

Calculus of Force Majeure in Corona Lockdown

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Abstract

*Force Majeure is not a new concept in Law. Vis major is a concept of contractual relations prevalent in Roman Laws since time immemorial whereas the force majeure is equivalent concept in French Laws imported from the Roman Laws per se in Continental Law system alien to Common Law legal System which uses the term of frustration of contract. Like any other Commonwealth Countries inter alia USA, India also adapted the Legal System of Common Laws of England which use the term doctrine of frustration. However, the advent of COVID-19 gave rise to multiploidization of litigation and legal consultancy across the Globe as to whether the breach of contract or non-performance of respective obligations triggered by lockdown due to pandemic COVID-19 would amount to 'force majeure. Courts of Law are divergent. **How COVID-19 pandemic is unprecedented to constitute Force Majeure and strikes at root of the contract as whole?** This Paper attempts to do a Legal evaluation of force Majeure clause in view of unprecedented and un-paralleled swingeing loss sustained to the life and business of the people subsequent shuttering down borders, grounded flights and sledgehammered a complete compulsory penal lockdown of all activities of its citizen inter alia arresting all activities of business establishments, industries, and service sectors across by many Countries. In this backdrop it also examines **Whether an Amendment in Indian Contract Act, 1872, is needed to address the concept of Force Majeure in the emerging circumstances of COVID-19?***

Keywords: Force Majeure, COVID-19, Corona, Contract Act 1872, Legal

INTRODUCTION

The Corona Doom

Everything was normal and calm across the globe till a deadly pandemic virus named COVID-19 splattered in Wuhan, a city of China when the case of COVID-19 was reported for the first time and after much willy-nilly China finally confirmed human to human transmission on 21st January, 2020 [1] and after dilly dallying, criss-crossed and kowtowed the improvident the World Health Organization (WHO) was also constrained to declare COVID-19 as pandemic on 11th March, 2020 [2], but till then a swingeing loss was already sustained to the life and business of the people as travellers from China carried the virus to almost every country in the world and subsequent thereto many countries shuttered their borders, grounded flights and sledgehammered a complete compulsory penal lockdown of all activities of its citizen *inter alia* arresting all activities of business establishments [3], industries and service sectors' so as to restrict infection as less as possible as no

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medicine for treatment of COVID-19 was yet available and death was ensued.

COVID-19 Impacted the Capacity to Perform Under Contract

Indisputably, this sledgehammering of complete compulsory penal lockdown of all activities of its citizen across the globe seriously impacted the capacity to perform the respective obligations under the contract which entailed a hot debate not only nationwide but worldwide which gave rise to multiploidization of litigation and legal

consultancy as to whether the breach of contract or non-performance of respective obligations triggered by lockdown due to pandemic COVID-19 would amount to '*force majeure*'.

What is a Force Majeure

A *force majeure* is a expressed or implied clause in the Contract where parties to the contract envisage some supervening or intervening events or circumstances likely to occur subsequent to entering into the contract and this supervening or intervening events or circumstances are so intense and adverse that it makes onerous or impossible for a party to perform his respective obligation under the contract and in the event of this non-performance caused by the supervening circumstances the liability of a party is either completely excused by another party or restricted to the extent of damages mentioned in the said force majeure clause.

In India, the phrase 'force majeure, is not incorporated the Indian Contract Act, 1872 but its concept is defined under Section 32 and Section 56. In para 36 of the Energy Watchdog vs. Central Electricity Regulatory Commission [4], the Hon'ble Supreme Court observed that "Where the Court finds that contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract and such case would be dealt with under Section 32 of the Act." However, on the other hand "If an untoward event or change of circumstances totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor find it impossible to the act which he had promised to do. If, However, frustration is to take place de hors the contract, it will be governed by Section 56".

Vis Major', Force Majeure' and Frustration of Contract

Vis major is a concept of contractual relations prevalent in Roman Laws since time immemorial whereas the *force majeure* is equivalent concept in French Laws imported from the Roman Laws *per se* in Continental Law system alien to Common Law legal System which uses the term of *frustration of contract* [5]. Like any other Commonwealth Countries *inter alia* USA, India also adapted the Legal System of Common Laws of England which use the term *doctrine of frustration*. However, the concept of *vis major'*, *force majeure'* and *frustration of Contract* are distinguishable *inter se* and must not be mingled with. Ewan M. Kendrick [5] in his book 'Force Majeure and Frustration of Contract', Second Edition, 1995 writes "The concept of *force majeure*, though alien to common law, is an established doctrine in French law which relieves a promisor from responsibility for non-performance in certain circumstances. Although having a close affinity with common law *doctrine of frustration*, it is somewhat *narrower* in its relieving effects. Many *force majeure* clauses in English Contracts uses the French words. The words *force majeure* appears in article 1148 of the Code Civil which provides "There is no place for any damages when, as a result of force majeure or *cas fortuit*". French law of *force majeure* is narrower than the English Law of *frustration* which does relieve a promisor in such circumstances. In English Law an event will be force majeure even if it constitutes a legal or physical restraint on the performance of the contract (whether or not occurring through *human intervention*)".

