Amal Peterson vs The Authorized Officer on 18 August, 2020

Author: M.M.Sundresh

Bench: M.M.Sundresh, R.Hemalatha

W.P.No. 7611 of

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.07.2020

Date of Judgment : 18.08.2020

CORAM

The Hon'ble Mr.Justice M.M.SUNDRESH
and
The Hon'ble Mrs.Justice R.HEMALATHA

W.P.No.7611 of 2020
and W.M.P.Nos. 8934 to 8936 of 2020

Amal Peterson .. Petitioner

Vs

1.The Authorized Officer,
Tamilnadu Mercantile Bank Ltd.,
Tirunelveli Regional Office,
Tirunelveli.

2.The Branch Head,
Tamilnadu Mercantile Bank Ltd.,
Alangulam Branch,
549A, Tenkasi Road,
Alangulam – 627 851. .. Respondents

PRAYER: Petition filed under Article 226 of the Constitution of In
praying to issue a writ of certiorarified mandamus calling for the
records relating to the communication e mail dated 02.05.2020 sent
by the Branch Head, Alangulam Branch, Tamilnadu Mercantile Bank
Pvt. Ltd., the second respondent and quash the same and direct the
respondents to extend the period for payment of balance amount by
45 days for the sale of the item 2 of the property under sale noti
dated 13.01.2020 issued by the first respondent.

Page 1 of 49

W.P.No. 7611

For Petitioner : Mr.A.V.Arun
for Mr.P.Sugumaran

For Respondents : Mr.V.Chandrasekaran, Standing Cou
for R1 and R2
Mr.AR.L.Sundaresan, Senior Counse
M/s.AL.Ganthimathi
for proposed respondent

ORDER

M.M.SUNDRESH., J In Periyar Pathai, Puliyur Village, Choolaimedu, Egmore, Nungambakkam (TK), Chennai, a land with an extent of 2400 sq ft., situated at old T.S.No.127 and 129, New T.S.No.129/4 pt was brought up for auction by the respondents on 03.02.2020 with the reserve price of Rs.1,50,00,000/- (Rupees One Crore and Fifty Lakhs only).

The petitioner took part in the auction held on 03.02.2020 offering to bid for a sum of Rs.1,70,00,000/- (Rupees One Crore and Seventy Lakhs only). The following is the relevant terms and conditions governing the parties:-

> "5.The successful bidder shall deposit the balance seventy five percent (75%) of the bid amount within 15 days of the sale or such extended period as agreed upon in writing by the Authorized Officer/Secured Creditor at his discretion. In case of any default in depositing http://www.judis.nic.in the amount within the stipulated period, the deposit will be forfeited as per sub Rule (5) of Rule (9) of Security Interest (Enforcement) Rules 2002 and the property shall be resold and the defaulting purchaser will forfeit all his/her claims to the property or to any part of the sum for which it may be subsequently sold." 1.1 Accordingly, the petitioner paid a sum of Rs.42,50,000/-

(Rupees Forty Two Lakhs and Fifty Thousand only) being the one-

fourth of the bid amount on 06.02.2020 followed by sale confirmation letter issued by the respondents. In furtherance of the sale, he made further payment of Rs.40,00,000/- (Rupees Forty Lakhs only) on 16.03.2020 and Rs.10,00,000/- (Rupees Ten Lakhs only) on 18.03.2020 and Rs.4,00,000/- (Rupees Four Lakhs only) on 21.03.2020. Thus, the petitioner paid a sum of Rs.96,50,000/-

(Rupees Ninety Six Lakhs and Fifty Thousand only).

1.2 However, the petitioner did not pay the remaining amount within the maximum period of ninety days allowed. Accordingly, on 29.04.2020, the second respondent asked the petitioner to remit the

http://www.judis.nic.in remaining amount on or before 03.05.2020 failing which the one-

fourth of the amount already paid shall stand forfeited. The relevant paragraphs of the said communication are appositely referred hereunder:-

> " You have paid Rs.42,50,000(25% of bid amount) on 06.02.2020 and we have issued sale confirmation letter. Subsequently, you have paid an amount of Rs.40,00,000/- on 16.03.2020, Rs.10,00,000/- on 18.03.2020 and Rs.4,00,000/- on 21.03.2020.

