders it physically or commercially impossible to fulfil the contract or alternatively transforms the obligation to perform into a radically different obligation from that undertaken at the time that the contract was made.

This memorandum, in essence, states that the COVID- 19 could effectively be covered under force majeure clause because it is a 'natural calamity' and all the departments who should invoke it by following the 'due process.' But this implication of COVID- 19 cannot be upheld for every contract, and the clause needs to be interpreted based on different circumstances.

Force Majeure and the doctrine of frustration: "Frustration is an English contract law doctrine that acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract."

THE OUTBREAK: -

Mankind has observed various pandemics throughout the history where some of them were more disastrous. Once again we are observing a very tough time once again fighting an invisible enemy; the novel COVID-19 corona virus. Initially it was

observed in the Wuhan province of China (which was famous for its scientific laboratory), now very fastly spreading around the world.

Corona virus or COVID-19 has been the biggest fear among the people whether related to risk of life or economic or financial market across the globe. Recently at the end of 2019 Wuhan an emerging business hub of China experienced an outbreak of a novel corona virus that killed more than eighteen hundred and infected over seventy thousand individuals within the first fifty days of the epidemic. After that this novel virus named as Corona virus by a Chinese researcher. And then later WHO named it as COVID-19, this disease caused by the new corona virus that is called SARS-CoV-2, or sometimes just "novel corona virus".

The virus infected more than 110,000 people in at least 110 countries and territories globally, according to the World Health Organization. Of those infected, more than 4,000 people have died, according to WHO data.⁸ In the public mind, the origin story of coronavirus seems well fixed: in late 2019 someone at the now world-famous Huanan seafood market in Wuhan was infected with a virus from an animal.

Prof Stephen Turner, head of the department of microbiology at Melbourne's Monash University, says what's most likely is that

⁷ Vijay Pal Dalmia , *The Doctrine of Frustration and Force Majeure Clause on COVID-19*, <https://www.lexology.com/library/detail.aspx?g=d63bbf8d-64ec-4595-ab87-633934115ab0>.

⁸ Yen Nee Lee, 6 charts show the coronavirus impact on the global economy and markets so far (Mar 11,2020),<https://www.cnn.com/2020/03/12/coronavirus-impact-on-global-economy-financial-markets-in-6-charts.html>.



virus originated in bats. But the origin of virus is not yet confirmed.

The World Health Organization (WHO) has described the novel corona virus as a pandemic for the first time. In a press briefing on Wednesday, WHO director-general Tedros Adhanom Ghebreyesus expressed concern about trajectory of the disease, which has rapidly expanded across the globe in the months since it was first announced in China. Meanwhile during their period of time the cases of Corona virus name COVID-19, started rising sharply around all over the world specially in Italy, Iran, and South Korea. After that it reached in USA as well with more than 600 cases and 29 deaths.

And now it becomes a pandemic on world and also effects all the sectors of economy. Like sue to this the government of the country decided to lockdown the states to minimize the contact of people and due to this decision various agreements and contracts are become impossible to perform and so it becomes frustrated not breached. As many of the contractual agreement are done by various alternative methods like online conferencing, meeting with clients virtually, etc., but it is not same in other cases like delivering of goods, transferring something, etc. So that agreements are frustrated due to this pandemic.

Force Majeure: -

The term has originated from the French language and finds its roots in 'Code Napoleon'. Over the years and within the usage of a similar in the written agreement sphere, it's been outlined as 'an irresistible force or compulsion like can excuse a celebration from acting a part of the contract'. An unavoidable casualty clause is typically place altogether contracts in order to forestall termination of a similar because of unpredictable circumstances that render performance of written agreement obligations as not possible and/or troublesome to perform. The Hon'ble Supreme Court within the case of Dhanrajmal Gobindram vs. Shamji Kalidas⁹, has control that the term unavoidable casualty is of wider import. Judges within the past have united that wherever the reference is formed to unavoidable casualty, the intention is to avoid wasting the acting party from the results from the something over that he has no management.