Whether Force Majeure is Static or Elastic

In *Paradine vs. Jane* (1647), *Aleyn 26* [6], *Paradine* sued *Jane* for rent upon a lease but *Jane* pleaded that enemy to the King invaded the realm with a hostile army and with same force did upon enter the defendant possession and expelled him out of possession and rent was not due because *Jane* had been deprived of events beyond his control, the Court *held* that this was no excuse. When the party by his own contract creates a duty or charge upon himself, he is bound to make it good *notwithstanding any accident or inevitable necessity*. If the lessee covenant to repair a house, though it be *burnt by lighting or thrown down by enemies*, yet he ought to repair it. However, Anson's 'Law of Contract' 2002 edition [6] strenuously advocates that the said principle was overruled by *Taylor vs. Caldwell* (1861-73) All ER where C Contracted with T to hire him for a music hall and gardens for entertainment but just before the day of performance the music hall was destroyed by fire and C was held not liable to

pay for contract as the “Contract is not to be construed as positive contract but subject to an implied condition that the parties shall be excused in case performance becomes impossible before breach. Chitty on Contracts 1989 edition [7] supplies emphasis that “force majeure clause may assume a variety of forms and must be construed in the light of their precise wording and with regard to the nature and general terms of the contract” Lord Denning in Karsales (Harrow) Ltd. Vs. Wallis, (1956) 1 WLR 936 ruled “The thing is to do is look at the Contract apart from the exempting clauses and see what are terms, express or implied which impose an obligation on party”.

Indian Cases Prior to COVID-19

The Supreme Court while dealing with a case prior to COVID Lockdown has settled the law of force majeure in the matter of Energy Watchdog vs. Union of India (2017) 14 SCC 80 (*Supra*) and held *inter alia* that (i) Impossibility of performance under Section 56 of Contract Act would include impracticability or uselessness (ii) if an untoward event of change of circumstances totally upsets the very foundation upon which parties entered their agreements it can be said that the promisor finds it impossible to do the act (iii) Court cannot generally absolve performance of a contract because it has become onerous due to an unforeseen turn of events (iv) If there is an alternative mode of performance, the Force majeure Clause will not apply. The Bombay High Court, when a plea was taken that the petitioner could not perform its obligation of meeting targets because of power cut in Esjay International Pvt. Ltd. vs. Union of India [8], 2011 SCC Online Bom 1263 : (2011) 6 Mah LJ 750 at page 756, ruled that “A prudent business man therefore, ought to have taken notice of the said aspect and ought to have arranged his business accordingly, power cut was in force right from January, 1995 and the petitioners were to fulfil their export obligations by September, 1995.

Whether COVID-19 Lockdown is a Force Majeure: Divergent Views of Courts

In Delhi High Court, in a matter of USD 197 million contract between M/s Halliburton Offshore Services Inc vs. Vedanta Ltd. 2020 [9] SCC OnLine Del 542, Halliburton argued that substantial part of contract was performed and only a 3.5% was remained to be completed and interrupted because of Corona outbreak worldwide but the Delhi High court refused to consider the plea on the ground that the conduct of the parties prior to the outbreak is to be considered and every breach or non-performance *per se* cannot be justified or excused merely on the invocation of COVID-19 as force majeure. Nonetheless, Even the Bombay High Court also refused to accept the plea of the invocation of COVID-19 as force majeure in the Standard Retail Pvt Ltd vs. M/s GS Global Corp [10], 2020 SCC Online Bom 704 on the ground that the Letters of Credit with the bank are an independent transaction. But in both cases, it was not adjudicated and left the mixed question of facts and law undecided that whether the COVID-19 coupled with its subsequent lockdown would amount to force majeure or not. However, per contra, the Delhi High Court in another case of MEP Infrastructure Developers vs. SDMC [11], W.P.(C) 2241 of 2020, interpreted the public declaration of COVID pandemic on 23.03.2020 as “to be affected from 19.02.2020 itself” qua a force majeure and held that “ground reality having been altered because of global pandemic/nationwide lockdown or reduction of volume of traffic, as a consequence thereof” and suspended the obligation of payment due in the said case of MEP Infrastructure.