Further, please note as per Sub-

Rule(4) of Rule 9 of security interest rules – The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth days of confirmation of sale of the immovable property.

Sub-Rule (5) of Rule 9 of security interest rules – in default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

http://www.judis.nic.in Even though we have granted maximum period of three months time as per the rule (ie up to 03.05.2020) you have failed to remit the remaining amount till date.

Therefore you are requested to pay the remaining bid amount of Rs.73,50,000/- on or before -03.05.2020. Otherwise the 25% of the bid amount already paid by you shall be forfeited as per the above said rules of the Act and the property will be resold and you have no claim over the property or to any part of the sum or which it may be subsequently sold." 1.3. The petitioner sent a reply dated 30.04.2020 to the second respondent seeking another twenty five days after the lifting of the lockdown imposed due to the pandemic. It is stated by him that he was not able to realize the amount from the property sold by him due to the lockdown and, therefore, sufficient time will have to be granted to repay the remaining bid amount.

1.4. A reply was sent by the second respondent dated 02.05.2020 stating that a maximum period of three months has been granted in accordance with the Rule and, therefore, no further http://www.judis.nic.in extension would be granted. Thereafter, the petitioner has come forward to file the present writ petition through the affidavit sworn on 04.05.2020 seeking another forty five days for the payment of the balance amount.

2. We have heard the learned counsel appearing for the petitioner and the learned standing counsel appearing for the respondents and the learned counsel appearing for the borrower represented by Mr.AR.L.Sundaresan, learned Senior Counsel.

3. Learned counsel appearing for the petitioner submitted that due compliance could not be made because of the pandemic situation. The petitioner was expecting payment pursuant to the sale agreement for the sale of the property situated in Pari Street, Choolaimedu which could not go through due to the inability to complete physical verification for sanctioning the mortgaged loan. The inability to comply with the conditions is because of force majeure caused by the pandemic. Therefore, Section 56 of the Indian Contract Act, 1872 (for short, 'the Act') will have to be pressed into service. The petitioner is ready and willing to make the remaining payment within a http://www.judis.nic.in month's time from now. To buttress his submission, the learned counsel relied on the following decisions:

(i) Satyabrata Ghose v. Mugneeram Bangur & Co. reported in AIR 1954 SC 44

(ii) Naihati Jute Mills Ltd v. Khyaliram Jagannath, reported in AIR 1968 SC 522

(iii) Boothalinga Agencies v. V.T.C.Poriaswami Nadar reported in AIR 1969 SC 110

(iv) Smt. Sushila Devi and others v. Hari Singh and others reported in (1971) 2 SCC 288

(v) National Agricultural Cooperative Marketing Federation of Indian v. Alimenta S.A. (C.A.No. 667 of 2012 dated 22.04.2020).

4. Mr.V.Chandrasekaran, learned standing counsel appearing for the respondents submits that the petitioner has been given maximum time permissible. Even the time sought for by the petitioner has expired. Now, he seeks for further time. Therefore, he stands to lose the bid amount paid already. The petitioner cannot seek the benefit under Section 56 of the Act.

5. Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the borrower submitted that One Time Proposal is still pending http://www.judis.nic.in consideration with the respondents. If the sale is not allowed to go through, the borrower can still retain the rights available. There may be a possibility of higher amount being augmented pursuant to the proposed subsequent sale.

6. By way of reply, the learned standing counsel appearing for the respondents submitted that there is no question of considering One Time Proposal at this stage. However, the respondents would go for re-auction as the petitioner did not comply with the terms and conditions.

7. As there is no realm of controversy on facts, let us deal with the legal issues particularly on the scope and ambit of the relevant provisions under the Act.