DOCTRINE OF FRUSTATION: -

Doctrine of Frustration in general means parties are not supposed to fulfill their obligations because of occurring of an event which makes it impossible to do. In simple terms it discharges the party from their contractual obligations. Sec 56¹⁰ of the Indian Contract Act mentions about Doctrine of

⁹Dhanrajmal Gobindram vs. Shamji Kalidas (1961) 3 SCR 1020 (India).

¹⁰Agreement to do impossible act. —An agreement to do an act impossible in itself is void. —An agreement to do an act impossible in itself is void." Contract to do act afterwards becoming impossible or unlawful.— A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.1 —A contract to do an act which, after the

contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.2" Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee



Frustration. It says an agreement is void if it is impossible to do the mentioned act. Frustration occurs when firstly, the performance is physically impossible to do. Secondly, a contractual object fails. The ultimate outcome of this is that parties become free from performing their contractual obligations.

The frustration of contract happens generally in the cases of: -

- a) Death of the party –At times the parties enters into the contract but before fulfilling is obligation one of the parties dies.
- b) By Virtue of Legislature- Law is promulgated after entering into the contract.
- c) Change in Circumstances-Situation is such that it is impossible to perform the obligations.

Apart from these, there are few conditions important for the applicability of the doctrine: -

- Existence of a valid contract between the parties to the contract;
- Along with this some part of the contract should be left unperformed;
- Or it becomes impossible to perform the contract after entered into which makes it void.

The Courts in various cases has explained the meaning if doctrine, taking into consideration various facts and circumstances which may

sustains through the non-performance of the promise. —Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

lead to impossibility of performing some contractual obligations. In the case of Indian Rare Estate vs. Southern Electricity Supply Co. of Orissa ¹¹the Supreme Court interpreted the doctrine of frustration an stated that , doctrine is that in which even the act has not become impossible to perform in literal sense but is such that becomes meaningless from the parties point of view.

In the case of Joseph Consultative Line Ltd vs. Imperial Smelting Corp.¹²focusing on the change of circumstances the court held that a contract becomes frustrate when the circumstances are such that it makes its performance impossible in the stipulated time and manner.

Neville & Sons. Ltd. v. Guardian Builders Ltd.¹³The Court held that the frustration of a contract takes place when a supervening event occurs without the default of either party and for which the contract makes no sufficient provision. That event must so significantly change the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated at the time when the contract was entered into, that a Court must be satisfied that it would be unjust to hold the parties to the contract terms in the light of the new circumstances. The Supreme Court also noted that the doctrine of frustration was flexible and capable of being applied in new ways in suitable

¹¹Indian Rare Earths Ltd V. Managing Director, Southern Electricity Supply Co. of Orissa Ltd, AIR,2010Ori115 (India).

¹²Imperial Smelting Corporation, Ltd. v. Joseph Constantine Steamship Line, Ltd., (1941) 70 Il.l.rep.

¹³Neville & Sons. Ltd. v. Guardian Builders Ltd IESC 4. 351/89 & 27/90 [1994].



circumstances. The effects of a finding that a contract is frustrated are:

- all future obligations are discharged (at common law) accrued rights stand
- restitution on the basis of a total failure of consideration

Bombay High Court's Order passed in Standard Retail Pvt. Ltd vs Gs Global Corp And Ors on 8 April, 2020 COVID-19 a curious cases of frustration doctrine.¹⁴

In a departure from its 3 April 2020 Order, the Bombay High Court refused to grant interim measures to the Petitioner observing that the commodity in question was an essential item and lockdown is only for a limited period. Consequently, Petitioner cannot resile from its contractual obligation of making payments to the Respondents.

IMPACT OF DOCTRINE OF FRUSTAION DURING PANDEMIC (COVID-19)

With the arose of this pandemic we can see all the short term impact on the economy. Along with this if we go into the depth of the situation this pandemic is going to have long term impact on the economy. Short term impact has been seen in restaurants, airlines, hospitality, tourism and many more. Further people will cut down their expanse so clothing, automobile and griffin goods will also have a downfall. Long germ impact will be seen in the tourism, restaurants, luxurious goods such as gold, stock market and other few industries or manufacturing units.

