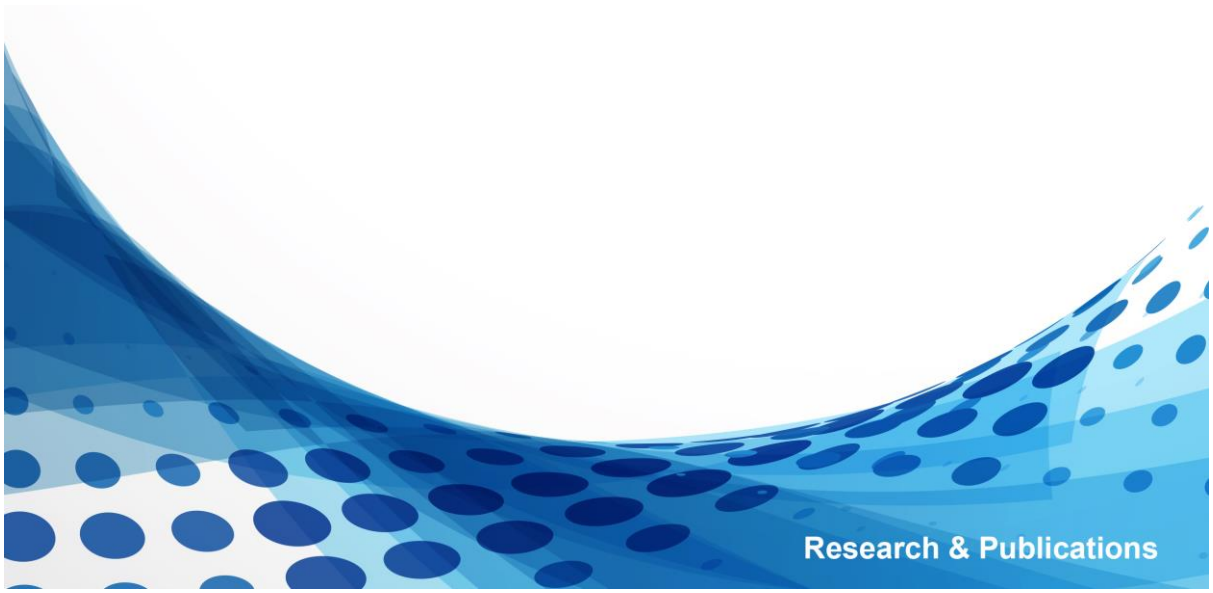
INDIAN INSTITUTE OF MANAGEMENT AHMEDABAD

IIMA
Working Paper

The Doctrine of Frustration under section 56 of the Indian Contract Act

M. P. Ram Mohan
Promode Murugavelu
Gaurav Ray
Kritika Parakh



Research &
Publications
W. P. No. 2020-10-01

The Doctrine of Frustration under section 56 of the Indian Contract Act

M. P. Ram Mohan
Promode Murugavelu
Gaurav Ray
Kritika Parakh

October 2020

INDIAN INSTITUTE OF MANAGEMENT AHMEDABAD

The Doctrine of Frustration under section 56 of the Indian Contract Act

M P Ram Mohan[a] Promode Murugavelu[b] Gaurav Ray[c] and Kritika Parakh[d]

Abstract

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 of this 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.

Keywords: doctrine of frustration; impossibility; illegality; impracticability; Indian contract law; performance

---

[a] Associate Professor, Strategy Area, Indian Institute of Management Ahmedabad [Corresponding Author: mprmohan@iima.ac.in]
[b] Partner, Shardul Amarchand Mangaldas & Co.
[c] Advocate, Supreme Court of India
[d] Research Assistant, Indian Institute of Management Ahmedabad

Acknowledgements
We are thankful to the Research and Publication Area of the Indian Institute of Management Ahmedabad for funding the project "Restatement of Indian Contract Law" and thank Mridul Godha for support. All errors are our own.

This is the pre-publication copy of the paper published by Indian Law Review (ILR) in January 2020. The ILR publication is available:
https://www.tandfonline.com/doi/full/10.1080/24730580.2019.1709774

I. Introduction

A *contract* is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. Execution of these obligations may be affected by unforeseen or supervening events, i.e., events which are unexpected or incapable of being known in advance by either of the parties and which ultimately discharge the parties from their contractual obligations.[1]

The doctrine of frustration is a "doctrine" of special case of the discharge of contract by an impossibility to perform it.[2] The Indian Contract Act, 1872 ("Contract Act) does not define the term frustration. The Black's Law Dictionary defines frustration in relation to contracts as "the doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated," also termed as the frustration of purpose.[3] In India, courts nuanced: "The expression 'frustration of the contract' is an elliptical expression. The fuller and more accurate expression is 'frustration of the adventure or of the commercial or practical purpose of contract'".[4] This doctrine is a device to reconcile the rule of absolute contracts with a special exception which is demanded in certain circumstances in the name of justice.[5]

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.[6] A contract is 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 relevant contract. Section 56 applies when contracts are discharged and parties absolved of their obligations as a result of subsequent impossibility due to outside forces and factors.

---

[1] *Satyabrata Ghose v Mugneeram Bangur and Co* AIR 1954 SC 44 [14]; *Dhruv Dev Chand v Harmohinder Singh* AIR 1968 SC 1024 [6].
[2] *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154.
[3] Bryan A Garner, *Black's Law Dictionary* (9th edn, West Group 2009)
[4] *Ram Kumar v PC Roy and Co Ltd* AIR 1952 Cal 335 [23]; *Andhra Pradesh Mineral Development Corporation Ltd v Pottem Brothers* 2016 (3) ALT 297 [69].
[5] *Hirji Mulji v Cheong Yue Steamship* [1926] A O 497, 510 (Lord Sumner), affd *Nirmal Lifestyle Ltd v Tulip Hospitality Services Ltd*, Arbitration Petition No 550, 864 and 891 of 2013 [14] (Bombay High Court, 27 November 2013).
[6] *Boothalinga Agencies v VTC Poriaswami Nadar* AIR 1969 SC 110 [10].

While discussing the law on the doctrine, the courts have interchangeably used the terms 'frustration' and 'impossibility to perform'.[7] To determine whether the supervening event has made the performance "impossible" under the ambit of section 56, it is important to lay bare different factors adopted by the courts, including the recently developed "multi-factorial approach"[8]. The courts in India and in England have identified a number of factors that may and may not render a contract frustrated. The question of whether the supervening event constitutes a frustrating event is a question of degree,[9] i.e., how substantially the supervening event has affected the performance. This paper focuses on restating the current legal position of *the doctrine of frustration* in India.

II. The genesis of the Doctrine of Frustration

The origin of the doctrine can be traced back to the Queen's Bench judgment in the case of *Taylor v Caldwell*[10] in 1863 in England. Prior to this judgment, in both Roman Law[11] and Common Law, the law regarding contractual obligation was extremely rigid. Supervening unforeseen events, owing to which the performance has become impossible or more onerous, were not regarded as an excuse for non-performance.[12] With the evolution of the doctrine, "loss of object", "radical change in the obligation", "implied condition" and the need to find a "just and reasonable" solution have become established justifications, as explained below, for excusing the performance of a contract.