7.1. Section 39:-

“39. Effect of refusal of party to perform promise wholly – When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by

words or conduct, his acquiescence in its continuance." http://www.judis.nic.in 7.2. This provision speaks on the effect of refusal of a party to perform his promise wholly. A refusal to perform or disability from performing is individual centric. One has to give importance to the word 'refusal to perform' or 'disable made from performing'. Therefore, it is not a question and the very disability to one arising out of disablement himself. To understand the provision, one is adopted to the principle governing ejusdem generis. Secondly, the promise is with respect to the total performance in its entirety. Therefore, this provision cannot have an application when a substantial part of the promise has been complied with and the remaining could not be complied with for the reasons beyond his control such as the act of god or force majeure or impossibility. Therefore, the right of a promisee would arise and accrued only when Section 39 of the Act gets attracted whereby the promisor refuses to perform or disable himself from performing. The word 'refusal' thus cannot be equated with 'impossibility' created by supervening circumstances. A contract may consists of several parts to be performed by the parties. Thus, acts may be severable in nature. Therefore, Section 39 of the Act may not have application when a promisor is unable to perform the act which is http://www.judis.nic.in not substantial in nature and that too after completing with the major parts, due to circumstances which made him impossibility to do so at the relevant point of time though he intends to comply with it after the pandemic. If that is the position, one can come to the conclusion that the right on the part of the promisor to get the contract being given effect to does not get vanished as the promisee, in turn, is not entitled to rely upon Section 39 of the Act.

7.3. Section 54:-

"Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises – When a contract consists of reciprocal promises, such that one of them cannot be performed, or that the performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract." 7.4. Section 54 is the effect of default as to the promise which should be first performed qua a contract of reciprocal promises.

Under this provision, in a contract involving reciprocal promises, the promisor is debarred from claiming the performance on the part of the http://www.judis.nic.in promisee, as reciprocal promise, until and unless he test his part. We may note that the provisions speaks about the promise which cannot be performed, the performance cannot be claimed and the promisor fails to perform. These three factors which are attributable to a promisor or on the basis of his individual acts which includes positive act and inaction. Therefore, even this provision does not speak or eschew an Act of God. When one that is the position, the question of payment of compensation to the other party when the contract is still insisted upon with the performance under the contract is still insisted

upon, would not arise for consideration.

7.5. The word 'failure' mentioned under Section 54 of the Act qua a contract involving reciprocal promises is akin to a refusal to perform and that too in its entirety, as discussed, on the scope of Section 39 of the Act. The failure may be with respect to a particular act of a contract but it should go to its roots rendering the performance of the rest of the contract is the one not sustainable.

Therefore, when the non-performance does not go to the root of the contract, a promisee can only seek for damages but not the discharge provided he is ready and willing to perform his part.

http://www.judis.nic.in 7.6. We may quote the following passage in Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, for ascertaining whether the failure of performance, constitutes such a breach of condition as would warrant a discharge:

> “Does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefits which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?” 7.7. Section 55:-
>
> “55. Effect of failure to perform at fixed time, in contract in which time is essential.
>
> - When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> Effect of such failure when time is not essential. - If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
>
> http://www.judis.nic.in Effect of acceptance of performance at time other than that agreed upon. - If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agree, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.” 7.8. Though this provision speaks of time as essence of contract, it is rather misleading because in effect it would only meant a particular term which is breached and, therefore, not the contract as a whole. The question as to whether time being the essence of the contract, the intention of the parties has to be ascertained on the basis of various governing such as the express word used in the contract, nature of the

property, nature of the contract and the circumstances governing which may be a question of fact, law or a mixed one. One has to not only look at the mere words used in the contract but the substances as a whole. The covenants contained in the contract providing for extension of time in certain contingences, payment of fine or penalty for non-compliance within the specified time or the determining factors to consider the above said question. We do not http://www.judis.nic.in wish to reiterate the said position except by quoting the pronouncement of the Apex Court in Hind Construction Contractors v State of Maharashtra reported in (1979) 2 SCC 70.

7.9. However, as stated, the position of law stands on a different footing when we are dealing with a commercial contract. In commercial contract, the Court is expected to give more importance to the covenants contained there under qua the period mentioned for performance.