Taking into account the present situation of the world where almost whole economy is

disturbed from public sector to private sector, Intra and Inter states transactions, international transactions and many more. This outbreak is going to have a significant impact in future also. Almost every countries economy has gone two years back with a huge number of death cases and still the situation is same. America having one of the strongest economies in the world failed to control this situation. Concerning the various issues around the globe one can analyze the importance of doctrine and its impact on various situation.

COVID -19 has widespread impact on the economy among which various major sectors concerned are: -

1. Stock Market: -It's not the first time in the worldwide history that there has been a downfall in the stock market. Earlier also stock market has crashed many a times. Sensex plunged 53 per cent in one year in "Harshad Mehta Scam" (1992) but recovered 127 per cent in 1.5 years. During the "Asian Crisis" (1996) Sensex dipped 40 per cent in four years but recovered 115 per cent in one year. During "Tech Bubble" (2000) Sensex crashed 56 per cent in 1.5 years but recovered 138 per cent in 2.5 years.¹⁵ The Corona virus has a very adverse impact on the stock market. There has been a huge downfall in the stock market leading to the crash of Stock market. The situation is too uncertain. Recovery from this situation needs a lot of money. Banks and other financial situations have certain policies to control the sinking condition of the economy. The efforts are indeed useful but recovery form COVID-19

¹⁴ <https://www.clydeco.com/insight/article/covid-19-india-a-curious-case-of-force-majeure>

¹⁵Abhishek Raja, *Outlook Money, COVID-19, Impact on Stock market*, (Apr 21,2020,)

<https://www.outlookindia.com/outlookmoney/equity/covid-19-impact-on-stock-market-4666>.



is still a big challenge to predict the economic condition of the world.

In this case Rural Fairprice Wholesale Ltd. & Anr vs. IDBI Trusteeship Services Ltd. & Ors.¹⁶ the Bombay High Court recognized the market situation pursuant to the COVID-19 and observed that the share market had collapsed due to COVID-19, therefore, it had been a fit case to restrain the bank from acting upon the sale notices and a direction to withdraw any pending sale orders for the pledged shares.

2. Aviation Industry: - Aviation industry is concerned with manufacturing of aircrafts and its related services during transportation. A social distancing with the coming of outbreak has led to the non-functioning of aviation sector. This has a huge impact on aviation industry because of less demand of travelling and its restrictions to curb the transmission of virus. The government all across the world are cancelling visa and locking down all the affected areas. Its affects U P to shrink by 5%-15%, due to downfall in manufacturing sector coupled with factory shutdown. The country like china which holds a large number of manufacturing industries in it has the greater impact on their economy as many companies were going to take off their industries from China. And on the second place it will going to generate new employment opportunities.

is seen is all the countries across the world few of which are India, US, Europe and many more. Ministry of Civil Aviation on March 23rd, 2020 under Sec 8(B) of Aircrafts Act, 1934 gave directions to all Schedule operators and Non-schedule operators for the ceasing of all commercial operations with effect from March 24th Midnight¹⁷. With this the revenue of all have gone down and will have a long term negative impact as tourism will decrease and people due to the fear of Corona will travel less. Even Government

has laid some norms such as middle seat should be vacant in all the flights to maintain social distancing due to which the companies will also sell the limited tickets.

3. Manufacturing Sector: - The disruption on manufacturing caused by the COVID-19 has severe operational, social and financial consequences. It is forcing the manufacturers to rethink risk management and contingency plans. Hands on safety protocols, producing operations and new ways that of operating opportunities, all at an equivalent time.

Manufacturing sector is considered as the major part of the economy because it consists of nearly 20% in the global economy¹⁸. In the year 2015; Indian government took an initiative known as Make in India to promote the Indian manufacturing sectors. However due to this COVID pandemic the global FDI inflows has witnessed a sharp decline "as per the estimation by United Nation Conference on Trade and Development (UNCTAD), the COVID-19 outbreak could cause global FDI to shrink by 5%-15%, due to downfall in manufacturing sector coupled with factory shutdown. The country like china which holds a large number of manufacturing industries in it has the greater impact on their economy as many companies were going to take off their industries from China. And on the second place it will going to generate new employment opportunities.

