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DECODING FORCE MAJEURE CLAUSES

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ABSTRACT

The COVID-19 pandemic has led to a complete halt in economic activities worldwide. The performance of contractual obligations has been affected and the repercussions are being felt increasingly today. This has led to the invocation of the usually dormant provision i.e., the Force Majeure Clause ("FMC"), in order to avoid the immediate performance of obligations. Such an unprecedented event has led the entire legal industry among others, squabbling as to whether the outbreak of the pandemic succeeds as an FMC event, and can it be cited as a reason to justify the delay in performance or non-performance of duties.

This principle is not expressly defined in any Indian statute, yet the Indian Contract Act, 1872 contains a principle on similar lines that is invoked by parties to discharge themselves of contractual obligations as the performance of the act becomes impossible due to a change in circumstance.

The main aim of this paper is to give a statutory view of the force majeure clause, and its invocation in the Indian scenario during such unconventional times with the help of case laws while also referring to approaches adopted by other nations.

Keywords- FMC, COVID-19, Indian Contract Act, unforeseen events, suspension, obligations.

INTRODUCTION

The outbreak of the COVID-19 pandemic has occasioned in not just a humanitarian crisis but also an economic crisis on a large scale worldwide. The lockdown imposed in countries to break the chain of transmission has resulted in the shutting down of commercial establishments, thus resulting in the invocation of Force Majeure Clause ("FMC") present in contracts. Thus, a carefully worded document is important for the proper interpretation of the contract.

DEFINITION

Black's Law Dictionary, Force Majeure is an "*event or effect that can be neither anticipated nor controlled . . . [and] includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).*"[1]

The International Chamber of Commerce defines Force Majeure as the happening of an event or circumstances that prevents one or all the contractual obligations of the parties, from being performed. However, the party affected by such event must prove:

- That the impediment is beyond the reasonable control of the parties,
- At the time of closing of the contract, such event could not be reasonably foreseen
- The effect of the impediment was unavoidable by the affected party.

The earliest case to deal with the concept of force majeure in India was *Edmund Bendit And Anr. vs Edgar Raphael Prudhomme*[2] and they relied and adopted the definition provided in *Matsoukis v. Priestman and Co.*[3], as "*causes you cannot prevent and for which you are not responsible*", was considered.

In the Indian context force majeure has not been specifically defined under the prevailing statutes. The Indian Contract Act, 1872 ("ICA") has to some extent dealt with this concept under Section 32 that provides for the enforcement of contracts contingent on an event happening. Section 56 of the ICA lays down the provision for the Doctrine of Frustration and covers illegality or impossibility in carrying out the obligations in a contract.

Due to the lack of a proper definition, the Courts have had to rely on precedents to define and determine the scope of force majeure, how and when it can be invoked, difference between the doctrine of frustration. They have used a strict approach in interpreting a contract in terms of force majeure clauses.

In *Dhanrajmal Gobindran v Shamji Kalidas*[4], the Apex Court gave a wider ingress to the term "force majeure" as compared to expression "*vis major*" which translates to "act of God".

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*Amity University, Kolkata.

[1] Black's Law Dictionary (11th Edition, 2019), available at: https://corporate.cyrilamarchandblogs.com/2020/04/force-majeure-in-the-times-of-covid-19/#_ftnref1 (Visited on November 2, 2020).

[2] AIR 1925 Mad 626.

[3] (1915) 1 K.B. 681.

[4] AIR 1961 SC 1285.

They further held that when reference is made to force majeure, the intention is to save the party due to perform his obligations, from the outcome of events over which he has no control.

In *Alopi Parshad & Sons Ltd. V. Union of India,*[5] the Supreme Court observed that the ICA does not allow for the obliviousness of express agreements and claiming payment of consideration at rates different than the stipulated rate. Furthermore, it was held that a party cannot be absolved from his contractual obligations simply because as a result of the happening of an unforeseeable event, carrying out the contract becomes onerous. The Court held that "*.....no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the uncontemplated turn of events, but will do therein what is just and reasonable.*"[6]

FORCE MAJEURE CLAUSE

A contract usually contains a FMC, that is negotiated between the parties before entering the contract. Such clause may specifically lay down events that could qualify as a force majeure event and it could range from Act of God, acts of Government, plagues, epidemic, strikes and so on or, a catch-all phrase like 'any additional event outside the reasonable control of parties' might be used along with a list of the specified events. If an FMC or a plea of frustration is invoked the main aim, is to exempt a party to a contract from its predetermined responsibilities on account of the happening of some unforeseen event without being liable for breach of contract.