7.10. Section 55 again speaks of failure on the part of the promisor to do an act within the specified time. Therefore, failure to do an act is mandatory to a promisee to exercise the option to repudiate or rescind from the contract. This is on the premise that the intention of the parties being the time as the essence of the contract. Therefore, such a failure has to be reckoned on the part of the promisor and thus the inability to do so based upon impossibility would not attract Section

55. In such a situation, it is not open to the promisee to press into service, Section 55 of the Act and seek for the non-performing of the http://www.judis.nic.in contract by exercising his option. We may note, a promisee cannot even seek for compensation in that scenario.

7.11. The second part of Section 55 deals with the effect of a failure on the part of the promisor when time is not the essence of the contract. As discussed above, even such a provision speaks about the entitlement of compensation will not be available to a promisee for any loss occurred to him as there is no failure on the part of the promisor since he was not responsible for it as it was brought forth by an act of god and when time is not essential one.

7.12. Section 56:-

“56. Agreement to do impossible act. - An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossibility 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.

> Compensation for loss through non- performance of act known to be impossible or unlawful. - Where one person has promised to do something which he knew, or, with http://www.judis.nic.in reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise." 7.13. Section 56 of the Act has got two parts, if we leave out the part which deals with the compensation. The second part speaks of the effect of a contract which was made when the subsequent impossible situation was not in existence. Therefore, it concerns itself with a situation where an act enjoined on a party to a contract becomes impossible. Thus, it makes the obligation of a party impossible of performance which in turn gives him the escape route.

This principle of law is not expected to be invoked lightly and the onus lies heavily on the person who invokes it.

7.14. When once it is known that a contract has been frustrated involving force majeure, the incidental question would be the consequences followed by the relief that can be given by the Court.

It may be a defence for a defendant who was not able to perform the contract by raising this plea. However, the question for consideration is when a party seeks the relief based upon the frustration and force http://www.judis.nic.in majeure, in that eventuality, a party instead of seeking the contract to be void can also seek extension for the due performance. For example, if a contract provides for a performance within a specified time and that could not be done due to force majeure then one can seek extension as it is not the question of impossibility of performance forever but ignoring or condoning the period of performance. Thus, there may not be a frustration of contract but only an act in terms of the contract. We may note that impossibility becomes a supervening event which was never in existence or contemplation when a contract was entered into. However, a relief can be sought by reading Sections 55 and 56 together. After all, the power of the Court is plenary and the relief always be moulded. Though in stricto sensu Section 56 of the Act cannot have an application, one can go back to other provisions including Section 55 of the Act and mould the relief while taking note of the impossibility factor which was not in existence at the time of entering into the contract but eventually was in force for a temporary period making it possible for a party to complete the terms thereafter.

The supervening event which non-suits a party from performing his part of the contract must be the one which strike at the root and, therefore, a mere deferment of such a performance would not be a http://www.judis.nic.in ground to deny the relief which a promisor seeks. Obviously, the test is one of impact. To assess the impact the contract as a whole along with the intention are to be taken note of. Such an impact shall have the effect of materially altering the contract. Therefore, the extent of impact would be the relevant factor.

7.15. The word 'void' as mentioned under Section 56 of the Act is the aggravated, extended and ultimate form of voidable. Thus, it nullifies all further acts on the basis of impossibility are being unlawful. However, in case where such an impossibility or inability vanishes qua a minor part of the

performance, then the rights would still be kept intact. To put it differently, an element of void would be attributable only to that part when specific reference to the time is essence of the contract. We would like to illustrate by an example.

A enters into contract with B by paying a sum of Rs.1 lakhs within a specified time. Let us presume that the time is the essence of the contract. However, A is not able to make the payment as there was a situation of flood when he was about to deliver the consideration in cash on a particular day which is not in dispute. In the mean while, http://www.judis.nic.in the time expires. He also paid complete with the earlier part of the contract by paying the advance amount on time. In such case, what he performed already would not get invalidated and when impossibility to perform the remaining act cannot be termed as his failure but on account of impossibility is concern his right to as the promisee is complete with his reciprocal promise would not get extinguished.