The impact of COVID-19 on global manufacturing industries was classified into automobiles, food & beverages, machinery,

¹⁶ **Rural Fairprice Wholesale Ltd. & Anr. vs IDBI Trusteeship Services Ltd. & Ors., (Apr 3 2020).**

¹⁷ Somesh Arora, *Impact on Aviation Lease* (Apr 18, 2020), <https://www.legalbites.in/covid-19-impact-on-aviation-leases/>.

¹⁸ René Van Berkel, *India's Manufacturing reels from the Impact of COVID-19*, UNIDO Representative at the Regional Office India, <https://www.unido.org/stories/indias-manufacturing-reels-impact-covid-19>.



electronics, aviation, pharmaceutical and medical equipment, and others. Mainly the electronic industries are going to be affected during this period of time. And during this period of time China hold nearly 85% of components utilized in Smartphone and 75% in televisions. Nearly all critical electrical components such circuit, memory, etc., was imported from China only. And during this pandemic most of the companies were shut down. As a result of these the Chinese vendors have increased their prices on products which absolutely effect their economy. And therefore it negatively affected the electronic manufacturing sector along the globe.

The COVID-19 pandemic will also have long-lasting implications for the future of manufacturing. No company can operate in isolation, so it is essential to identify continuity risk and any single point of failure. All manufacturers need to look closely at their end-to-end operations to assess how well positioned they are to respond to future disruptions with confidence and speed. Simply saying that they have to do the work on reshaping themselves into digitally enabled, resilient, and agile organization that will help to quickly help to adjust in the face of adversity.

4.Hospitality sector: -The outbreak of Covid-19 is going to have an unprecedented effect on the Hospitality sector, such that has not been seen in Modern History. With the travel ban having been imposed and tourism shut, the Hospitality sector has experienced a complete shutdown in its economic activities whereby leading to magnanimous losses in its revenue. Oyo Homes and Hotels, one of the country's largest chains in the Hospitality sector has already suspended payments to its

partners owing to unprecedented losses in its revenue. In the current scenario it is advisable that the entities forming part of the sector invoke the Force Majeure clauses in their agreements seeking suspension of payments and other obligations arising out of contracts. It has been predicted that the Hospitality sector alone in India is looking at losses to the tune of almost Rs. 500 Crores in the next 6 months owing to the outbreak of this global pandemic. Hotel operators, owners and franchisors should consider carrying out a review of key contracts to determine whether the impact of the outbreak constitutes a Force Majeure event. With an absolute bar having been implemented across the nation, hotels have had to shut their operations, owing to which it is advisable that depending on the wordings of the contract, the sector should invoke the Force Majeure clause comprising part of its agreements, seeking exemption from payments and other liabilities. Albeit, regardless of whether Force Majeure provisions apply to a specific agreement or not, the Hospitality sector should further apply the Doctrine of Frustration of contract, which although narrow in its scope, may further be helpful in the current scenario inasmuch as owing to the prevalent conditions and the magnanimous losses that the sector is going to be burdened with, the entities comprising of the sector may be in a situation to plead impossibility to perform its obligations arising out of the contract.

5.Unemployment: - The biggest affect is to the workers in the company or persons hired by small scale business man. COVID-19 has led to the reduction of income for all the biggest of the biggest companies as well as the small scale business operators. All are removing their workers with the fear of how to pay them even half of the wages when the



income is nil. Recently swiggy requited it staff members. Government notified to pay half the wages and this has lead more problems to the owners. The unemployment has a huge rise. Incident of death due to unemployment is also seen. Daily wage workers are the most affected people with no income in the hand even to feed their families. Though government is taking initiative to feed the people but the sole earning and its saving is good for individuals and whole economy.

Bombay High Court's Order passed in Standard Retail Pvt. Ltd vs Gs Global Corp And Ors on 8 April, 2020

In a departure from its 3 April 2020 Order, the Bombay High Court refused to grant interim measures to the Petitioner observing that the commodity in question was an essential item and lockdown is only for a limited period. Consequently, Petitioner cannot resile from its contractual obligation of making payments to the Respondents.