Prior to *Caldwell*, it was presumed that the parties could have provided for such eventualities in their contract if they wanted to.[13] This rule of "absolute contracts" was reaffirmed in the renowned judgment, *Paradine v Jane*,[14] where a lessee was made liable to pay the arrears of rent even when he was evicted as the alien enemy. The reasoning cited was that "when the party of his own contract creates a duty upon himself, he is bound to make it

[7] *Satyabrata* (n 1) [10].
[8] *Energy Watchdog v Central Electricity Regulatory Commission* [2017] 14 SCC 80 [39] discussed "multi-factorial approach" as laid down in *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage and Towage) Ltd* [2007] 2 All ER (Comm) 634 [111].
[9] *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 688 (Lord Hailsham).
[10] [1863] 3 B&S 826.
[11] R W Lee, *The Elements of Roman Law* (4th edn, Sweet & Maxwell 1956) 349, 350.
[12] *Paradine v Jane* [1647] EWHC KB J5.
[13] *Atkinson v Ritchie* [1809] 10 East 530. See also *Barker v Hodgso* [1814] 3 M&S 267, later held to be wrongly decided in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287, 303; H G Beale, *Chitty on Contracts* (Sweet & Maxwell, 30th edn, 2008) 1480.
[14] [1647] EWHC KB J5.

good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract".

This rigidity in Common Law was diluted in *Caldwell*. In this case, an opera house was rented for holding concerts, however, it was destroyed by fire before the night of the concert. In this case, Blackburn J evolved the theory of "implied condition" or "implied term" while holding that "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance". The courts applied this implied condition *ab initio* because the parties themselves had decided this, though subconsciously, while entering into the contract.[15] This theory faced much criticism as the implied condition was nothing more than a fiction created by courts.[16] The objection to the implied condition theory rested on the deliberate nature of risk taken by the parties in not incorporating any possible intervening circumstances in their contract, therefore, no question of an implied condition could really arise. The House of Lords rejected the implied condition theory in *National Carriers Ltd v Panalpina (Northern) Ltd*[17] while criticizing that "[t]he weakness […] of the implied term theory is that it raises once more the spectral figure of the officious bystander intruding on the parties at the moment of agreement".

The "loss of object" or the "loss of foundation" of the contract by the supervening events is another theory and more *sophisticated* one, justifying the doctrine.[18] The classic example for this theory is *Krell v Henry*,[19] popularly known as one of the "coronation cases" where it was held that the foundation of the contract had been frustrated with the cancellation of the coronation procession which was the object of the agreement and that the defendant was excused from performance. The performance is dependent on the continued availability of a specific state of things.[20] Unlike "implied condition", the "loss of object" or the "loss of foundation" of the contract has been widely accepted by the courts as well as by many reputed

[15] *Paradine v Jane* [1647] EWHC KB J5 [3]; *Atkinson v Ritchie* [1809] 10 East 530; *Hirji Mulji v Cheong Yue Steamship* [1926] A O 497, 504 (Lord Sumner).
[16] William Reynell Anson, Jack Beatson, Andrew S Burrows, John Cartwright, *Anson's Law of Contract* (29th edn, OUP Oxford 2010) 486.
[17] [1981] 1 All ER 161.
[18] *Hirji Mulji v Cheong Yue Steamship* [1926] A O 497.
[19] [1903] 2 KB 740.
[20] *Russkoe v John Strik and Sons Ltd* ILR [1922] 10 214; *WJ Tatem Ltd v Gamboa* [1938] 3 All ER 135; Guenter Treitel, *The Law of Contract* (5th edn, Sweet & Maxwell) 682.

authors as it obviated the necessity of speculation involved in ascertaining the intention of the parties.

The next theory counts on the intervention of the court to impose a "just and reasonable" solution to a case of frustration. Even if the contract is absolute in its term, nevertheless, it will not be held absolute in effect when it is not absolute in intent.[21] Soon this theory also invited criticism as the courts applied it in cases[22] by assuming vast powers to qualify the absolute or wide terms of the contracts in order to do what they seem just and reasonable in that situation.

Another widely accepted theory to excuse the performance of the contract is the theory of "radical change in the obligation" (also known as "construction theory") formulated by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council.*[23] In this case, it was observed that:

> [F]rustration occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do.

There must be a change in the significance of obligation that the thing which was undertaken would if performed, be radically different from that which was contracted for. Here, the doctrine does not come into play merely because of hardship, inconvenience or material loss.[24]

The evolution of the doctrine through the above-stated theories shows the endeavour of the courts to evolve a more realistic approach to the problem of impossibility to perform. In the UK for example, without going into the merits of it, many of the rights and liabilities of parties to frustrated contracts, have been codified through the Law Reform (Frustrated Contracts) Act 1943. This Act was enacted after the landmark case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,[25] where the House of Lords, overruled *Chandler v*

[21] *British Movietone News Ltd v London and District Cinemas Ltd* [1951] 1 KB 190 (Lord Denning).
[22] *Dhal v Nelson, Donkin and Co* [1881] 6 AC 38; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* 1942 AC 154, 185; *British Movietone News Ltd v London and District Cinemas Ltd* (1951) 1 KB 190.
[23] [1956] AC 696.
[24] ibid.
[25] [1942] 2 All ER 122.

Webster[26] (one of the coronation cases in which the court denied the recovery of advance payment) and decided that advance payment was recoverable where the payee had not received anything prior to the frustrating event. This Act allows the recovery of payments in full or in part or in a manner which the courts deem equitable.

III. Interpreting the Doctrine under the Contract Act

The doctrine of frustration has been well-codified in India under section 56 of the Contract Act, and this obviates the dependence on different theories to justify the application of the doctrine.[27] It lays down a positive rule relating to the frustration of contract and does not leave the matter to be determined according to the intention of the parties or the choice of theory to be applied by the court.[28] The relief under this section is given by the court on the ground of subsequent impossibility when it finds out that the whole purpose or the basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond the control of the parties.[29]

Section 56 states that an agreement to do an act which becomes impossible or unlawful is void. A thorough explanation of the section can be sought from the celebrated and seminal decision of *Satyabrata Ghose v Mugneeram Bangur and Co.*[30] In this case, the defendant company promised to sell the plaintiff a plot of land after developing it by constructing the roads and drains. However, some portion of the area comprised in the scheme was requisitioned for military purposes. The Supreme Court, while applying the doctrine, held that the requisitioning of the area had not substantially prevented the performance of the contract as a whole and therefore, the contract had not become impossible within the meaning of section 56.

While enunciating the law laid down under section 56, Mukherjee J. explained that the first paragraph of section 56 is on the same lines as of Common Law, which discharges the obligation to perform because of inherent impossibility attached to it. An illustration of "inherent impossibility" is provided therein as "A agrees with B to discover treasure by magic." Such agreements are inherently impossible to be performed and therefore, they are *void ab initio*.

---

[26] [1904] 1 KB 493.
[27] ibid.
[28] *Satyabrata* (n 1); *Dhruv Dev* (n 1) [17].
[29] *Kesari Chand v Governor-General in Council* [1949] ILR Nag 718, affd *Satyabrata* (n 1) [11].
[30] *Satyabrata* (n 1) [9].

The second paragraph has been a fertile source of litigation as the court has deliberated much on the interpretation of the word "impossible". Mukherjee J. further stated while referring to the second paragraph to section 56:

> [T]he word "impossible" has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view. Therefore, if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.[31]

The question that is to be addressed here is how far the indisputable departure from the rule of literal interpretation can be compatible with the scheme of section 56. The second paragraph of section 56 deals with two conditions: (i) impossibility (ii) by reason of some event which the promisor could not prevent, illegality. While the second condition expressly prescribes that the illegality should arise out of an event which is within the control of, as a result of fault, of parties, the first condition does not make such a prescription. Thus, a contract will be discharged even if the performance has become "impossible" by the fault a party or due to the failure of a party to prevent the relevant event. However, this is not the extant position of the doctrine under Indian law, in fact, it is exactly opposite. As clarified later in the paper, self-induced frustration, i.e., impossibility to perform because of the fault of any party, cannot discharge performance under section 56. Though it seems here that the interpretation which was adopted by the Supreme Court in Satyabrata cannot be reconciled with the wordings of section 56, however, this understanding changes when we consider the illustrations provided within the section. Illustration (e) under section 56 is as follows:

A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

In the above illustration, incapability to perform is adequate event to satisfy the test of impossibility and trigger the section. It clarifies that the term "impossible" is not restricted to

[31] ibid.

its literal understanding and here we can conclude that the deviation from literal interpretation of the section is justified considering the whole scheme of section.

