DECODING THE LAW ON FRUSTRATION OF CONTRACT: THE CASE OF SATYABRATA GHOSE

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Abstract — The article is written with an aim to analyse the ratio laid down by Supreme Court in Satyabrata Ghose v. *Mugneeram Bangur & Co.*[1] *in relation to frustration of Contract and discharge of obligations as provided under the Contract itself with emphasis on the tenability of FM Clause vis-à-vis the operation of absolute positive law under Section 56 para 2 of the Contract Act. The article will explore the understanding of construction of Contract and application of statutory frustration of contract and Contingent Contract. Further, the article will also examine the ratio laid down in the Satyabrata Ghose case on the touchstone of the statutory provisions of Contract Act. The article will, finally, conclude on the fallibility of the ratio laid down by the Court.*

Keywords: Force Majeure, Performance of Obligations, Frustration of Contract, Contingent Contract, Construction of Contract

This Article is written with an aim to examine the law laid down by Supreme Court in the *Satyabrata Ghose* v. *Mugneeram Bangur & Co.*[2] case in 1954. This judgment of the Supreme Court occupies the sphere of law related to Frustration of Contract and Force Majeure Clause in a

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[1] AIR 1954 SC 44 : 1954 SCR 310.

[2] *Ibid.*

Contract. This article will throw light on the understanding of a Force Majeure Clause in brief.

The ratio of judgment of the Supreme Court in *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* case is as follows which is being considered for analysis in this article:

> "*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 Indian Contract Act, which deals with contingent contracts, or similar other provisions contained in the Act. In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement.*"

Basis the above ratio, this article seeks to explore the following limited question of law laid down by Supreme Court in the judgment of *Satyabrata Ghose*, its applicability *vis*-à-*vis* Force Majeure Clause in a Contract and will critically analyse the above ratio laid down which is followed subsequently in recent judgments of the Supreme Court in *Energy Watchdog*[3] and the judgment of Delhi High Court in *NTPC case*[4]:

1. Whether an event mentioned in a force majeure clause with the scheme/ modalities would operate as contingent contract without the event being a ground for invocation of frustration of contract under S. 56 of the Contract Act?

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[3] *Energy Watchdog* v. *Central Electricity Regulatory Commission*, (2017) 14 SCC 80 : 2017 SCC Online SC 378.

[4] *NTPC Ltd.* v. *Voith Hydro Joint Venture*, 2019 SCC Online Del 9014. The Court held that where the parties contemplate possibility of such an event, which would affect the performance of the contract, the same would not be frustrated.

2. Whether subsequent impossibility being beyond contemplation of parties is founded in Section 56 of the Indian Contract Act?

Basically, in all the above-named landmark judgments[5], the Supreme Court answered the above question of law in the affirmative meaning thereby that if an event falls under FM Clause, Section 56 cannot be invoked. This is the main basis which determines trigger of either FM Clause or frustration of Contract under Section 56 (in absence of FM Clause). In short, the governing law for such events would be the law related to Contingent Contract as provided under the Act and not S. 56.

I. FORCE MAJEURE CLAUSE

A force majeure event refers to any event or circumstance(s) or combination of events or circumstance(s) that adversely affect, prevent or delay any party in the performance of its primary obligation(s), in accordance with the terms and conditions of the contract entered between the parties. The Clause in relation to Force Majeure is drafted to spell out the modalities, scheme of performance and obligations of the parties that shall take place on actual happening of such event.[6] It is often seen that an FM Clause suspends the obligations for an interim period post happening of an event and it may incorporate the operation of performance or a deviated performance etc. to be done during happening of such event or continuance of such event. Therefore, the primary the obligations under the Contract are altered to that extent on happening of a specified event. Generally, such events are beyond the control of the parties nor it could be prevented on employing reasonable measures by parties. Accordingly, FM Clause in a Contract is one of the modes by which parties provide for discharge of obligations on happening of event/s under the contract itself.