Delhi High Court's Order passed in M/s Halliburton Offshore Services Inc. vs Vedanta Limited &Anr. 20 April 2020

The case pertained to restrain on invocation of bank guarantees. While granting interim relief on the invocation of bank guarantees, the Delhi High Court observed that the country wide lockdown was prima facie, in the nature of force majeure. Therefore, it could be said that special equities do exist, as would justify grant of the prayer, to injunct invocation of the bank guarantees.

Delhi High Court's Order passed in Indirajth Power Private Limited v. UOI &Ors on 28 April 2020

The Petitioner sought interdiction of the Bank Guarantee inter-alia on account of the lockdown in the country due to spread of

COVID-19 pandemic, which could drive the Petitioner towards being declared an NPA.

The Court while observing the Petitioner's conduct i.e. despite the extension of 12 months, could not fulfil its obligation under the Contract, refused to grant relief to the Petitioner. The Court observed that Petitioner's position under the contract was unaffected by the imposition of the lockdown.

Suggestions: -

- One needs to bear in mind, that proving 'frustration' in an Indian Court of Law would not be easy, clearly, because of the fact that the courts would be only be willing to interpret the outbreak of COVID-19 as mere hardship and in any case, the language of the force majeure clause does not specifically include the pandemic. It really will be a challenging task.
- It is best for the parties to keep evidence with them, i.e. the supporting documents with regard to the impossibility of performance, delay or notices served, if any. Notices must be served promptly showing that the contract has become impossible to perform or that a force majeure event has occurred. It is also necessary for parties to identify the origin of such non-performance. Reviewing financing and insurance agreements to cover any unexpected losses should be of the highest priority.
- For parties 'receiving' notices of force majeure, it is necessary for them to determine whether such notice holds consistency with the protections contemplated by the clause, if due process has been followed and whether supporting documents are available. Parties claiming force majeure should be very careful about the evidence of such impossibility, what steps they are taking to



prevent such impossibility and the magnitude of that event, since parties making claims are always at a risk of making a wrongful claim.

- Most importantly, parties need to determine whether the events associated with COVID-19 prompt the 'material adverse event' term in the contract. Meaning, that subsequently, post execution of the contract between the parties, the events took an 'unexpected turn'. This could be a valid line of argument, although it will again depend on the language as well as specifics of the case.
- As the COVID-19 crisis continues to expand, manufacturers will likely face challenges on numerous fronts. Manufacturers will also need to look beyond their own economic viability. They will need to coordinate closely with the public sector to forge plans that are essential to both public safety and the solvency of their workforce, while keeping the lights on in their operations, challenging climate. Some will be austere, but austerity measures should be tempered to preserve long-term objectives.
- Lastly, if the contract becomes wasteful on account of the COVID-19 crisis and loses its economic value, or if the other party wishes to repudiate or terminate the contract in order to mitigate or prevent any further losses, it is recommended that parties rely on the 'termination clause', 'entitlement to terminate' or any such clause as may be specified in such a contract.

Conclusions: -

The success or failure of a plea of frustration supported the COVID-19 pandemic in defense of a breach of contract claim will mainly depend upon the factual matrix surrounding the subject matter of the contract. The length of any delays imposed by pandemic-related restrictions,

specifically, are visiting be of great importance.

Here the force majeure clause plays an important role in The absence of a force majeure clause or similar provision for a party to be excused for non-performance, is beheld extremely conservatively by the Courts. Without a force majeure clause the burden of proof for the party claiming frustration shall be much higher than if the force majeure clause was present. Parties will have to show a direct correlation of the non-performance to the said event i.e. COVID-19 state of emergency, and that the non-performance was not due to any other factor like the economic slowdown or a lack of funds. Hence, each case will be reviewed in accordance with the facts and circumstances of that particular case to determine bona fide frustration.

The Court must consider whether or not the party seeking to invoke frustration has established that the outbreak of the pandemic, and the associated government restrictions renders it physically or commercially impossible to fulfil the contract or alternatively transforms the obligation to perform into a radically different obligation from that undertaken at the time that the contract was made.