The third paragraph provides compensation to the promisee in a case where he has suffered loss because of the promise of the promisor, which the promisor knew or should have known to be impossible or unlawful to perform. The third paragraph postulates that one of the parties already had or should have the knowledge of impossibility to perform at the time of contracting whereas the second paragraph deals with the supervening impossibility that has arisen after the contract is entered into. Eg, "A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise."[32] The obligation to compensate is dependent upon (1) the knowledge as well as the reasonable diligence in obtaining that knowledge as to the act being impossible, (2) the want of knowledge on the part of the promisee, and (3) whether the promisor could have prevented that event which renders the act impossible.[33]

Be that as it may, any change in circumstances *ipso facto* does not frustrate the contract. The frustration of contract is not to be lightly invoked to dissolve the contract.[34] It must be applied within very narrow limits.[35] "The courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events."[36] In an English case, *Tsakiroglou and Co Ltd v Noblee Thorl GmbH,*[37] despite the fact that the customary route for shipping, i.e., Suez canal, was closed, the court held that the contract was not frustrated. The court further directed the relevant party to perform the contract by an alternative route which was much more expensive, as a mere rise in freight price cannot be the reason discharge of its obligations under the contract.

Section 56 applies when a contract does not incorporate provisions dealing with the consequences of certain supervening events. When the consequences of such events are

[32] The Indian Contract Act 1872, s 56, illustration (c).
[33] *Firm of Hussainbhoy Karimji v Haridas* AIR 1928 Sindh 21 [23].
[34] *Twentsche Overseas Trading Co Ltd v Uganda Sugar Factory Ltd* AIR 1945 PC 144, [6]; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724.
[35] *Energy Watchdog* (n 8) [37], [43]. See also *Hirji Mulji v Cheong Yue Steamship* [1926] A O 497, affd *Nirmal Lifestyle Ltd v Tulip Hospitality Services Ltd,* Arbitration Petition No 550, 864 and 891 of 2013 [16] (Bombay High Court, 27 November 2013).
[36] *Naihati Jute Mills Ltd v Khyaliram Jagannath* 1968 (1) SCR 821 [17].
[37] [1962] 2 All ER 145, affd *Energy Watchdog* (n 8) [37].

expressly provided in the contract, the parties shall be bound by them and cannot take the defence under section 56.[38] Therefore, the application of section 56 depends on the contractual terms. The Supreme Court in 2016 held that:

> [I]f the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulates that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.[39]

A *force majeure* clause in a contract may relieve the parties from the uncertainties regarding the consequences of an event on which they have no control. Also, if an alternative mode of performance is provided in the contract, then the party has to switch to this mode instead of calling for the application of a *force majeure* clause.[40] Moreover, if a person expressly contracts to absolutely do a thing which is not naturally impossible, the defence of the act of god or illegality for non-performance cannot be taken.[41]

Section 56 of the Contract Act has been drafted in a manner such that it captures the frustration of contracts exhaustively. The Law Commission of India[42] has recognised this position and the relevant portion reads as follows:

> This section (56) marks a departure from the English Common Law to a considerable extent and it is neither profitable nor necessary to examine which of the various theories underlying the doctrine of Frustration in English Law are applicable to cases arising under this section.

The decision of East Punjab High Court in *Purshotam Das Shankar Das v Municipal Committee Batala*[43] that section 56 is not exhaustive of the law relating to the frustration of contracts in India, had been declared as a wrong understanding of law by the Supreme Court

[38] *Alopi Parshad and Sons Ltd v Union of India* AIR 1960 SC 588 [23]; *Mary v State of Kerala* AIR 2014 SC 1 [13].
[39] *Delhi Development Authority v Kenneth Builders and Developers Ltd* AIR 2016 SC 3026 [33].
[40] Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 12-034, affd H G Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) [14-151].
[41] *Matthey v Curling* [1922] 2 AC 180, 234, affd *Kenneth Builders* (n 39) [33].
[42] 13th Law Commission of India Report, Contract Act 1872, 33, 34 (1958) <http://lawcommissionofindia.nic.in/1-50/Report13.pdf> accessed 8 August 2019.
[43] AIR 1949 EP 301.

in *Dhruv Dev Chand v Harmohinder Singh*[44]. It has been further held, including in a 2018 case that the reliance on foreign judgments to understand Indian law is fruitless.[45] Common Law judgments "cannot" be of direct assistance; however, they possess persuasive value and show how the courts in England have approached and decided cases under similar circumstances.[46] Although the Supreme Court has explicitly taken the stance that Indian law on frustration is exhaustive and not dependent on Common Law, Indian courts have time and again cited, considered and even relied on Common Law cases.

A. The Test of Frustration under section 56

There exist three basic conditions that are needed to satisfy the doctrine under section 56: (1) there must be a subsisting contract, (2) some part of the contract is still to be performed and (3) the performance has become impossible after the contract is entered into.[47] Physical impossibility is not a prerequisite as already discussed. A radical change in the fundamental assumption, on the basis of which contract was entered into, is required to make the performance impracticable, illegal or impossible without the default of either of the parties.[48] The determination of the degree of change in the obligation must be done by looking into the construction of the contract in the light of facts existing at the time of its formation.[49]

Notwithstanding the *ex facie* subjectivity, the test for frustration is an objective test,[50] because "it is well settled that the supervening frustrating event immediately puts an end to an agreement, independently of the volition of the parties, without either party being conscious of the fact that what has happened has snapped their contractual bonds".[51] Unlike cancellation of contract, the frustration of contract is not determined at the volition of the party.[52] While deciding whether or not a contract has been frustrated, the courts objectively look to the construction of the contract, the effect of the changed circumstances on the parties' contractual

[44] AIR 1968 SC 1024 [8].
[45] ibid; Superintendence Company of India Pvt Ltd v Krishan Murgai, AIR 1980 SC 1717 [24]; Daiichi Sankyo Company Ltd v Malvinder Mohan Singh, 247 (2018) DLT 405 [48].
[46] *Boothalinga* (n 6) [13], [14].
[47] *Industrial Finance Corporation of India Ltd v The Cannanore Spinning and Weaving Mills Ltd* AIR 2002 SC 1841 [43]; *Sharda Mahajan v Maple Leaf Trading International Pvt Ltd* [2007] 139 CompCas 718 [29].
[48] *Davis Contractors* (n 23) 729, affd *Industrial Finance Corporation of India Ltd v The Cannanore Spinning and Weaving Mills Ltd* AIR 2002 SC 1841 [42].
[49] H G Beale, *Chitty on Contracts* (Sweet & Maxwell, 31st edn 2012) [23-015].
[50] *Davis Contractors* (n 23) 728.
[51] *State Bank of India v Earnest Traders Exporters, Importers and Commission Agents* 67 (1997) DLT 218 [21].
[52] ibid.

obligations, the intentions of the parties and the demands of justice.[53] The Supreme Court has, in *Energy Watchdog*,[54] brought new factors to the above-mentioned list, through a "multifactorial" approach which was enunciated in the celebrated English case of the *Sea Angel*[55] as under:

> [T]he application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.
>
> Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

The factors mentioned in the above excerpt point towards the intention/contemplation of the parties at the time of entering the contract which may or may not be evident from the terms of the actual contract. These factors help in ascertaining as opposed to assuming (i.e., implied condition theory), the possibilities of performance in changed circumstances which parties had agreed upon at the time of contracting. The question therefore revolves around the extent to which the parties had contemplated the effect of changed circumstances or supervening events on the performance of their obligations. The requirement of radical change

[53] *Satyabrata* (n 1) [18] referring to *Morgan v Manser* [1941] 2 All ER 666; H G Beale, *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) 1489; Pollock and Mulla, *the Indian Contract and Specific Relief Acts* (14th edn, LexisNexis 2012) 881; H G Beale, *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) 1489.
[54] *Energy Watchdog* (n 8) [39].
[55] *Sea Angel* (n 8).

in obligations further ensures that the doctrine is not invoked lightly to discharge the performance of the contract.