II. FRUSTRATION OF CONTRACT AND CONTINGENT CONTRACT: AN ANALYSIS

It would be important to distinguish between an event in the realm of contingent contract and event under frustration of contract. In a contingent Contract, the event is the triggering point for performance or non-performance of obligations meaning thereby that event happens first followed by performance/non-performance as agreed. For an event under frustration of Contract, the obligations are not linked with happening of the event. The obligations/performance has to happen first in its independent sphere, which may be followed

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[5] Supreme Court in *Energy Watchdog* and Delhi High Court in *NTPC case*, while relying on the ratio of *Satyabrata Ghose case*, held that S. 56 cannot be resorted if the Contract contains a FM Clause and that it would be dealt with under S. 32 of Indian Contract Act.

[6] FM Clause is contract specific and must be analysed for each contract to arrive at a conclusion regarding its nature and scope.

by an event wherein performance will cease to operate as per law. Hence, in this case the event happens later unlike in a Contingent Contract. Therefore, operation of the two Sections of the Contract Act i.e. S. 32 and S. 56 para 2 is mutually exclusive of each other and the stage of operation is also different.

Undoubtedly, the essence of operation of S. 32 and S. 56 of Contract Act is based on an "event". When the obligations are created on naming happening/non-happening of an event, it is within the sphere of Contingent Contract while when the obligations which are to be performed cannot be performed on account of impossibility/unlawfulness, such area is governed by S. 56 of the Contract Act.[7]

It is needless to mention that freedom of parties to contract is not absolute and is subject to applicable law. Section 56 is an absolute positive law and is not subject to any agreement to the contrary. Therefore, once the essential ingredients of S. 56 are complied with, it can be rightly invoked. Now assume a general contract with obligations of the parties delineated without having a FM Clause. Under such circumstances, an event which is beyond the control of the promisor happens which renders any required performance impossible would make the contract void under Section 56. Here, we talking of general performance of obligations and NOT obligations of a contingent contract. We generally know such events by experience, which may hold good for excuse of performance under S. 56.

Essentially, we are, in order to avoid application of Section 56, wrapping those events in the FM Clause and provide the modalities in case of such events happening thereby ensuring that contract is not frustrated. As per the judgments of the Court, the said FM Clause for such mentioned events would fall under the scope of Contingent Contract. However, on an independent basis, for any such events actually happening, it is possible that Section 56 para 2 would also apply *vis*-à-*vis* the obligation required to be performed but in view of the event being named in the FM Clause, the Court held such happening of event shall be governed by the FM Clause itself and S. 56 cannot be relied upon for frustration. Such wrapping of events in the FM Clause, *prima facie*, may be a legal trick to get away from straight application of law i.e. S. 56 para 2. The question is how far the trick is sustainable in the eyes of law is analyzed hereinafter.

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[7] An obligation under S. 32, which has become enforceable on happening/non-happening of an event as agreed, may not be performed if performance of such obligation has become impossible or unlawful as required under S. 56 of the Contract Act. S. 32 is attracted when the "event" becomes impossible while S. 56 para 2 is invoked when the "performance/act" becomes impossible/unlawful.

III. THE CONTRACT, FM CLAUSE AND CONTINGENT CONTRACT

From the immediate preceding section of the article, two things are clearer:

1. Frustration of Contract would not apply to a truly Contingent Contract as they operate in different spheres.
2. In general business/commercial contracts, the primary and substantial obligations created are not contingent on event happening/non-happening.

In this sense, at the best a contract may be broken into two sets i.e. one with obligations whose performance is not contingent on event happening/non-happening and other set of obligations whose performance is linked with event happening (like FM Clause). A non-contingent obligation (primary and substantial obligations under the Contract) will, without any doubt, operate beyond the realm of contingent contract as their performance begins *ab initio* without being contingent on any event and hence, a valid event/impossibility under S. 56 will come directly to the rescue of the parties for discharge of such obligations irrespective of FM Clause. Therefore, an FM Clause cannot shield the statutory remedy (under S. 56) for non-contingent obligations by excluding its application, which is otherwise available under the Act. It is also possible that such FM clause, to the extent it is in direct contradiction with S.56, is void under S. 23 being against the law in view of barring the statutory remedy indirectly. In these contracts, the substantial and primary performance of obligations starts *ab initio* and is not subject to happening of any event and hence, such contracts cannot be coloured being a Contingent Contract by presence of a mere FM Clause.