The rule of ejusdem generis is used in interpreting an FMC, which means "of the same kind". If a general term follows a specific genus of words then the former is to be interpreted in to

[5] 1960 (2) SCR 793.

[6] India: Force Majeure In Times Of COVID-19: Challenges And The Road Ahead https://www.mondaq.com/india/litigation-contracts-and-force-majeure/930674/force-majeure-in-times-of-covid-19-challenges-and-the-road-ahead (Visited on November 3, 2020).

embrace events similar in nature to those enumerated by the preceding specific words.[7] Expanding the scope of the language of a FMC, in *Md. Serajuddin v. State of Orissa*[8] it was held that "… *the words "any other happening" must be given Ejusdem generis construction so as to engulf within its fold only such happenings and eventualities which are of the nature and type illustrated above in the same clause…*".[9]

INVOKING A FORCE MAJEURE CLAUSE

The Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur & Co.*[10], explained in length the enforcement of an FMC. They held that the termination of a contract would happen within the terms of the contract, if such term, either impliedly or expressly, state that the contract would stand discharged on the happening of certain events. Such cases would be dealt with under Section 32 of the ICA rather than Section 56. It also held that if it is anticipated that the happening of an event might affect the performance of the contract, and accordingly it is decided that the contract would remain standing despite the circumstances, the doctrine of frustration cannot be invoked.

In *Bharat Heavy Electricals Limited v. G+H Schallschutz GMBH*[11], it was held that parties would be bound to perform the contract if there is an alternate mode of performance decided and mentioned by the parties in a force majeure condition.

In case a contract does not have an FMC, it will be examined under section 56 of the ICA. This provision applies to two cases, firstly an agreement to do an impossible at is declared void and secondly subsequent impossibility i.e., a lawful act, due to some event beyond the control of the parties, becomes unlawful or impossible to perform.

The landmark case regarding the doctrine of frustration is *Taylor v. Caldwell,*[12] where it was held that the rule of frustration can be applied only if the contract is absolute without any express or implied conditions.

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[7] *Interore Fertichem Resources Sa v. MMTC of India Limited,* 2007 (4) ARBLR 242 Delhi.
[8] AIR 1969 Ori 152*, TGV Projects & Investments Pvt. Ltd. v. National Highways Authority of India,* 2019 (173) DRJ 717.
[9] Force Majeure In The Time of COVID-19: An Overview, *available at* https://www.argus-p.com/papers-publications/thought-paper/force-majeure-in-the-time-of-covid-19-an-overview/ (Visited on November 6, 2020).
[10] (1954 SCR 310).
[11] Decided on July 9, 2018 by the High Court of Delhi.
[12] QB (1863) 3 B&S 826.

In *Syed Khursed Ali v. State of Orissa and Anr*,[13] the performance of the contract had become impossible but the contract itself did not contain an FMC. The Court in this case categorically stated that Section 56 of the ICA does not cover every and all cases where neither party is responsible impossibility of performance of the contract. However, in this particular case the Court stated, *"Giving regard to the nature and circumstances of the transaction and implied terms, no doubt is cast in the present case that the performance of the contract on the part of the petitioner became an impossibility and such impossibility can be brought within the fold of "force majeure"."*[14]

The rule of frustration depends on two principles of contract i.e., sanctity of contract, where every party to the contract must comply with their contractual obligations; and the second being that there are certain unforeseen events that may make the performance of the contractual obligations impossible, thus, they must be discharged.

In *Satyabrata Ghose v. Mugneeram Bangur and Company and Ors.* (supra), the Court held that the word "impossible" does not strictly refer to bodily or verbatim impossibility. It may become impracticable but not literally impossible and if there arises any untoward event that changes the entire foundation of the contract then it can be held that the promisor could not perform what was promised, due to impossibility. A judgment along similar lines was passed in G*ovindbhai Govardhanbhai Patel v/s Gulam Abbas Mulla Allibhai*[15], where meaning was given to the expression "impossible of performance" under section 56 of ICA, to excuse the parties if substantially the performance of the contract becomes impracticable due to some event not within the control of either of them.