B. Differentiating section 32 and section 56 of the Contract Act

Under the Contract Act, both sections 32 and 56 apply to cases of frustration of contacts and it is important to understand the difference between section 32 and section 56. The party(ies) may see an incentive to go under section 56 instead of section 32. This incentive is the compensation under the third paragraph of section 56 that a loss-incurring party may receive for loss through non-performance of act known to be impossible or unlawful.[56]

Technically, under both sections 32 and 56, the contract can be discharged on the impossibility of certain events in the future. Section 32 deals with a contingent contract, which is dependent on the fulfilment of a condition for its survival. A contingent contract will dissolve under its own force if the condition is not satisfied, whereas, section 56 is attracted when a contract becomes impossible to perform because of an outside force.[57] Therefore, it can be said that "it is sometimes a matter of doubt whether a contract falls under section 32 or section 56".[58]

In *Satyabrata*, the Supreme Court stated that:

> In cases, therefore, where the Court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under section 32 of the Contract Act which deals with contingent contracts or similar other provisions contained in the Act.[59]

Section 32 will not only apply to a contract that expressly provides a condition on which performance is dependent, but also to a contract where such condition is implied.[60] For

[56] *Kirpal Das Jivraj Mal v Manager, Encumbered Estates* AIR 1936 Sindh 26 [6].
[57] *Durga Devi Bhagat v JB Advani and Co Ltd* 1970 CWB 528 [35], referring to *Satyabrata* (n 1).
[58] *Kirpal Das Jivraj Mal v Manager, Encumbered Estates* AIR 1936 Sindh 26 [6].
[59] *Satyabrata* (n 1) [18].
[60] ibid; *Chandnee Widya Vati Madden v Dr CL Katial* AIR 1964 SC 978 [6]; *Bishambhar Nath Agarwal v Kishan Chand* AIR 1998 All 195 [21].

instance, the contract of sale of property would be a contingent contract if the sale is impliedly dependent upon the consent of other joint owners on the partition.[61] This would imply that even if the condition is implied in nature, its non-fulfilment should attract the application of section 32 and not section 56. However, sometimes the courts have considered such cases under section 56 instead of section 32. For instance, where acquiring permission was impliedly required to sell the property, the Supreme Court scrutinized the case under section 56. It directed the respondent to approach the competent authority for its permission and stated that:

> Unless the competent authorities have been moved and the application for consent/permission/sanction have been rejected once and for all and such rejection made finally became irresolutely binding and rendered impossible the performance of the contract resulting in frustration as envisaged under section 56, the relief cannot be refused for the mere pointing out of some obstacles.[62]

Such cases should properly fall within the scope of section 32 and not section 56 because in such cases the contract is discharged by the nonfulfillment of the condition on which the contract was contingent and not by some outer force.[63] Under English law, these cases are also treated as cases of frustration,[64] which could be one explanation for Indian courts wrongly applying section 56 in such cases.

C. Factors amounting to the Frustration of Contract

Physical destruction of the subject matter, loss of the object, subsequent illegality to perform, delay, death or incapacity of the party in a contract requiring personal performance, etc., are some of the factors that attract the provisions of section 56. An event may fall under one or more of such factors. Some of the most common and prominent factors are analysed below:

1. The Subject Matter of the Contract is physically destroyed.

The destruction of the specific subject matter essential for the performance of the contract will render the contract frustrated. The landmark case *Caldwell,*[65] which laid down the foundation of the doctrine in the UK also falls under this category. This factor is strongly considered in

[61] *Kirpal Das Jivraj Mal v Manager, Encumbered Estates* AIR 1936 Sindh 26 [5].
[62] *Nirmala Anand v Advent Corporation Pvt Ltd* AIR 2002 SC 3396 [17].
[63] Pollock (n 53) 894.
[64] *Satyabrata* (n 1) [18].
[65] *Caldwell* (n 10).

cases, such as where factory premises in which machine was to be installed is destroyed by fire,[66] or where a wall of the cinema was collapsed by heavy rain and the contract stood frustrated.[67] If the subject matter is not completely destroyed, but immensely, even then the contract may be discharged. It was held in a case that even though the cargo of dates was sold in the market for other purposes, yet it lost its mercantile character when it sank and was affected by water and sewage. Therefore, the cargo owner's liability to pay the freight was discharged.[68]

The things which are destroyed must specifically be the subject matter of the contract and therefore, if the contract was not restricted to those specific goods, then it may not be discharged. A contract of agency to sell goods manufactured by defendant was not frustrated when the factory was burnt down because the contract was not restricted to the goods manufactured by the defendant at that particular factory.[69]

2. Legal Changes resulting in Subsequent Illegality

It is presumed that the parties intend to contract with reference to the law as existing at the time when the contract is made.[70] However, a subsequent change in the law or in the legal position, affecting a contract and prohibiting the performance undertaken by the contract, is a well-recognised ground for frustration under section 56. Here, "law" may include foreign law, unless otherwise reflected from the contract. In the *Energy Watchdog*,[71] the Supreme Court held that unless the contract provides otherwise, "this would be true as a general statement of law […that…] if performance of a contract is to be done in a foreign country, what law would be relevant would be foreign law" and if the performance has become illegal under foreign law, the contract will stand discharged.

To discharge the contract, the change in the law must be such as to strike at the basis of the contract and not merely to suspend the performance under it.[72] Such change in law may be brought by the Supreme Court's order which prohibited stone crushing activity and as per the

[66] *Appleby v Myres* [1867] LR 2 CP 651.
[67] *VL Narasu v PSV Iyer* AIR 1953 Mad 300 [28].
[68] *Asfar and Co v Blundell* [1896] 1 QB 123, 128, affd *Union of India v Customs and Central Excise Steel Commission* 2010 (254) ELT 647 (Bom) [5].
[69] *Turner v Goldsmith* [1891] 1 QB 544, affd *International Oil Co v Indian Oil Co Ltd* AIR 1969 Mad 423 [4].
[70] Pollock (n 53) 900.
[71] *Energy Watchdog* (n 8) [52].
[72] *Ram Kumar v PC Roy and Co Ltd* AIR 1952 Cal 335 [27]; *Rozan Mian v Tahera Begum* AIR 2007 SC 288 [9]; see J Beatson, Andrew S. Burrows, John Cartwright, *Anson's Law of Contract* (29th edn, OUP Oxford 2010) 508.

contract, the supplier was required to supply crushed stones from its own stone crusher, the change in legal position made it impossible to supply crushed stones.[73] The Government's Import Control Order of 1955 put a positive condition not to sell the imported goods and therefore, it was impossible for appellant to supply chicory of a specific type to the respondents.[74] Further, any prohibition order of Government which makes the performance illegal will also frustrate the contract.[75]