7.16. Therefore, Section 56 of the Act would not completely make the entire transaction void when adequately his part is completed and the due to the remaining part could not be completed for the reasons beyond the control of the promisor. After all, Section 56 is not only a shield but also a sword, to be used by the party in a given situation. Thus, the right to seek relief cannot be taken away by taking umbrage under Section 56 of the Act and so also the question of payment of compensation or repudiating the contract under Section 55 of the Act. Of course, the onus to prove the inability to pay due to an act of guard certainly lies heavily on the promisor.

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8. Having dealt with the aforesaid position, we would like to place on record the general scope of Section 56 as has been held by the Apex Court in the following decisions:

> 8.1. In Satyabrata Ghose v Mugneeram Bangur & Co., reported in AIR 1954 SC 49, the Apex Court held thus:-
>
> “9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to the discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment.
>
> This much is clear that the word "impossible" has not been used here 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 http://www.judis.nic.in parties had in view; and 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.”

> 10. Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact, impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The parties shall be excused, as Lord Loreburn says, see – Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd., 1916-2 AO 297 at p 403 (A).

"If substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible." In - Joseph Constantine http://www.judis.nic.in Steamship Line Limited v. Imperial Smelting Corporation Ltd.', 1942-AO 154 at p 168 (B) Viscount Maugham observed that the "doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made." Lord Porter agreed with this view and rested the doctrine on the same basis. The question was considered and discussed by a Division Bench of the Nagpur High Court in Kesari Chand v. Governor-General-inCouncil ILR (1949) Nag 718 (C), and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance after it is made, on account of circumstances beyond the control of the parties. The doctrine is a special case of impossibility and, as such, comes under Section 56 of the Indian Contract Act. We are in entire agreement with this view which is fortified by a recent pronouncement of this Court in Ganga Saran v. Ram Charan, AIR 1952 SO 9 at p 11 (D) where Fazl Ali, J., in speaking about frustration observed in his judgment as follows: "It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look http://www.judis.nic.in primarily to the law as embodied in Sections 32 and 56 of the Indian Contract Act, 1872." We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law dehors these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before our courts.

15. These differences in the way of formulating legal theories really do not concern us so long http://www.judis.nic.in as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word "impossible" in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

16. In the latest decision of the House of Lords referred to above, the Lord Chancellor puts the whole doctrine upon the principle of construction. But the question of construction may manifest itself in two totally different ways. In one class of cases the question may simply be, as to what the parties themselves had actually intended; and whether or not there was a condition in the contract itself, express or implied, which operated, according to the agreement of the parties themselves, to release them from their obligations; this would be a question of construction pure and simple and the ordinary rules of construction would have to be applied to find out what the real http://www.judis.nic.in intention of the parties was. According to the Indian Contract Act, a promise may be express or implied Vide Section 9. 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 http://www.judis.nic.in which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object – Vide Morgan v. Manser, 1947-2 All ER 666 (L). This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive http://www.judis.nic.in law and as such comes within the purview of Section 56 of the Indian Contract Act." In this celebrated judgment, it was held that when a contract in question did not deal with fixed time period and the period of impossibility is a temporary phenomenon, the question of frustration would not arise. It was further held that the principle of frustration aspect of discharge of contract and dissolution of agreement would take place under the very terms of the contract itself.