In *Ganga Saran* v. *Firm Ram Charan Ram Gopal*[16], it was held that for the application of the Doctrine of Frustration, Courts must first refer to the provisions laid down under Section 32 and 56 of the ICA respectively.

It is pertinent to note that there is a difference between force majeure and doctrine of frustration. The latter is relied upon and invoked for termination of the contract where the performance of a contract has become impossible due to any unavoidable and unforeseen

[13] AIR 2007 Ori 56, 2006 II OLR 557.
[14] *Syed Khursed Ali v. State of Orissa and Anr.,* AIR 2007 Ori 56, 2006 II OLR 557, *available at,* https://indiankanoon.org/doc/574714/, Para 12 (Visited on November 10, 2020).
[15] AIR 1954 SC 44.
[16] AIR 1952 SC 9.

event or condition whereas, the concept of Force Majeure is relied upon for postponement of the obligations during the occurrence of an event and may sometimes even provide a right to terminate the contract if the event carries on for a specified period.

In the case of *Bhoothalinga Agency v. V.T.C. Poriaswami Nadar,*[17] the difference between an FMC and section 56 was highlighted taking into consideration the aspect of intention. While FMC is mutually agreed upon by the contracting parties, section 56 of ICA lays down a positive rule with no scope of intention of parties in play.

At this juncture we can refer to a case which raised the illegality in the performance of a contract due to the outbreak of smallpox[18]. The Court directed the defendant to abide by the provision of the contract thereby rejecting the defence under Section 269 of the Indian Penal Code, 1860, ("IPC") which was invoked by the defendant.

n *NTPC v. Voith Hydro Joint Venture O.M. P*[19]*,* the Delhi High Court reassured the autonomy of an FMC, by establishing that the same will prevail over the provisions of frustration under the ICA.

The Supreme Court in a recent judgment of *Energy Watchdog and Ors. v. Central Electricity Regulatory Commission and Ors.*[20] summarized the entire principle relating to force majeure and held that force majeure is governed by the ICA to the extent that an express or implied clause dealing with contingent contracts. The court stated that if a force majeure events transpires outside the contract, it is to be dispensed with under section 56 of the ICA, thus strictly interpreting the force majeure provision. It was propounded that the doctrine of frustration can be invoked if it can be shown that the performance of the act will not be practicable, not losing sight of the object sought to be achieved by the contract. Few important points of this judgment are:

- Force Majeure is inclusive, not exhaustive.
- An FMC is above the principles of Section 56 of ICA, if present in a contract.
- If any substitute mode of performance is available, the force majeure clause will not apply.
- Only a fundamental change in the contract will attract the doctrine of frustration.

[17] AIR 1969 SC 110.
[18] *Bombay and Persia Steam Navigation Company Ltd. v. Rubattino Company Ltd*., (1889-90) ILR 13-14 Bom (VI) 555.
[19] MANU/DE/2103/2019.
[20] (2017) 14 SCC 80.

FMC vary from one contract to another. Few of them may lay down a specific list of event that may qualify as a force majeure, while others may have a general list simply referring to "events not within the reasonable control of the parties" or a combination of both with a specified list of events along with a sweep up clause. The language of an FMC will regulate the remedies available with some allowing for instantaneous termination while others may suspend the performance of a contract. Thus, the criteria's for seeking to invoke an FMC are

- An unforeseeable event must take place, that gives rise to a party's non-performance under the contract. Such event must fall within the definition of the FMC in the contract as laid down in *Lebeaupin v Crispin,*[21],where it was stated, "A force majeure clause should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument."[22] In *Edmund Bendit And Anr. vs Edgar Raphael Prudhomme*[23] it was held that the event must be covered by the FMC and the non-performance was due to that event itself.[24]
- Occurrence of such event is not assumed,
- Due to such event the performance of obligations becomes impossible or impracticable and they were beyond the control of the parties as held in *Dhanrajamal Gobindram (supra).*
- The parties to the contract have taken all reasonable measures to mitigate the damage or ensure performance of the obligations. In the case of *Mamidoil - Jetoil Greek Petroleum Company SA Moil - Coal Trading Company Limited vs. Okta Crude Oil Refinery,*[25] no reasonable steps had been taken to mitigate the loss arising due to the event or its consequences.
- The burden of proof will lie on the affected party invoking FMC, to show that the occurrence of the event has affected the party's execution of the contract.