The commencement of the Constitution of India also frustrated contracts which were in contravention to any article of the Constitution. A contract providing a monopoly of manufacturing radios and other electronic apparatuses was frustrated by the operation of Article 19(1)(g).[76] The merging of different states into India or other states of India led to the discharge of a number of agreements which could not be performed because of the changed legal position.[77]

Any legislation enacted by the Government which fundamentally changes the legal situation renders the performance illegal.[78] However, in a case, the Supreme Court decided that the liability of a guarantor to pay on the default of principal debtor will survive even after the Nationalisation Act came into force and the principal debtor is nationalized.[79] It held that "the Contract of Guarantee has no co-relation with that of the Nationalisation Act neither is dependent thereon: it is an independent contract and in all fairness has to be honoured to fulfil the contractual obligation between the surety and the creditor".[80]

Furthermore, the declaration of war also alters the legal relations of the countries and contracts are affected by party becoming an alien enemy.[81] Any contract which necessarily involves intercourse with or in advantage to an alien enemy, who was not an enemy when the

[73] *New Delhi Municipal Council v Manohar Stone Crushing Co*, RFA No 341/2006 (Delhi High Court, 1 October 2018) [6].
[74] *Boothalinga* (n 6) [14].
[75] *Kenneth Builders* (n 39) [39].
[76] *Hamara Radio and General Industries Ltd Co v State of Rajasthan* AIR 1964 Raj 205 [32].
[77] *State of Rajasthan v Associated Stone Industries Kota Ltd* AIR 1971 Raj 128, 133 [18]; *State of Rajasthan v Madanswarup* AIR 1960 Raj 138 [21].
[78] *Raj Kumar Gupta v Des Raj* AIR 1995 HP 107 [20].
[79] *Industrial Finance Corporation of India Ltd v The Cannanore Spinning and Weaving Mills Ltd* AIR 2002 SC 1841 [44].
[80] ibid.
[81] Pollock (n 53) 902.

contract was entered into, will stand frustrated as soon as the war breaks out.[82] However, the continuance of those executory contracts which are not against public policy is not abrogated by one party becoming an alien enemy.[83] Therefore, the supervening event, that is, outbreak of war, must strike at the foundation of the contract and render it illegal to perform. If the contract did not specify the source of the goods, then the seller cannot take the defence that since the goods were to come from Germany, an enemy country, the contract stands frustrated.[84] Moreover, a temporary restriction imposed by the war, according to the terms of the contract may not result in frustrating the contract,[85] as in the case of a lease agreement of 99 years may not be frustrated by the restriction imposed during the war.[86]

3. Loss of Object

As already explained, the term "impossible" has not been used in section 56 of the Act in the sense of physical or literal impossibility.[87] The performance of a contract may be possible to carry out physically but if it has become redundant having regard to the object and purpose of the parties, by an untoward event or change of circumstances, then it must be held that the contract is frustrated.[88] The landmark judgment of *Krell v Henry*[89] captures this; where though the room could be hired yet the court declared the contract frustrated because the purpose of hiring the room (i.e., watching coronation procession) was lost. Therefore, the object or purpose of the contract can also be lost because of the non-occurrence of an expected event or the non-existence of a state of things. A contract under which the object of the purchaser was to sell the goods according to his own terms to a person of his choice, stood frustrated by a direction issued by the General Manager which authorized the district officer to nominate the person/persons to whom plaintiff had to sell the goods.[90]

---

[82] *Nissim Issac Bekhor v Sultanalli Shystary and Co* AIR 1915 Bom 76 [3] - [5]; *Duncan, Fox and Co v Schrempft and Bonke* [1915] 1 KB 365 observed in *Marshall and Co v Naginchand Fulchand* AIR 1917 Bom 182 [4]; *Rama Nand Vijay Parkash v Gokulchand* AIR 1951 Simla 189; *AF Ferguson and Co v Lalit Mohan Ghosh* AIR 1954 Pat 596 [24]; *Re Helbert Wagg and Co Ltd* [1956] 1 All ER 129, 144.
[83] H G Beale, *Chitty on Contracts* (Sweet & Maxwell, 31st edn, 2012) 1652 [23-030].
[84] *Twentsche Overseas Trading Co Ltd v Uganda Sugar Factory Ltd* AIR 1945 PC 144 [4].
[85] *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, affd *VL Narasu v PSV Iyer* AIR 1953 Mad 300 [12].
[86] *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] 1 All ER 252, affd *Kesarichand v Governor-General in Council* [1949] ILR Nag 718 [47].
[87] *Satyabrata* (n 1).
[88] ibid; *Sushila Devi v Hari Singh* AIR 1971 SC 1756 [11]; *Rozan Mian v Tahera Begum* AIR 2007 SC 2883.
[89] *Krell v Henry* [1903] 2 KB 740.
[90] *Firm Meghraj Nathmal v Firm Motilal Suresh Chand* RLW 1963 Raj 621 [13].

The court will not accept the plea of impossibility if even after the supervening event, the object of the contract is not rendered redundant and the contract can still be performed substantially in accordance with the original intention of the parties though not literally in accordance of the language.[91]

4. Delay, Death or Incapacity to Perform

The delay and laches also result in frustration of contract.[92] Though it is often a difficult matter to decide whether a contract has been frustrated by an event or change in circumstances which causes an unexpected delay in its performance.[93] The delay has to be so great and of such a character that it would totally upset the basis of the bargain and commercial object which the parties had in view.[94] Such delay must be abnormal in its cause, effects or expected duration so that it could not be reasonably contemplated at the time of contracting.[95] The fulfilment of the obligations when the delay is over will not accomplish the object which both the parties to the contract had in view and for which they entered into the contract.[96] Such delay will radically change the circumstances and then, it will be impossible to fulfil the obligations which parties originally had.

If the delay was within the commercial risks undertaken by the parties and it does not frustrate the commercial purpose of the contract, there can be no frustration. In a case, delay in the supply of cargo did not frustrate the charter-party because such delay was already contemplated in the terms of the contract.[97] Further, when a contract specifically lays down a time-limit, then a supervening event causing delay for an indefinite period may make the performance impossible.[98]

The theory of radical change in the obligation also comes into play to determine whether the delay already suffered and the prospects of a further delay from that cause will make the ultimate performance "radically different".[99] Conclusively, it is a question of degree whether

---

[91] *Satyabrata* (n 1).
[92] *Sharda Mahajan v Maple Leaf Trading International Pvt Ltd* [2007] 139 CompCas 718 (Del) [32].
[93] H G Beale, *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) 1498 [23-035].
[94] *Satyabrata* (n 1).
[95] H G Beale, *Chitty on Contracts* (28th edn, Sweet & Maxwell 1999) 1498 [24-034]; *Sir Lindsay Parkinson and Co Ltd v Commissioners of Works and Public Buildings* [1950] 1 All ER 208 (CA).
[96] Lord Simonds, *Halsbury's Laws of England* (3rd edn, Butterworths 1954) 187.
[97] *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1961] 2 All ER 577.
[98] *Codelfa Construction Pty Ltd v State Railway Authority of New South Wales* [1982] 149 CLR 337 [19].
[99] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 752, affd H G Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) 1654 [23-036].

the effect of delay suffered and likely to be suffered, will be such as to frustrate the commercial purpose of the venture.[100]

Finally, death or incapacity of a party, whose personal performance was required as per the contract, is a valid ground for the frustration of a contract.[101] For example, in an n English case, the contract was declared frustrated because of the illness of the pianist who was unable to perform in the concert.[102]

D. Factors not amounting to the Frustration of Contract.

The application of the doctrine is bound by the contractual terms and the principles of fairness and justness. It is not applied to cases where the factors do not amount to the frustration of contract as discussed hereunder.