8.2. In Naihati Jute Mills Ltd. vs. Khyaliram Jagannath, reported in AIR 68 SC 522, following the judgment in Satyabrata Ghose (supra), the aforesaid principle of law has been reiterated. The following paragraphs would be apposite:-

> "7. Such a difficulty has, however, not to be faced by the courts in this country. In Ganga Saran v. Ram Charan, 1952 SCR 36 = (AIR 1952 SC 9) this Court emphasized

that so far as the courts in this country are concerned they must look primarily to the law as embodied in Section 32 and 56 of the Contract Act. In Satyabrata Ghose v. Mugneeram, 1954 SCR 310 = (AIR 1954 SC 44) also, Mukherjee, http://www.judis.nic.in J. (as he then was) stated that Section 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may be expressed or implied, in cases where the court gathers as a matter of construction that the contract itself contains 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. Although in English law such cases would be treated as cases of frustration, in India they would be dealt with under Section 32. In a 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 performance of the contract. The Court can grant relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at http://www.judis.nic.in the date of the contract. There would in such a case be no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs, it is the court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in Section 56 which governs such situations.

x x x

9.What is however important in cases such as the one before us is to ascertain what the parties themselves contemplated at the time of entering the contract. That the appellants were aware that licences were not issued freely is evident by the provisions of the contract themselves which provide that if the appellants failed to furnish to the respondents the import licence in November 1958 the period of shipment was to be extended up to December 1958 and the price in that event would be enhanced by 50nP. The contract further provided that if the appellants were not able to http://www.judis.nic.in furnish the licence by December 1958 they would pay damages at the market rate prevailing on 2-1-1959 for January-February shipment goods. These clauses clearly indicate that the appellants were conscious of the difficulty of getting the licence in time and had therefore provided in the contract for liability to pay damages if they failed to procure it even in December 1958. The contract, no doubt, contained the printed term that the buyers would not be responsible for delay in delivering the licence but such delay as therein provided was

to be excused only if occured by such reasons as an act on God, war, mobilisation, etc., and other force majeure.It is nobody's case that the performance became impossible by reason of such force majeure. As already stated when the appellants applied for the licence, the authorities refused to certify their application because they held at that time stock for more than 2 months. It is therefore manifest that their application was refused because of a personal disqualification and not by reason of any force majeure. Since this was the position there is no question of the performance becoming impossible by reason of any change in the Government's policy which http://www.judis.nic.in could not be foreseen by the parties. No question also would arise of importing an implied term into the contract.

x x x

10. .. A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. .. The question would depend upon whether the contract which the appellants entered into was that they would make their best endeavours to get the licence or whether the contract was that they would obtain it or else be liable for breach of that stipulation . ... there is nothing improper or illegal for a party to take upon himself an absolute obligation to obtain a permit or a licence and in such a case if he took the risk hem must be bound to his stipulation.

8.3. In Boothalinga Agencies v. V.T.C. Poriaswami Nadar, reported in AIR 1969 SC 110 it has been held thus:-

http://www.judis.nic.in “10. The doctrine of frustration of contract is really an aspect, or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It should be noticed that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

x x x

13. In English law, therefore, the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in Section 56 of the Indian Contract Act lay down a positive rule of law and English authorities cannot therefore be of direct assistance, though they have persuasive value in showing how English courts have approached and decided cases under similar circumstances.

> 14. Counsel on behalf of the respondent, however, contended that the contract was not http://www.judis.nic.in impossible of performance, and the appellant cannot take recourse to the provisions of Section 56 of the Indian Contract Act. It was contended that under clause 1 of the Import Trade Control Order No. 2-ITC/48, dated March 6, 1948 it was open to the appellant to apply for a written permission of the licensing authority to sell the chicory. It is not shown by the appellant that he applied for such permission and the licensing authority had refused such permission. It was therefore maintained on behalf of the respondent that the contract was not impossible of performance. We do not think there is any substance in this argument. It is true that the licensing authority could have given written permission for disposal of the chicory under clause 1 of Order No.2-ITC/48, dated March 6, 1948 but the condition imposed in Ex. B-9 in the present case is a special condition imposed under clause (v) of paragraph (a) of Order No.2-ITC/48, dated March 6, 1948 and there was no option given under this clause for the licensing authority to modify the condition of licence that "the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion http://www.judis.nic.in thereof will be sold to any party". It was further argued on behalf of the respondent that, in any event, the appellant could have purchased chicory from the open market and supplied it to the respondent in terms of the contract. There is no substance in this argument also. Under the contract the quality of chicory to be sold was chicory of specific description— "Egberts Chicory, packed in 495 wooden cases, each case containing 2 tins of 56 lb. nett". The delivery of the chicory was to be given by "S.S. Alwaki" in December, 1955.