COVID-19 AND FORCE MAJEURE

The term force majeure is often interchangeably used with an "Act of God", as it literally translates to superior or irresistible force. But the Courts have recognized force majeure as a

[21] [1920] 2KB 714.
[22] COVID-19 Pandemic: Whether a Force Majeure Event? A Legal Analysis, *available at* https://www.scconline.com/blog/post/2020/05/23/covid-19-pandemic-whether-a-force-majeure-event-a-legal-analysis/ (Visited on November 14, 2020).
[23] Supra at 2.
[24] The Forgotten Force Majeure Clause and Its Relevance Today Under Indian And English Law, *available at* https://www.barandbench.com/columns/the-forgotten-force-majeure-clause-and-its-relevance-today-under-indian-and-english-law (Visited on November 20, 2020).
[25] [2003] 2 Lloyd's Rep. 635.

more expansive concept and in *Perlman v. Pioneer Ltd. P'ship,*[26] it was stated that a FMC finds place in a contract so that the parties are aware of the circumstances that will create impossibility to perform, due to an act of God.

There is no direct ruling of Indian Courts that per se brand an epidemic/pandemic like the COVID-19, as an 'Act of God'. But we can refer to the case of *The Divisional Controller, KSRTC v. Mahadava Shetty*[27], that held that an 'Act of God' signifies the operation of natural forces[28] without human interference, and unexpected natural events cannot be used as an excuse to free one from the liability, if it can be reasonably foreseen or anticipated. Similarly, the Kerala High Court in *Kerala Transport Co. v. Kunnath Textile,*[29] held that an act of God is one arising from natural causes. They are inevitable accidents beyond the control of man.

But we can refer to certain foreign cases wherein it was held that an epidemic/pandemic, amounts to an act of God. *In Lakeman v. Pollard*[30], the Supreme Court of Maine categorized the outbreak of cholera as an Act of God, thereby not holding a mill laborer liable for non-completion of contractual obligation.

In *Aviation Holdings Ltd. v. Aero Toy Store LLC,*[31] it was held under UK law that due to a pandemic causing a dearth of pilots, the incapability of a party to deliver an aircraft on time, fell within the catch-all phrase in a FMC.

The COVID-19 pandemic has led to the imposition to lockdowns and movement restrictions. The main issue that may arise in the context of this outbreak is whether there exists any substitute mode for performing the contractual obligations were prescribed or not, whether the obligations could be performed, but with some difficulty or increase in cost, if the non-performance is actually due to this pandemic or some other delay. Section 56 of the ICA as mentioned earlier deals with the impossibility of performing the contractual obligations after execution of the contract. A single reading of this section considering the current pandemic with emphasis on para 2 of the section, seems to be fully applicable. However, the question

[26] 918 F. 2d 1244, 1248 n.5 (5th Cir. 1990).
[27] 2003 7 SCC 197.
[28] Force Majeure In The Times of COVID-19, *available at* https://corporate.cyrilamarchandblogs.com/2020/04/force-majeure-in-the-times-of-covid-19/#_ftn1 (Visited on November 21, 2020).
[29] 1983 KLT 480.
[30] 43 Me 463 (1857).
[31] (2010) 2 Lloyd's Rep 668.

that arises is would the 'impossibility' of performance would impose a blanket void on all contracts from the date of impossibility?

Express terms mentioned in a contract regarding the happening of certain events would render a contract either suspended or discharged. Under English law such action would be dealt with under the doctrine of frustration and in India such cases are treated under Section 32 of the ICA that deals with contingent contracts.

The Government of India issued a memorandum[32] in lieu of the ongoing pandemic that clarified that the Force Majeure under the Manual of Procurement of Goods, 2017 would be applicable during these unprecedented times due to the disruption of the supply chains. As per para 9.7.7 of this memorandum *"a Force Majeure ("FM") means extraordinary events or circumstances beyond human control…A FM clause in the contract frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract….An FM clause does not excuse a party's non-performance entirely, but only suspends it for the duration of the FM….a doubt has arisen if the disruption of the supply chains due to spread of coronavirus in China or any other country will be covered in the Force Majeure Clause ("FMC"). In this regard, it is clarified that it should be considered as a natural calamity and an FMC may be invoked, wherever considered appropriate, following due procedure as above."*[33] But the FMC does not explicitly specify "epidemic" "pandemic" as a force majeure event, unlike the Model Tender Document issued by the Ministry of Mines, that specifically mention the same. Similar notifications have been issued by the Ministry of New & Renewable Energy[34] ("MNRE") and the Ministry of Shipping. The former agencies "may" grant extension of time to projects whereas in the latter case the ports were informed that the COVID-19 pandemic "can be" a force majeure event due to natural calamity. Giving these agencies the authority to decide who will get the benefit due to the invocation of the force majeure clause will result in unilateral amendment of the contract which if it does not result in the ultimate benefit to the counter party, is a decision