If the Contract in general puts substantial obligations (non-contingent obligations) whose performance is not contingent on event happening/non-happening with one FM clause, how far it would be correct to treat such Contract to be Contingent Contract is doubtful. In our opinion, such contract cannot be said to be Contingent Contract as the essence and spirit of performance of obligations is not contingent on event happening/non-happening. At the best, the limited part of FM Clause may be in the nature of contingent contract but the same is also doubtful. The real essence or intent of incorporating a FM Clause in the Contract is to determine the modalities when the main non-contingent obligations could not be performed by the parties in view of an event happening. Basically, the obligations in the FM Clause are inter linked with the main non-contingent obligations and hence, these obligations in the FM Clause are in the nature of incidental or supplementary obligations to the main non-contingent obligations in the contract. Though the obligations in the FM Clause can be said to be linked with happening of an event but that cannot be seen in isolation. The intention of the parties, in business contracts, is not to draft

and create a Contingent Contract generally and the FM Clause cannot stand as an independent contingent contract in severance from the main contract. Therefore, application of provision related to contingent contract in these circumstances is improper and cannot be supported by law.

Thus, FM clause cannot stand in isolation from the main contract and the obligations created under the said FM Clause cannot stand in isolation in severance from the main obligations as well. Additionally, the contract must be seen on comprehensive and wholesome basis and as stated before that performance of obligations already commences in a general business contract without being linked to an event, reliance on Section 32 for operation of FM Clause is not legally tenable.

The nature of contract assumed in analysis of this section of article is a general business contract and not a contract, which is a truly Contingent Contract.

IV. UNFORESEEABLE/UNCONTEMPLATED EVENTS AND S. 56 OF THE ACT

The language employed in Section 56 is absolute in application and is not either subject to a "contract to the contrary" or subject to "unless the parties otherwise agree", the phrases we often see in lot of contract law related statutory provisions.

Section 56 provides for discharge of obligation of a Contract on two grounds:

1. Act becoming impossible
2. Act becoming unlawful by virtue of an event which is beyond the control of the promisor[8]

From the analysis of the section, it is clear that there are two important words used, one is "act" and the other one is "event". For act becoming impossible, the event has no place. However, when the act becomes unlawful, the test of "event" being beyond the control of the promisor is the cumulative requirement of the section. Hence, for cases being considered under impossibility under Section 56 para 2, the only requirement of the provision is that act has become impossible to be performed and nothing else[9]. However, when the case

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[8] The phrase "*by reason of some event which the promisor could not prevent*" is applicable only when the event becomes unlawful and not applicable when the act becomes impossible. This is clear from the use of comma after the word "impossible" being used in the section.

[9] It is because of the fact that once performance becomes impossible, it means that it cannot be made possible by anything. The conclusion of impossibility is arrived at only after exploring any possibility of performance. Hence, if an act has become impossible, "event" has no

is being considered for act becoming unlawful, the requirement of S. 56 para 2 is that event should be beyond the control of the promisor.

The issue of non-contemplation of event is nowhere the requirement of the section and such test is against the spirit of Section 56 para 2. In the case of act becoming impossible, there is no requirement at all to examine or analyze any "event" leading to such impossibility. In the case of act becoming unlawful, the only requirement in relation to event is that it should be beyond the control of the promisor. The Court has wrongly applied the said test as no words or the language employed in the section suggest that the event has to be beyond contemplation by the parties. The Court has also conveniently imported the application of "event" to cases of impossibility of performance, which is only applicable in case of act becoming unlawful and that too limitedly when such event is beyond the control of the promisor.

Further, on the contrary S. 56 para 3 states that if the promisor knew or could have known the impossibility or unlawfulness of the act from reasonable diligence and the promisee did not know, the loss if suffered by promisee is payable by promisor. This is clearly indicative of the fact that an event as envisaged under S. 56 para 2 may be within the contemplation of a party i.e. promisor. This leads to an inevitable conclusion that if both parties, i.e. the promisor and the promisee, with reasonable diligence might have known occurrence of such event, S. 56 para 2 would still operate except that compensation under S. 56 para 3 would not have been payable by promisor[10]. Therefore, the Court has completely ignored implication of para 3 of S. 56 in arriving at a conclusion that event should be beyond contemplation of parties for application of S. 56 para 2[11] and applied a wrong test of non-contemplation of event by the parties for the purpose of S. 56 para 2.