1. Inherent or Foreseeable Risks

A contract may incorporate certain inherent or foreseeable risks, though not expressly, which are required to be considered while applying the doctrine. Its application cannot be sought in cases where the parties have or ought to have foreseen the risk of the happening of a supervening event because such risk is consciously accepted by the parties.[103] Certain risks are deemed inherent to contracting. In a case, a common carrier had the obligation to ensure the safety of goods against everything extraneous, except the act of god or state enemies. He was made liable for the destruction of the goods when a mob put them to fire post Smt. Indira Gandhi's assassination because the contract had foreseen such risk.[104] This was not an act of god and the common carrier, therefore, had an obligation to keep the carrier safe.

A high degree of foreseeability has to be proved to exclude the application of the doctrine,[105] e.g., delay in a construction contract due to a shortage of skilled labour was found not to have frustrated the contract because the delay did not result in a new state of affairs that the parties could not have reasonably foreseen.[106] A knowingly taken risk will also exclude the

---

[100] ibid, 752; JE Stannard, "Frustrating Delay" (1983) 46 Modern Law Review 738.
[101] *Balwinder Singh v State of Punjab* (2017) 185 PLR 356 [16].
[102] *Robinson v Davison* [1871] LR 6 Exch 269, affd *Satyabrata case* [13].
[103] *Panakkatan Sankaran v The District Board of Malabar* AIR 1934 Mad 85 [7]; *Union of India v Chanan Shah Mahesh Dass* AIR 1955 Pepsu 51 [8] [9]; *Ramayya v Firm of Gulfarosh Mohideen Saib Shaik Saib* AIR 1958 AP 576 [16]; *Gujarat Housing Board v Vipul Corporation* AIR 2004 Guj 319 [10]; Pollock (n 53) 894.
[104] *Lucky Bharat Garage Pvt Ltd v South Eastern Coalfields Ltd* 2011 (2) CGLJ 483.
[105] Pollock (n 53) 917.
[106] *Davis Contractors* (n 23).

application of the doctrine. When the oil generating companies submitted their bids with non-escalable tariffs, they accepted the risk of an unexpected rise in the prices of coal.[107]

Notwithstanding the presumption that the general character of the frustrating event is un-foreseeability, Lord Denning observed:

> It has often been said that the doctrine of frustration only applied where the law situation is "unforeseen", "unexpected" or "uncontemplated", as if that were an essential feature, but that is not so. The only thing that is essential is that the parties should have no provision for it in the contract. [108]

The question which is significant is whether the contract incorporates the provision for such events. Foreseeability will support the assumption of risk-assumption only where the supervening event is one which any person of ordinary intelligence would regard as likely to occur, or the contingency must be one which the parties could reasonably be thought to have foreseen as a real possibility.[109]

Again, the construction of the contract plays a significant role in determining whether the failure to incorporate the provision for unforeseen events would mean that the risk should be borne by both the parties.[110]

2. Performance becomes Burdensome or Onerous

In the course of carrying out the performance, a party may often face events which are not anticipated, eg, an abnormal rise or fall in prices, sudden depreciation of the currency, any unexpected obstacle to execution, etc.[111] However, these do not by themselves get rid of the bargain that has been made. The Supreme Court has emphasised that courts do not have a general power to absolve a party from liability merely because the performance of the contract has become onerous on account of an uncontemplated turn of events.[112] It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which

[107] *Energy Watchdog* (n 8); *Ocean Tramp Tankers Corporation v V/O Sovfracht* [1964] 1 All ER 161.
[108] ibid.
[109] Treitel, *Frustration and Force Majeure* (1st edn, Sweet & Maxwell 1994) [13-09].
[110] Lord Hailsham, *Halsbury's Laws of England, Contract* (9(1) vol, 4th edn, Butterworths 1998) 905.
[111] *Travancore Devaswom Board v Thanath International* (2004) 13 SCC 44.
[112] ibid.

had unexpectedly emerged, that the contract ceases to bind.[113] Hence, a contract is not discharged merely because it is difficult to perform or onerous.[114] Impossibility referred to in section 56 is not merely a commercial impossibility.[115]

Any economic condition, irrespective of its seriousness and affect, cannot *ipso facto* amount to impossibility. There is no implied condition as to "commercial" impossibility.[116] If the performance is legally and physically possible, but commercially unprofitable, the contract cannot be stated to be frustrated.[117]

Treitel reiterated that a mere rise in price, rendering the contract more expensive to perform, does not constitute "hindrance".[118] For instance, the expression "hinders the delivery" in a contract should not mean merely a question of rise in price, but a serious hindrance in the performance of the contract as a whole.[119] To attract the doctrine, burdensomeness is not the necessary consideration; the impossibility of performance is the true criterion. The decrease in the amount of remuneration has the effect of rendering the contract more burdensome, but not yet impracticable or impossible.[120] In an often-cited judgment of the Supreme Court, *M/s Alopi Parshad & Sons Ltd v Union of India,*[121] it was held that the performance of a contract is never discharged merely because it may become onerous to one of the parties. In this case, the court rejected the plea of enhancement of rate, which was sought on the ground that performance at reduced rates as provided in the contract was not possible due to the continuation of World War II hostilities. Moreover, the Supreme Court has recently taken upon and agreed to the modern approach to frustration while citing the popular *Sea Angel*[122] and held that a contract may not be frustrated as a whole when alternative modes of performance were available, albeit, at a higher price.

---

[113] *Ram Abhoshan v PEC Ltd* OMP, 444/2015 (Delhi High Court, 14 November 2018) [12], citing *M/s Alopi Parshad and Sons Ltd v Union of India* 1960 (2) SCR 793.
[114] *Today Homes and Infrastructure Pvt Ltd v Jitender Singh* OMP 13/2012 (Delhi High Court, 11 December 2014) [9]; Lord Hailsham, *Halsbury's Laws of England, Contract* (9(1) vol, 4th edn, Butterworths 1998) 455.
[115] *Sri Amuruvi Perumal Devasthanam v KR Sabapathi Pillai* AIR 1962 Mad 132 [15].
[116] Roy Grenville McElory, *Impossibility of performance* (first published, Cambridge 1941) 194.
[117] *Blackburn Bobbin Co Ltd v Allen (TW) & Sons Ltd* [1918] 1 KB 540 and *Re Commptoir Commercial, Annersois and Power Son & Co* [1920] 1 KB 868, affd in *Sri Amuruvi Perumal Devasthanam v KR Sabapathi Pillai* AIR 1962 Mad 132 [15].
[118] Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) [15-158]; *Tennants (Lancashire) Ltd v GS Wilson and Co Ltd* [1917] AC 495.
[119] *Peter Dixon and Sons Ltd v Henderson, Craig and Co Ltd* [1919] 2 KB 778, affd *Energy Watchdog* (n 8) [43].
[120] *Badri Narain v Kamdeo Prasad* AIR 1961 Pat 41 [34].
[121] (1960) 2 SCR 793.
[122] *Sea Angel* (n 8), affd by the Supreme Court in *Energy Watchdog* (n 8) [41].