[32] Office Memorandum no. F.18/4/2020-PPD dated February 19, 2020, issued by Ministry of Finance (Department of Expenditure – Procurement Policy Division), Government of India, *available at* https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf (Visited on November 22, 2020).

[33] Ibid.

[34] Government of India and Office Memorandum No. 283/18/2020-GRID SOLAR dated March 20, 2020 issued by the MNRE, Government of India, *available at*, https://mnre.gov.in/img/documents/uploads/file_f-1584701308078.pdf (Visited on November 25, 2020).

by a person in its own case and could be challenged for contravention of this principles of natural justice.

Here if we look at Singapore's COVID-19 (Temporary Measures) Act, 2020 ("CTMA"), it lays down provisions for temporary relief in the event of inability to perform a contract. The CTMA also provides that the affected party must serve a notice for relief to the counter party. This prohibits the counterparty from taking certain steps like commencing a court proceeding against the other party or enforcing any security for the purpose of trade or profession. This provision of the CTMA, is beneficial at this stage as without it the Court will have to adjudicate on issues such as whether the inability to perform constitutes a breach or whether COVID-19 is a defence to the inability to perform, instead of granting interim reliefs. Broadly, this law does not change the underlying contractual obligations, but it simply freezes the right to enforce the contractual obligations for specified duration.[35] One instance of an amendment to the contractual obligation is that the period of delay resulting in ability to perform will not be counted for calculating liquidated damages or assessing damage. An interesting feature is the presence of a force majeure clause, which will prevail over the CTMA, if it is invoked by the parties.

The main highlight of this provision of the CTMA which can be imbibed by the Indian Government, is the fact that the onus shifts to the counter party and is no longer on the affected party. Until that fact is proved, the affected party will get all the benefits of all the temporary reliefs applicable to its contract, including protection from coercive steps being taken by the counterparty, which are done by assessors. This will ensure protection to the parties in India, whose performance is affected due to COVID-19, without having to prove its inability in the first place. The CTMA achieves through a law and a system of independent assessors, what the Indian Government hopes to achieve by way of notifications.

The notification has already been brought up for consideration before the Delhi and Bombay High Court, and they have differed in their approach while interpreting the notifications.

In the case of *Standard Retail Pvt. Ltd. v. M/s Global Corp & Ors.*[36] the Bombay High Court refused to grant an injunction and held that an FMC was only mentioned in the contract for sake of steel and not in the letters of credit. This is the first case where the Court held that,

[36] 8 April 2020 (No. 404 of 2020).

"lockdown cannot come to the rescue of the Petitioners so as to resile from their contractual obligations."[37] In these unprecedented times, the Court held that the lockdown could not be used as an excuse to repudiate a contract as it was imposed for temporary and limited period. They further held that in view of COVID-19, any hardship faced in performing a contractual obligation, cannot be used as a valid objection against the seller. The Court also highlighted the possible complications that could rise if the primary contract excuses performances but an independent financial arrangement like bank guarantee, does not contain an FMC. In another case the Bombay High Court by way of an ad-interim protection, granted a temporary injunction restraining the respondents from selling shares, taking into view the prevailing market situation.[38]

The Delhi High Court on the other hand granted an injunction restraining the encashment of a bank guarantee in the case of *M/s Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.*[39]. It was observed that the lockdown imposed by the Government, is prima facie a force majeure as it is unprecedented and could not have been predicted by either party. The lockdown and its extended ramifications are "special equities" and they could be used to justify the order of injunction against the bank guarantees being enchased. A similar judgment was passed by this Court in *Ashwini Mehra v. Indian Oil Corporation Limited & Ors.*[40] where the invocation and encashment of bank guarantees were stayed considering the nationwide lockdown.[41]