The Court in *Satyabrata Ghose case*[12] discussed English Jurisprudence relating to Frustration of Contract in detail including relying on the case of *Taylor* v. *Caldwell*[13] in reaching to the conclusion of uncontemplated/unforeseeable events or any other event to take place, which changes the very basis or goes to the root of Contract, for triggering the frustration of Contract. It is important to point out here that though such a test of uncontemplated or

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relevance and possibly, this is the reason why event has not been linked with impossibility in S. 56 para 2.

[10] S. 56 para 3 restricts compensation in case where promisor only knew or might have known an impossible act indicating thereby that it is quite possible that both parties may know/might have known such events under and for application of S. 56 para 2 except that compensation shall not be payable in that case (which can be claimed otherwise under S. 56 para 3).

[11] S. 56 para 3 cover cases of S. 56 para 1 and S. 56 para 2 as well. The use of the words "unlawful" and "non-performance of promise" in S. 56 para 3 denotes/indicates that cases of S. 56 para 2 are also covered in S. 56 para 3. However, drafting of S. 56 para 3 could have been done in a better way.

[12] *Supra* note 1.

[13] 1863 EWHC QB J1.

unforeseeable events, which goes to the root of contract or alters the very basis of Contract, might be a valid test under equity under English jurisprudence but the same test cannot be imported under statutory provision unless provision provides for such flexibility. The Court erred in not examining the scope of S. 56 of Contract Act and resultantly, laid such test of uncontemplated/unforeseeable events for statutory frustration, which is not applicable under Indian Law for the reasons stated in the preceding paragraphs of this section of the article.

V. DICHOTOMY BETWEEN S. 32 AND S. 56 OF THE CONTRACT ACT

On the issue dichotomy between S. 32 and S. 56 of the Act, the Court in *Satyabrata Ghose case* relied on the judgment of Supreme Court in another case of *Ganga Saran* v. *Firm Ram Charan Ram Gopal*[14]. In the case of Ganga Saran, Court was faced with analysis of the following clause of the contract:

> "*61 bales as noted below are to be given to you by us. We shall continue sending goods as soon as they are prepared to you up to Magsar Badi 15 Sambat 1998. We shall go on supplying goods to you of the Victoria Mills as soon as they are supplied to us by the said Mill.*
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> *Specifications of cloth given here- We shall go on delivering the goods to you up to Magsar Badi 15 out of the goods noted above which will be prepared by the Mill.*"

In this case, the respondent failed to supply the cotton bales as agreed. The Respondent defended on the ground that Victoria Mill did not deliver the goods to respondent Firm because of which Respondent could not provide the agreed cotton bales to appellant.

The question before the Court was, in view of the said clause, whether performance of obligation of respondent was contingent on supply of goods by Victoria Mills to Respondent. Simply put, the question was whether the agreement is Contingent Contract. To analyze the same, the Court went into construction of the Contract and found the obligation of the Respondent was not contingent on supply of goods from Victoria Mills to respondent, and hence, out of purview of S. 32. Thereafter, the Court analyzed whether frustration of contract would apply which was also answered in the negative.

Without going into merits of this case, one thing is clear that if obligation are contingent on event happening and such event becomes impossible, the obligations are also discharged as per Section 32 para 2 and contract becomes

[14] AIR 1952 SC 9 : 1952 SCR 36.

void. The impossibility of occurrence of uncertain event in S. 32 discharges obligation while happening of an event discharges further obligation of the parties under S. 56. The difference between the two is that obligations were never performed being discharged under S. 32 on the ground of impossibility of event while an event under S.56 discharges an already continuing obligation. Possibly, this is the dichotomy in the operation of two sections of the Act. However, the crucial factor is always determining the nature of obligation first i.e. apply S. 32 if it is contingent else apply S. 56 if it is an absolute obligation.[15]

The Court in *Satyabrata Ghose case* while contra distinguishing between the two sections, wrongly put forth the ratio as mentioned in the beginning of the article that such provisions of contract shall be governed by S. 32 of the Act including introduction of doctrine of contemplation of events which is incorrect and lacks statutory basis.