A Critical Statement of These Judgments

The Delhi High Court in Halliburton (*supra*) held that “The Court would have to assess the conduct of parties prior to outbreak *inter alia* the deadlines that were imposed in the contract” The Supreme Court in Energy Watchdog (*supra*) has left undefined what is onerous or impracticability and only cited case laws of India and abroad but none of those case laws were propounded and settled in a circumstances similar to COVID-19 and *ipso facto* not applicable in claim of force majeure entailed by facts and circumstances of COVID-19 and its lockdowns. However, Delhi High Court in its judgment of Halliburton (*supra*) observed that “There is no doubt that COVID-19 is a Force Majeure event” but it did not dwell upon its *raison detere*.

Standard of Proof for Force Majeure

Chitty on Contracts at para 1037 [12] strenuously argues that “A party relying upon force majeure must prove (i) non-performance was due to circumstances beyond his control (ii) there were no reasonable steps that could have taken to avoid or mitigate the event or its consequences”. So, going by this standard the facts and circumstances of COVID-19 amounts to force majeure for non-performance of Contract.

How COVID-19 Pandemic is Unprecedented to Constitute Force Majeure: Strikes at Root of the Contract as Whole

Bombarding a tedious question to a litigant by a court of law as to prove whether COVID-19 actually prevented the litigant to perform its respective obligation under contract and to come with cogent evidence is not justified as we all across generation gaps had never witnessed this kind unprecedented event of COVID-19 in human history. Nor even the infamous 1896 bubonic plague epidemic of Bombay which led to enactment of the Epidemic Diseases Act of 1897. The former Chief Justice of India and now Member of Parliament, Rajya Sabha, Justice Ranjan Gogoi [13] says “What happened during the Emergency are constitutional perversions conceived by the human mind. The Current situation is beyond human comprehension. Never before have we experienced anything even remotely similar.” India’s international lawyer and top-notch Senior Advocate Sri Harish Salve [13] argues “There is need for a law so that people are not penalised because of non-performance of contractual obligations as whole businesses were shut and there was no fund during the period.” IBA Global Insight [14], a magazine of International Bar Association claims that 200 hundred countries become poorer than in December 2019. The World Bank’s Global Economic prospect estimates that 40-60 million people will be pushed into extreme poverty. A London based financial risk consultancy Blonde Money [14] laments that ‘it shows that globalisation has made our supply chains vulnerable to a supply shock’ and ‘this recession has been caused by a reduction in the velocity of people. As per Business Today [15] 72% of firms have reported adverse effects on operations and 90% are facing supply chain disruptions and 53% anticipate a decline in sales over next two quarters. Industrial output in key sectors could fall by up to 15% and GDP growth by 10-20%. “With the pandemic and consequent lockdowns, the IMF projects GDP growth of 1.9% in India.” Most of the big bazars retail outlets have no goods to deliver because of interruptions in supply chains and shortfall in production owing to exodus of migrant workers. Occupancy in branded hotels is likely to drop by 38%. Some of the worst affected sectors are Construction, Gems and Jewellery, Auto Ancillaries and Petrochemicals, Hotel Industry, Airline Services, Textiles, Consumer Durables. According to ‘India Today’, States in India have to sustain loss of Rs.30.3 Lakh Crore. Nonetheless, even after lifting of lockdown the virus is spreading fast and the damages on life and business are still counting. Tedros Adhanom, Director General of WHO cautioned on 8th June that “more than six months into this pandemic, this is not the time for any country to take its foot off the pedal.” According to Business Today, Voxxy Media, a celebrity social media influencer was supposed to shoot a celebrity for the brand of a company but national lockdown constrained it to complete the shooting and obviously celebrity was not paid and whole schedule went for a toss. Kulbir Sachdeva, Director told the Business Today “The Contracts we have signed did not list pandemic under the Force Majeure Clause, but given the situation, where everyone is stuck and all businesses are suffering, we have no choice but to agree to some of delays and non-payments” Nonetheless, retail outlets, restaurant chains, multiplexes have sought waiver of rents. Several companies such as Standard Retail, Hero MotoCorp, Eicher Motors, Adani Ports have invoked the *force majeure* clause. Moody’s downgraded India’s rating the lowest, a first in two decades. Nonetheless, Fitch too rated just 5% in the fiscal year ending March from the strict lock down measures imposed since March, 25th. India is ranked 43rd on an Annual World Competitive Index by the Institute for Management Development (IMD). Pre-COVID Employment rate was 39.5% which slumped to 29.9% by a margin of 10 in the period of lockdown. As per data issued by the Ministry of Statistics and Programme Implementation, Government of India, India’s Industrial Production shrank to 55.5% in April from 64.3%. As per Economic Times quoting National Statistical Office(NSO) “In view of the preventive measures and announcement of