Even if an FMC provides for a pandemic situation and COVID-19 falls within its ambit, it does not necessarily provide relief to parties from executing their pre-determined obligations as laid down under the contract. The event must have a direct impact on the above mentioned and before reliance on such a clause, the party is bound to take all reasonable measures to mitigate and/or look for an alternative for performing the contract. The need for a link between the happening of a force majeure event and the resulting situation was laid down in

[37] How the Bombay High Court is Changing Force Majeure Amid COVID-19, ***available at,*** https://www.jurist.org/commentary/2020/05/tushar-behl-force-majeure-india-covid19/ (Visited on November 26, 2020).
[38] *Rural Fairprice Wholesale Limited and Anr Vs IDBI Trusteeship Services Limited and Ors,* (Commercial Suit No 307 of 2020).
[39] O.M.P. (I) (COMM)& I.A. 3697/2020.
[40] Writ Petition (C) No. 2966 of 2020.
[41] *Supra* at note 28.

Sri Ananda Chandra Behera v. Chairman, Orissa State Electricity Board,[42] where the decision passed by the House of Lords in *Greenock Corporation v. Caledonian Railway Co.*[43], was reiterated. It was held that only if a situation is directly caused, naturally without human intervention, can an accident be an act of God. Even though there is always some co-operation between humans and nature, the immediate and direct cause should only be investigated, in order to determine whether the act is an act of God or not.

One of the grounds for refusal to grant injunction in *Standard Retail Pvt. Ltd. v. M/s Global Corp & Ors. (supra)* was the lack of a direct causal link between COVID-19 and the non-performance. The Court observed that the distribution of steel fell under essential services, which had no restrictions imposed on its movement. Ergo the performance of the contract remains unchanged and unaffected.

OTHER SITUATIONS

There are special events that have been declared as a force majeure event by the Supreme Court of India like World War II[44] and Partition[45] but demonetization was not held as a force majeure event[46]. In this case it was the contention of the Petitioners to rely on the doctrine of *'Contra Proferentum'* that finds application when there are equivocal terms in a contract. They held that by the implied conduct of Solar Energy Corporation of India Limited ("SECI") they had held the demonetization was a force majeure event and had thus, granted additional time to fulfill conditions under the Power Purchase Agreement ("PPA"). The Central Electricity Regulation Committee ("CERC") held that the "PPA does not expressly provide or otherwise cover the 'demonetization' as either Force Majeure or Change in Law within the scope of Articles 11 and Article 12 of the PPA."[47] It was further clarified that insufficiency of funds does not lead to impossibility of performance, it simply becomes onerous to perform and it is an exclusion of Force Majeure. In addition to that the Petitioner did not try to deal with the specific aspects of the delay due to Government Instruments and

[42] (1998) 85 CLT 79.
[43] 1917 AC 556.
[44] *Satyabrata Ghose Vs. Mugneeram Bangur and Co.* AIR 1954 SC 44.
[45] *Sushila Devi Vs Hari Singh*, AIR 1971 SC 1756.
[46] *M/s. Krishna Wind Farms v. Solar Energy Corporation of India Ltd.,* Order in Petition No. 27/MP/2018.
[47] *M/s Talettutayi Solar Projects Four Private Limited (TSPFPL) v. Solar Energy Corporatin of India Ltd & Ors.,* Petition No.: 19/MP/2018, Order dated December 11, 2019, *available at,* http://www.cercind.gov.in/2019/orders/19-MP-2018.pdf (Visited on November 27, 2020).

other alleged force majeure events and no notice of force majeure was issued which was a pre-condition for claiming relief. Thus, demonetization was not a 'change in law' as it did not constitute any adoption, enactment, promulgation, amendment, modification or repeal of any law. This was clearly laid down by the Commission in the matter of *Darbhanga-Motihari Transmission Company Limited –v- Bihar State Power transmission Company Limited and Ors.*[48] where it was inter-alia held that "the event of 'Demonetization' does not fall within the definition of Change in Law event."[49]

The Supreme of Court of China had issued a "judicial interpretation" during the Severe Acute Respiratory Syndrome ("SARS") epidemic of 2003 in case a contract could not be performed and declared this situation as a force majeure event[50]. In this case, due to an order passed by the Department of Health as a result of the SARS outbreak, a premise could not be inhabited for 10 days, thereby frustrating the tenancy agreement. Here the Hong Kong court did not term the outbreak of SARS as an unforeseeable event, rather it was held to be arguable. There was no definitive view as a 10-day period out of a 2-year tenancy does not significantly change the obligations of the parties.