3. Self-induced Frustration or cases where the Frustration could be prevented

A party is excused of non-performance if it proves that (1) the non-performance was due to an impediment beyond its control, (2) it could not have reasonably foreseen the impediment at the time of the making of the contract, and (3) it could not avoid or overcome the impediment or its consequences.[123] A party is not entitled to rely on its own fault to get himself excused from the liability under the contract.[124]

The onus of proving that the frustration was self-induced is on the party who alleges the same.[125] A party is not required to prove affirmatively that the event occurred without his fault.[126] In a case, the performance of the charter-party became impossible because of the violent explosion in the boiler of the chartered ship. The owners of the ship were not required to prove their innocence, but the other party alleging the self-induced frustration had the burden of proof.[127]

The real question is whether the frustrating event relied upon is truly an outside or extraneous change of situation or whether it is an event which the party (who is seeking the plea of frustration) had the means and opportunity to prevent, but nevertheless caused or permitted it to come about.[128] Therefore, "negligence" generally excludes frustration, eg, the plea should have failed in *Caldwell* if the fire had been due to the negligence of the defendants. In such a case it would be unjust to make the other party bear the loss. A "negligent omission" should likewise exclude frustration. Therefore, for instance, even though the applicants were not contractually bound to licence the chartered trawler, yet they cannot claim impossibility because of change in the law when they did not get the trawler licensed, even when they had the opportunity to get it licensed.[129] In another instance, a contract cannot be said to be

[123] The UNIDROIT Principles, art 7.1.7, <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/404-chapter-7-non-performance-section-1-non-performance-in-general/1050-article-7-1-7-force-majeure> accessed 10 August 2019; *Central Bank of India Staff Co-operative Building Society Ltd v Dulipalla Ramachandra Koteswara Rao* AIR 2004 AP 18 [39].
[124] *Maritime National Fish Ltd v Ocean Trawlers Ltd* AIR 1935 PC 128 [16]; *GA Galia Kotwala and Co Ltd v KRL Narasimhan and Brother* AIR 1954 Mad 119 [15] [16]; *DR Mehta v Tin Plate Dealers Association Ltd* AIR 1965 Mad 400 [7] [8]; *Siddhivinayak Realties Pvt Ltd v V Hotels Ltd* Arbitration Petition No 667 and 629 of 2011 (Bombay High Court, 10 May 2013) [121]; *Nirmal Lifestyle Ltd v Tulip Hospitality Services Ltd,* Arbitration Petition No 550, 864 and 891 of 2013 [20] (Bombay High Court, 27 November 2013); *Balwinder Singh v State of Punjab* (2017) 185 PLR 356 [16].
[125] *MD Army Welfare Housing Organisation v Sumangal Services Pvt Ltd* AIR 2004 SC 1344 [120].
[126] Michael Furmstone, *Cheshire, Fifoot and Furmston's Law of Contract* (14th edn, Oxford 2005) 643.
[127] *MD Army Welfare Housing Organisation v Sumangal Services Pvt Ltd* AIR 2004 SC 1344 [120].
[128] *Union of India v Modi Korea Telecom Ltd* (2009) 2 Arb LR 553 [21].
[129] *Maritime National Fish Ltd v Ocean Trawlers Ltd* AIR 1935 PC 128 [16].

frustrated where the plaintiff did not do anything to get further permission from the government to purchase the rest of 20 bighas of the land after getting permission for 145 bighas while knowing that the government would not give permission for entire land at once.[130] Hence, in the cases of self-induced impossibility, which could have been removed by the party himself, section 56 is not applicable[131] and it will amount to a breach of contract where the party responsible for such breach is liable to compensate the other party.[132]

4. Executed Contract

The doctrine of frustration comes into play when the obligation, which is yet to be performed, has become impossible or impracticable to perform. The doctrine can only apply to executory contracts and not to the executed contracts or the transactions which have created a *demise in praesenti*.[133] To explain this, a division bench of Delhi High Court gave an example that a retailer purchased some goods from a manufacturer and agreed quantities were delivered with part consideration paid. Now, if the market was flooded with cheaper imported goods because of the change in import policy, then the retailer could not plead frustration requiring the Court to reduce the price and relieve him from the obligation to pay the balance sale consideration to the wholesaler.[134]

A completed conveyance is clearly distinguished from an executory contract, and a concluded transfer cannot be invalidated by supervening events.[135] Section 56 can apply to an agreement to lease but not to the lease deed[136] because lease deed is a completed conveyance. As soon as a lease deed is executed, the lease deed takes the place of the agreement to lease.

---

[130] *Gian Chand v York Exports Ltd* AIR 2014 SC 3584 [10].
[131] *Eacom's Control (India) Ltd v Bailey Controls* 74 (1998) DLT 213; *Union of India v Modi Korea Telecom Ltd* (2009) 2 Arb LR 553 [21].
[132] *Galia Kotwala and Co Ltd v KRL Narasimhan and Brother* AIR 1954 Mad 119 [15] [16].
[133] *HV Rajan v CN Gopal* AIR 1975 SC 261.
[134] *Airports Authority of India v Hotel Leelaventure Ltd* 231 (2016) DLT 457.
[135] *Dhruv Dev* (n 1) [9].
[136] ibid, overruling the judgment of Punjab High Court in *Gurdarshan Singh S/o Dalip Singh v Bishan Singh S/o Uttam Singh* AIR 1963 P&H 49, in which the court applied the doctrine to a contract of lease; *Abdul Hashem v Balahari Mondal* AIR 1952 Cal 380; *Courts of Wards Dada Siba Estate v Raja Dharan Dev Chand* AIR 1961 Punj 143; *Sri Amuruvi Perumal Devasthanam v KR Sabapathi Pillai* AIR 1962 Mad 132 [25]; *Rahim Bux v Mohammad Shaft* AIR 1971 All 16.

5. The Foundation is not Substantially Damaged

As it has been held that the doctrine of impossibility, which is based on equity and common sense cannot be permitted to become a device for destroying the sanctity of contract.[137] The Supreme Court has held in a case that when the property leased is not substantially destroyed or become permanently unfit, the lessee cannot avoid the lease on the ground that he is unable to use the land for purposes for which it is let to him.[138] In another case, the Supreme Court held that the contract is not frustrated when there is still an opportunity to get permission by making a fresh application.[139] To hold the defence of impossibility, substantial destruction of the foundation of the contract is necessary. If a party fails to prove how two mild cyclones have destroyed the essentials of the contract, it would not get relief under this doctrine.[140]

The Indian law on the doctrine of contract is essentially covered by the above-explained factors amounting and not amounting to frustration. As already explained that this doctrine comes into the picture when the contract is silent on the consequences of an unexpected event. A contract may incorporate a clause dealing with the consequences of any event which may hinder the performance. The next section of the paper deals with the interplay of the doctrine and such clause in the contract.

E. The Interplay between the Doctrine of Frustration & Force Majeure Clause

In Indian Contract Law, the presence of a clause dealing with supervening events in the contract, *ipso facto* does not exclude the possibility of application of the doctrine. In a number of cases, Indian courts have analysed the scope of such clause to determine if it covers the supervening event, which makes it relevant to discuss the interplay between the doctrine and the clause.