It is manifest that the contract, Ex. A-1 was for sale of certain specific goods as described therein and it was not open to the appellant to supply chicory of any other description.

Reference was made on behalf of the respondent to the decision in Maritime National Fish Limited v. Ocean Trawlers, Limited 1935 AC 524. In that case, the respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the Canadian government. Some months later the appellants applied for licences for five trawlers which they were operating, including the http://www.judis.nic.in respondents' trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they desired to have licences. They named three trawlers other than the respondents', and then claimed that they were no longer bound by the charter-party as its object had been frustrated. It was held by the Judicial Committee that the failure of the contract was the result of the appellants' own election, and that there was therefore no frustration of the contract. We think the principle of this case applies to the Indian law and the provisions of Section 56 of the Indian Contract Act cannot apply to a case of "self- induced frustration". In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. But for the reasons already given, we hold that this principle cannot be applied to the present case for there was no choice or election left to the appellant to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the

appellant not to sell the imported http://www.judis.nic.in chicory to any other party but he was permitted to utilise it only for consumption as raw material in his own factory. We, are accordingly of the opinion that Counsel for the respondent has been unable to make good his argument on this aspect of the case." 8.4. In Smt.Sushila Devi and Ors v. Hari Singh and others, reported in (1971) 2 SCC 288, the Apex Court opined as under:-

> "11. ... Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract.
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> http://www.judis.nic.in
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> 12. From the facts found in the case it is clear that the plaintiffs sought to take on lease the properties in question with a view to enjoy those properties either by personally cultivating them or by sub-leasing them to others. That object became impossible because of the supervening events. Further the terms of the agreement between the parties relating to taking possession of the properties also become impossible of performance. Therefore we agree with the trial court as well as the appellate court that the contract had become impossible of performance.
>
> (emphasis supplied)"

8.5. In Energy Watchdog vs. Central Electricity Regulatory Commission and others reported in (2017) 14 SCC 80, the apex court held thus:-

> "35. Prior to the decision in Taylor v. Cadwell, the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the Common law in which the http://www.judis.nic.in absolute sanctity of contract was upheld was loosened somewhat by the decision in Taylor v. Cladwell in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.
>
> 36. The law in India has been laid down in the seminal decision of Satyabrata Ghose v.

Mugneeram Bangur & Co. The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word 'impossible' has not been used in section 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 of the parties.

If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had http://www.judis.nic.in promised to do. It was further held that where the Court finds that the 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 itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place dehors the contract, it will be governed by Section 56.

37. In Alopi Parshad & Sons Ltd v Union of India, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is http://www.judis.nic.in 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 had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in Naihati Jute Mills Ltd (supra), this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose. Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

39. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, Tsakiroglou & Co Ltd v.

http://www.judis.nic.in Noblee Thorl GmBH, despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to ground the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

40. This view of the law has been echoed in Chitty on Contracts, 31st Edn. In para 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in Treitel on Frustration and Force Majeure, 3rd Edn., the learned author has opined, at Para 12-034, http://www.judis.nic.in that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See para 15-158)

41. Indeed, in England, in the celebrated Sea Angel case, the modern approach to frustration is well put, and the same reads as under:

"111. In my judgment, the application of 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 http://www.judis.nic.in 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 provisions 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.""