There are certain events that do not meet the requirements as a force majeure event. In *Tsakiroglou & Co. Ltd. v. Noblee Thorl GmBH,*[51] it was held that a rise in freight price does not render a contract impossible of being performed. The performance might become difficult, but the fundamentals remain unaltered. Hence, parties cannot take the defence of impossibility of performance.

In *Naihati Jute Mills Ltd. V. Hyaliram Jagannath,*[52]the Supreme Court observed that a contract is not frustrated due to variation in circumstances. It was further re-iterated that difficulty in performance of contract does not amount to the parties being discharged from their obligations. The Court further stated that it was due to a personal disqualification that the performance could not be carried out, and no question of impossibility of performance due to change in Government policy can be raised.

[48] Petititon No. 238/MP/2017, decision dated 29/03.2019.
[49] Supra at note 47, para 63.
[50] L*i Ching Wing V Xuan Yi Xiong* (2004) 1 HKC; (2004) 1 HKLRD 754; (2004) HKC 353.
[51] 1961 (2) All ER 179.
[52] 1968 (1) SCR 821.

In *Coastal Andhra Power Limited v. Andhra Pradesh Central Power Distribution Co. Ltd.*[53], the Court applied the principle laid down in *Energy Watchdog v. CERC (supra)*. They held that changes in Indonesian laws followed by the hike in coal prices does not amount to force majeure.

Therefore, inconvenience, economic inability like lack of sufficient funds as in the *Concadoro* case[54], difficulty in performance, presence of an alternative mode of performance, or the performance become onerous, are not viable grounds for a party to invoke a FMC, or terminate or get exclusion from a contract.

CONCLUSION

The main aim of invoking an FMC is not to excuse negligence by a party if the non-performance of a contract is due to natural circumstances and not because of the intervention of human force. There is no one size fits all approach in determining whether the present disruptions of contractual obligations due to COVID-19 pandemic, can lead to invocation of an FMC or will Section 56 of the ICA be applicable. The terms of the FMC must be interpreted in order to term COVID-19 as a force majeure event.

Invoking an FMC is an option available to either of the party to the contract. In a situation predicting force majeure, parties have the discretion of either invoking the FMC to excuse itself from performance under the contract or not.

When an FMC is invoked there are certain steps that ought to be followed. Firstly, a notice must of invocation must be served, in accordance with the agreement. Such notice must not just intimate about the existence of a force majeure event, but also mention the effect such an event will have on the contractual commitments of the party. The party to whom such notice is served, must ensure that the notice is in consonance with the provisions of the FMC, and is supported with evidence.

Secondly, a causal link must be present between the non-performance or impossibility of performance of contractual obligations and the happening of a force majeure event. They must show that the event too an unexpected turn and it was not reasonably foreseeable by the parties. Therefore, in order to rely on an FMC, the party must be able to show that all

[53] FAO (OS) No. 272/2012, decided on 15th January 2019
[54](1916) 2 AC 199.

judicious steps have been taken in order to mitigate the problem. This is subjective and will depend upon the facts and circumstances of different cases. If there are alternate modes of performance available, the contractual obligations must be performed using those modes, even if they are onerous or more inconvenient.

The presence of an FMC in a contract does not on the face of it terminate a contract. Rather it suspends the performance of the contractual obligations for a stipulated period. But it might provide for a right of termination if a certain time period has passed after the occurrence of the force majeure event.

If a contract does not have a FMC, then the parties can invoke the Doctrine of Frustration under section 56 of the ICA, but it must be kept in mind that if a pea of frustration is granted, it results in automatic dissolution of the contract. Thus, there is no flexibility as is with the case of an FMC.

The Court while dealing with cases on frustration, non-performance or impossibility post COVID-19 pandemic, will have to interpret the terms of the FMC, for each case differently. They can either follow the rationale laid down in Li Ching Wing v Xuan Yi Xiong,*(supra)* where it was held that despite the outbreak of a pandemic and it being a force majeure event, the same will not defeat the entire contract, or they can hold that the lockdown imposed and consequent steps taken during the ongoing pandemic, will lead to frustration of contracts.

It can be concluded that the present situation might be a temporary, yet it will have long lasting repercussions in terms of business contracts and so on. Thus, each case and situation must be determined by taking a pragmatic approach and the FMC must be interpreted along the facts and circumstances surrounding it to ensure minimum damage to both parties.