nationwide lockdown by the government to contain spread of COVID-19 pandemic, majority of the industrial sector establishments were not operating from the end of the March 2020 and this impacted production in April with a number of responding units reporting zero production. On March 11, the US President Donald Trump announced 30-day travel restrictions [16] from the European Schengen area which was soon extended to the UK and other countries. India too clamped world's largest lockdown on 24th March to be affected from next day starting initially from a fortnight lockdown which led to a huge exodus of workers. Measures to restrain spread of COVID-19 was not without cost. This macabre COVID-19 left behind an indelible egregious time in human history impacting the world economy to almost standstill.

Prime Minister's Appeal is Not Law: *Similia Similibus Curentur Did Not Work*

The relation between employer and the employee is strictly governed by the provisions of the contract they entered into and no third party can bend their legal relation save the law duly promulgated either by an Ordinance by the Government or by the Parliament of India or State Assembly duly assented by the President of India or the Governor of the State and notified in the official gazette of the Government of India or the State concerned, as the Case may be. Mere declaration or appeal *per se* by the Prime Minister of India in his televised address on March 23 [17] is not and cannot amount to law when he appealed to citizens to not to fire their workers and defer the payment of rent and other states governments also appealed to the people similarly but these casual approach of government inspired by the doctrine of *Similia similibus curentur* of Homeopathy did not work. Whereas, *per contra*, the Common man and common business people in private contract have been toiling from pillar to post, from lower court to supreme court that how to get rid the incompetency in performance of contract entailed by Corona Lockdown and its economic consequences. Law takes own course.

Whether an Amendment in Contract Act is Needed?

Ian McLeod in his book "legal theory", while analysing the theory of justice propounded by Aristotle, strenuously argues that 'justice cannot exist among people unless their relationship with each other is governed by law' [18]. So, mere verbal televised assurance of the Prime Minister entailed no law to protect breach of contract constrained by COVID-19. Law is not a matter of someone's Schadenfreude. Though Government of India attempted to promulgate a law for itself but not for public in general. It came out with a Notification dated February 29, 2020 of the Ministry of Commerce, Government of India [19], which is read as "A Force Majeure (FM) means extraordinary events or circumstances beyond human control. ...It is clarified that it should be considered a case of natural calamity and *Force Majeure* clause may be invoked whenever considered appropriate following the due procedure." Another Notification of Ministry of Road Transport and Highways, Government of India dated 18.05.2020 is read as "As an integral part of Atmnirbhar Bhart, the following measures are hereby notified for providing relief to Contractors/Developers, Concessionaires of Road Sector from the impact of COVID, Subsequent lockdown and other measures taken to prevent spread of COVID." But these all measures were initiated to grant relief only where the Government of India was one of the parties and in fact *per contra* neither the Government of India nor any State Government came out with a panacea for all common business people in order to save their non-performance of respective obligations under contract.

CONCLUSION

Law Reform is needed to Declare COVID-19 and Its Lockdown as Force Majeure

In view of the enormity of the Corona Lockdown and collapse of economy thereafter the Government must bring an appropriate legislation or an Ordinance to excuse the non-performance performance of respective obligations of contract fell due in the period coincided with the unprecedented National Lockdown as declared by none other than the Prime Minister *per se*.

Amendment in Indian Contract Act, 1872

Section 56 of the Contract Act is read as:

Agreement to do impossible act.—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.

A new phrase “or declared impossible by law” may be added just after word “impossible” in the extant provision of Section 56 and accordingly the Section 56 (after amendment) would be as follows.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, **“or declared impossible by law”**, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

So, as any successive government in time to come could declare by law any event or facts and circumstances such as COVID-19 as impossible to perform obligation under the Contract. What is suffocative situation as of now is that every individual has to muster all power under command to collect sufficient evidence to declare COVID-19 as one of such impossibility to perform a contract in an individual case which spoils business time and resources unnecessary.

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