8.6. In National Agricultural Cooperative Marketing Federation of India (supra) taking note of some of the judgments referred supra, the Apex Court has held as follows:-

> http://www.judis.nic.in " 49. This Court in Satyabrata Ghose v. Mugneeram Bangur & Co., AIR 1954 SC 44, considered the applicability of Sections 32 and 56 while considering the doctrine of frustration of contract. Impossibility and frustration are used as interchangeable expressions. The principle of frustration is an aspect of the discharge of a contract. In India, the only doctrine the courts have to go by is that of intervening impossibility or illegality as laid down in Section 56, and the English decisions in this regard may have persuasive value but are not binding. This Court also considered if the contract contained impliedly or expressely a stipulation, according to which it would stand discharged on happening of particular circumstances. The dissolution of the agreement would take place under the terms of the contract itself. Such cases would be outside the purview of Section 56 of the Contract Act altogether. They would be dealt with under Section 32 of the Contract Act, which deals with contingent contracts.
>
> x x x In this case, 'expected event' was a refusal by the Government as agreed to under Clause 14 of the Agreement. On the happening of such http://www.judis.nic.in an event, it is so fundamental as to be regarded by law as striking at the root. As such, we are of the opinion that the contract was rendered void in terms of section 32 of the Contract Act."

9. Thus, on a conspectus of above, and in light of the discussion made, in the preceding paragraphs, we are of the view that all the provisions dealt with are to be read in unison. Accordingly, we hold that the the promisor is entitled to seek for reciprocal performances from the promisee after the period of impossibility expires which prevented him from performing his part thereafter. In such a case, the question of payment of compensation also obviously would not arise as there is no element of failure involved on his part.

10. In the case on hand, there indeed a pandemic situation in existence during the period of ninety days granted. The respondents themselves have acknowledged the fact that the petitioner is entitled for the ninety days period as against the initial fifteen days. In fact, the communication sent also would vouch for the same. However, the petitioner is not entitled for further extension than the one he himself sought for. Even in the writ petition, he has sought for only forty five http://www.judis.nic.in days but the learned counsel appearing for the petitioner seeks further time.

11. No doubt, we do find some force in the submission made on the effect of the non-compliance. As the petitioner is not at fault, the forfeiture cannot be applied. Similarly, one has to see the condoning circumstances as well. The borrower does not have any substantial right except the interest in seeing to it that the property fetches higher value. There is no difficulty in appreciating the factual situation that the real estate value has come down in view of the pandemic. The writ court will have to take into consideration the competing interest in exercising its discretion. Therefore, while holding that the petitioner is entitled for refund, the extension sought for cannot be granted as a matter of course

especially when he is not in a position to pay even now since a further time is sought for.

12. After all, in the proposed e-auction, if the property goes for a lesser value then it would not be in the interest of the respondents and the borrower, it would also affect the interest of the petitioner.

13. Under those circumstances, while permitting the respondents to go on with the fresh e-auction, we also permit the petitioner to deposit the remaining amount within a period of four weeks from the date of receipt of a copy of this order to the respondents. The said deposit will not give him any equity or right. If in the re-auction in which the petitioner also can participate and the property fetches the higher amount, the same can be confirmed in accordance with law in which case the petitioner is entitled for the refund of the amount deposited by him sans interest as he is also not fully ready to make the payment even now. On the other hand, if the re-auction fetches lesser amount, the respondents shall confirm the earlier auction in favour of the petitioner.

14. We do not wish to express anything on the One Time Proposal offered by the borrower, as submitted by the learned Senior Counsel, as it is not the subject matter of this writ petition. However, considering the request by the respondents is not barred, if otherwise permissible in law. Since the borrower is stated to have given a representation, without expressing anything on merit, we merely say http://www.judis.nic.in that the respondents shall give a reply within a period of two weeks from the date of receipt of a copy of this order in this regard, if not given already. In the event of re-auction being proposed by the respondents, the same shall be completed within a period of three months from the date of receipt of a copy of this order.

The writ petition stands disposed of accordingly. No costs.

C.M.Ps are closed.

(M.M.S., J) (R.H
18.08.2020

Index :Yes
ssm

Note to Registry: Upload on 24.08.2020 To

1.The Authorized Officer, Tamilnadu Mercantile Bank Ltd., Tirunelveli Regional Office, Tirunelveli.

2.The Branch Head, Tamilnadu Mercantile Bank Ltd., Alangulam Branch, 549A, Tenkasi Road, Alangulam – 627 851.

 M.M.SUNDRESH ., J and R.HEMALATHA .,J (ssm) Pre-Delivery Order 18.08.2020