VI. FM CLAUSE AND FRUSTRATION OF CONTRACT: THE WAY OUT

Section 56 para 2 uses the words "act becomes impossible" or the "act becomes unlawful". From this, it is very clear that there is an act which is required to be performed as per the contract and that promisor takes the plea of non-performance basis a subsequent impossibility. Therefore, the fight is between "performance of act" and "non-performance of act". In this light, the Court must go in the construction of the Contract to find out what is required to be performed at a particular time and in a particular circumstance. Basis such construction of contract, if the Court concludes that a particular act is not required to be performed, plea of impossibility cannot be taken. To put it simply, when the performance is temporarily excused under the contract, seeking a relief of non-performance of an already excused act is of no use. Therefore, the question shall always be to check what is the performance required as per contractual terms and conditions. If any performance is required even on event happening and which cannot be performed on account of impossibility, Section 56 para 2 shall be available to dispense with such performance.[16] Hence, the Court may, if required, go into the construction of the contract to find out nature of performance required, whether performance is time specific on an event happening[17], whether performance is excused on an event happen-

[15] *National Agricultural Cooperative Marketing Federation of India* v. *Alimenta S.A.*, 2020 SCC OnLine SC 381.

[16] In case of an incorporated FM Clause in Contract, if an act is required to be performed under the FM Clause itself on happening of an event, such performance shall be liable to be tested under S. 56 para 2 of Contract Act.

[17] The Court in *Satyabrata Ghose case* has actually construed the terms of the contract in relation to time of performance of obligation and concluded that such obligation could be performed later, thus, rejecting application of S. 56. The Court correctly applied the approach but laid down wrong ratio in the case.

ing, whether performance is substituted with another performance etc. It is only after such analysis of the "performance of obligation" as per Contract, the Court will conclude whether any performance is required or not. In case some performance is still required on an event happening, for such performance plea of impossibility or unlawfulness can be rightly taken. Since, S. 56 para 2 relieves a party from performance, therefore, there has to a valid performance required under the Contract meaning thereby that one party seeks performance while other party pleas for non-performance which may be analysed as per contract itself.

As far as first part of S. 56 para 2 is concerned, the mere requirement of section is "act becomes impossible" and to determine the impossibility of performance, the simple test is to find out if the act is possible otherwise which the other party resisting non-performance may help the Court is such ascertainment. To ascertain the same, concepts of alternate mode of performance, commercial risk determination etc. may be validly introduced. The word "impossibility" may be interpreted to explain that the nature of impossibility to include practicable impossibility of performance, but to include non-contemplation or unforseeability of events is completely unfounded. It is quite possible that an impossible event might be contemplated but that would not change the nature of the said event to be possible. The section in general nor any words used in the section signify any importance to the non-contemplation of event.

VII. CONCLUSION

From the above analysis and the question of law posed by the authors, following things are clear:

1. FM Clause cannot be treated or dealt with under S. 32 of Contract Act as Contingent Contract.
2. The doctrine of contemplation or foreseeability of event under S. 56 para 2 has no basis.
3. The ratio laid down by the Supreme Court in the *Satyabrata Ghose case* and followed in subsequent case is *per incuriam*.

As stated in the immediate preceding section of the article, the only test to determine applicability of S. 56 to an absolute obligation (non-contingent obligation) is to analyse the act/obligation, which is to be performed at a particular time *vis a vis* the plea of impossibility which may be suitably taken by other party. Since, S. 56 para 2 is not subject to agreement to the contrary, performance of each and every obligation including any obligation required under a FM Clause on happening of an event shall be tested on impossibility/unlawful factor under S. 56 para 2. However, in case of performance is not required

or temporarily not required[18], obviously non-performance cannot be claimed. To examine the nature of performance, the Court may go into construction of contract and to examine impossibility, in case performance is required under a contract at a time, the Court may analyse if the performance is otherwise possible in some other manner. The Court in *Satyabrata Ghose case* has wrongly applied application of S. 32 to FM Clause while introducing theory of contemplation of parties which has no basis under the applicable statutory provision.

[18] This situation may happen where obligations of parties are suspended in view of an event happening. Under such circumstances, when performance of obligations is not required, S. 56 para 2 cannot be resorted.