The term *"force majeure"* or *"case fortuit"* (French) or *"casus fortuitous"* (Latin) means an unavoidable accident or a chance occurrence.[141] It is borrowed from the Code Napoleon and has received interpretation in several decisions.[142] It is a wider term than *"vis major"* which means the acts of God. *Force majeure* includes other events as well, such as

[137] *Ganga Singh v Santosh Kumar* AIR 1963 All 201 [11].
[138] *Dhruv Dev* (n 1).
[139] *Govindbhai Gordhanbhai Patel v Gulam Abbas Mulla Allibhai* AIR 1977 SC 1019.
[140] *Airports Authority of India v Hotel Leelaventure Ltd* 231 (2016) DLT 457.
[141] *Tungabadra Minerals Private Ltd v The Chennai Port Trust* (2017) 2 MLJ 486 [32].
[142] *Edmund Bendit v Edgar Raphael Prudhomme* (1925) ILR 48 Mad 538.

malfunctioning of machinery or labour strikes, etc. A *force majeure* clause ("the clause") is incorporated in a contract to avoid uncertainties when a supervening event happens beyond the control of the parties and for which they cannot be blamed. An example would be the termination of the license by a decision of the court after the contract is entered into.[143] Unless otherwise provided, the impossibility which is self-induced, like delay in applying for a license, [144] is not protected under this clause.[145] The intention as articulated by the Supreme Court is to save the performing party from any event on which he has no control.[146] The court explained the scope of a force majeure clause:

> McCardie J in Lebeaupin v Crispin, [1920] 2 KB 714, has given an account of what is meant by "force majeure" with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure".

The presence of the *force majeure* clause in the contract, squarely covering the event that has happened, will eliminate the application of section 56 in that particular case. However, "the force majeure clause does not exhaust the possibility of unforeseen events occurring outside natural and/or non-natural events [mentioned in the clause]".[147] It means that even though the parties have provided for the unforeseen events in the form of *force majeure* clause, yet there is a possibility of incompleteness of that clause.[148] If such a clause has not envisaged the extent of the circumstances which have actually now interfered with the performance, then

---

[143] *Serajuddin v State of Orissa* AIR 1969 Ori 152; *Unitech Wireless (TN) Pvt Ltd v Bharat Sanchar Nigam Ltd* Petition No 436, 437 of 2013 and MA No 334, 335 of 2013 (Telecom Disputes Settlement & Appellate Tribunal, 21 August 2014) [24].
[144] *Naihati Jute Mills Ltd v Khyaliram Jagannath* 1968 (1) SCR 821 [17].
[145] ibid.
[146] *Dhanrajamal Gobindram v Shamji Kalidas and Co* AIR 1961 SC 1285 [17]; see *Continental Enterprises Ltd v State Trading Corporation of India Ltd* 2009 CS (OS) 788A/1996 and IA 6204/1997 (Delhi High Court, 16 December 2009).
[147] *Energy Watchdog* (n 8) [43].
[148] Pollock (n 53) 921.

such intervening circumstance may discharge the contract under section 56 despite the express clause.

It can be deduced from the above analysis that even though a *force majeure* clause provides certainty to the contract, it is not necessary that it covers all supervening events thereby excluding the application of the doctrine.

F. Frustration and its Aftermath

It is a well-settled position of law that after the frustration of contract, the principle of restitution under section 65 of the Contract Act applies and the consideration received must be repaid.[149] Any party, who has received any advantage under a frustrated or void agreement or contract, is bound to restore it to the person from whom he had received it.[150] Also, any consideration or part-payment or earnest money paid in advance for the performance of the contract, which has now frustrated, has to be refunded.[151] For instance, when the contract of construction was frustrated because of restriction, the Supreme Court ordered to refund the deposit along with interest.[152] Similarly, when the land had been vested in the State with the promulgation of Calcutta Thika Tenancy Act 1949, the Supreme Court ordered a refund of the consideration already paid along with interest.[153] If a party incurred certain expenses which it was not bound to make under the contract, it is not entitled to recover for the expenses it made which it was not bound to make under the contract.[154]

In another case, the question of waiver of the right to get the refund was raised when the party kept on paying to the insurance company even after the war broke out. In this case, the court held that though the contract was frustrated, the party had not waived its right to get a refund because it made "perfectly clear that the request that he was making was without any prejudice to the rights of the parties due to outbreak of war".[155]

One of the most important concerns of the parties, following the happening of an event, is the risk allocation. The court has to first scrutinise whether the risk of the events which have

[149] *Sharda Mahajan v Maple Leaf Trading International Pvt Ltd* [2007] 139 CompCas 718 (Del) [33].
[150] *Govindram Seksaria v Edward Radbone* AIR 1948 PC 56 [12]; *Bombay Dyeing & Manufacturing Co Ltd v The State of Bombay* AIR 1958 SC 328 [34]; *Man Singh v Khazan Singh* AIR 1961 Raj 277.
[151] *Raj Kumar Gupta v Des Raj* AIR 1995 HP 107 [20].
[152] *Kenneth Builders* (n 39).
[153] *Rozan Mian v Tahera Begum* AIR 2007 SC 288 [11].
[154] *Nissim Isaac Bekhor v Haji Sultanali Shustary* AIR 1915 Bom 76 [3] - [5].
[155] *AF Ferguson and Co v Lalit Mohan Ghosh* AIR 1954 Pat 596 [26].

occurred is expressly assumed by any party, or if not, whether any party reasonably ought to have assumed the risk.[156] If an accidental fire has completely destroyed the work done and the consideration is promised to be paid on the completion of the work, then the contractor is not entitled to recover anything.[157] Again, "the doctrine of frustration has no application to a case where there is an express contract to repay money in case of supervening impossibility of performance of the major obligation".[158]

Though in England, prior to a 1943 case, [159] any amount advanced before the frustration of contract was irrecoverable and any loss arising from such frustration was to be borne by the person on whom such loss fell.[160] In India, the principle of restitution has been positively laid down in section 65as a rule of law which governs the courts to decide the case on the principle of unjust enrichment and fairness.

IV. Conclusion

The doctrine of frustration, incorporated under section 56 of the Indian Contract Act, provides a way out to the party(ies) when the performance has become impossible, owing to any supervening event, without their fault. The application of the doctrine questions the sanctity of the contract under certain changed circumstances. English courts evolved various theories to justify the application of the doctrine under certain circumstances, whereas Indian Law has, by codifying this doctrine in section 56, obviated the need for evolving and applying theories to justify the application of the doctrine.

Factors and circumstances that the courts consider while determining the applicability or non-applicability of section 56 have been dealt with in detail in this Paper. Situations in which the subject matter of the contract is destroyed; performance has become illegal; the purpose behind entering into the contract is 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. Conversely, when the risk is inherent to contract; frustration is self-induced; the contract is an executed contract; the contract can still be performed or the foundation of the

[156] PS Atiyah, *An Introduction to the Law of Contract* (5th edn, Oxford 1995) 237.
[157] *Appleby v Myers* (1867) LR 2 CP 65 1.
[158] *MM Tacki v Dharam Say* AIR 1947 Bom 98 [14].
[159] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122.
[160] *Chandler v Webster* [1904] 1 KB 493.

contract is not substantially destroyed; are examples of factors that would not attract the provisions of section 56.

While there are several instances of Indian courts erroneously applying section 56 to the cases of contingent contract, if the factors and circumstances amounting to frustration of contract are impliedly or explicitly dealt with in a contract, then such a contract should attract the provisions of section 32 and not section 56. However, if the provisions of the contract have not envisaged the extent of the factor and circumstances which actually interfere with the performance of the relevant contract, then such intervening factors and circumstance may discharge the contract under section 56 despite the express clause.

The contracting parties may avoid the realm of uncertainties caused by any future event by inserting well-drafted and specifically defined provisions in the contract, such as a *force majeure* clause. Such clauses may allocate the risks of any supervening event among the parties. However, the scope of such a clause will determine if it covers the supervening event, otherwise, there may be a need to apply section 56. The interpretation of the clause to determine its scope is mainly guided by commercial and market practices. The narrow application of both the doctrine and clauses such as *force majeure* clauses favours the enforceability of rights and obligations under a contract, which is important to safeguard the trust of parties to a contract.

While the doctrine of frustration has its roots under the Common Law, the codification of the doctrine in section 56 and the development of the doctrine under the Indian law is noteworthy and constant.