

Impact of COVID-19 on Tenancy agreements: Frustration, Force Majeure and Suspension

written by Gaurav Singh Gaur | April 8, 2020



The Riveting Aftereffect of COVID-19 on Tenancy Agreement

The widespread global outbreak of COVID-19 has resulted in the termination/suspension of various contracts including tenancy agreements. Generally, at the time of execution, the contracting parties often agree on the terms and conditions to be followed when the performance of the said contract by either of the party is affected by acts or circumstances that are beyond the reasonable control of the parties.

Under the normal scenario, tenancy, as a general rule, is terminated based on the following:

1. by action/Inaction of the Tenant in violation of the rental/lease agreements;
2. by action/Inaction of the landlord/owner in violation of the rental/lease agreements;
3. by mutual agreement;
4. by any order/decreed from the jurisdictional Court or Tribunal;

However, in addition to the same, tenancy may also end as a result of some external circumstances that are beyond the control of the parties to the rental agreement. This legal update focuses on the termination or suspension of the tenancy agreements in India by the invocation of Doctrine of Frustration, Force Majeure Clause (FMC), or Doctrine of Suspension of rent.

DOCTRINE OF FRUSTRATION

In the case of 'Doctrine of Frustration', the tenancy is frustrated when without the fault of parties, obligations under the agreement, as originally intended, become impossible to fulfill as a result of unforeseeable circumstances.

Tenancy, as a general rule, will terminate automatically when a frustrating event occurs, i.e., one which is unforeseeable and unexpected; beyond the control of the parties; or that renders the performance impossible or radically different from that which the parties, originally intended since the inception of the contract.

The doctrine of frustration as embodied under Section 56 of the Indian Contract Act, 1872, lays down principles as hereunder:

- An agreement to do an act impossible in itself is void;
- 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.

The Hon'ble Supreme Court of India explained the applicability of Doctrine of Frustration vis-à-vis ambit of Section 56 in *Satyabrata Ghose v. Mugneeram Bangur & Co.* [1] The Hon'ble Court held that it would be incorrect to say that section 56 of the Contract Act applies only to cases of physical impossibility.

The performance of an act may not be literally "impossible" but may be impracticable and useless considering the purpose that the parties had in

mind. The performance of a contract can be said to have become impossible if an untoward event or change of circumstances beyond the contemplation and control of the parties upsets the very foundation upon which the parties rested their bargain.

This principle was further summarized by a bench comprising of Justice P.C. Ghosh and R.F. Nariman in *Energy Watchdog v. CERC*[2]. Some key principles that were laid down by the Hon'ble Court are as hereunder:

1. If an express or implied 'force Majeure clause exists in a contract, the same will be exercised over and prior to the principle enshrined under Section 56;
2. Application of Doctrine of Frustration must always be with narrow limits and implications;
3. A mere rise in cost or expense does not come under the ambit of the Doctrine of Frustration;
4. The doctrine of Frustration will not apply so long as the fundamental basis of the contract remains the same.[3]

FORCE MAJEURE CLAUSE (FMC)

Non-performing parties in a contract may also rely on the applicable provision of '*Force Majeure*' (a French phrase that literally translates to "superior force") to avoid the liability for what would otherwise amount to a breach of contract. Whether a particular event constitutes '*Force Majeure*' or not, is a matter of contractual interpretation that differs from case-to-case basis.

The underlying principles of the applicability of '*force majeure*' clauses are as hereunder:

- the very basis of such clauses is that the events are beyond the reasonable control of parties;
- it is also necessary to analyze if the best endeavors have been taken to mitigate force majeure events;
- for an event to qualify as *force majeure*, it must be unforeseeable by the parties;
- that the event has rendered the performance of the contract impossible or illegal.[4]

Furthermore, in *Satyabrata Ghose* case[5], it has been held in particular that when a contract contains FMC and which on construction by the Court is held attracted to the facts of the case, then Section 56 can have no application in such circumstances.

Given the unprecedented nature of the widespread outbreak of COVID-19 and/or the response of the government across the globe, it is highly probable that COVID-19 would constitute a *force majeure* event under many contracts having such clauses. The official memorandum dated 19-02-2020 headed as "Force Majeure Clause (FMC)" issued by the Ministry of Finance, Department of Expenditure Procurement Policy Division clearly states that the spread of Coronavirus (COVID-19)[6] should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure.

In India, several State Governments and the Central Government have imposed travel restrictions, mandated quarantines, and/or has closed borders and business operations, to contain/restrict further outbreaks. Furthermore, the recent announcement dated 24-03-2020 by the Hon'ble Prime Minister of India declaring a three-week nationwide lockdown starting midnight of 24-03-2020 and the subsequent order dated 24-03-2020 vide No.40-3/2020-Dm-I(A) passed by

the Government of India, Ministry of Home Affairs has given rise to such issues where FMC may be invoked pertaining to several Tenancy agreements. In such circumstances, many companies and MNCs in India would find it suitable to invoke FMC in its rental contracts to not pay rent for the entire period of shutdown across the country. However, as mentioned earlier, the applicability of the FMC depends on the interpretation of the respective contractual terms and clauses.

DOCTRINE OF SUSPENSION OF RENT

There are some contracts that can be put on hold until a force majeure event is resolved. Whereas some contracts specifically provide for cancellation, termination, novation or alteration, etc., to remain in effect amidst the continuation of a force majeure event.

Several leases do not permit tenants to withhold or suspend the payment of rent and dues, regardless of any event. In such cases, the solution can be arrived at either by a mutual agreement between the contracting parties or by resorting to Sections 62 and 63 of the Indian Contract Act, 1872.

In respect to the same, the Hon'ble Supreme Court of India in *Surendra Nath Bibra v. Stephen Court Ltd.*^[7] observed that:

"On the one hand it does not seem, equitable that when a tenant enjoys a substantial portion of the property of the landlord, leased to him, without much inconvenience, he should not pay any compensation for the use of the property, in other words, to borrow the language of Sir George Ranking that he should enjoy a windfall.

On the other hand, it is unfair that if a tenant is not given possession of a substantial portion of the property, he should be asked to pay any compensation for the use of the property while he is taking appropriate measures for specific performance of the contract. It seems to us that it will depend on the circumstances of each case, whether a tenant would be entitled to suspend the payment of the rent or whether he should be held liable to pay a proportionate part of the rent."

In another case of *Raichurmatham Prahakar & anr. v. Rawatmal Dugar*^[8] it was held by the Apex Court as hereunder:

"The leases of immovable property and the relationship between landlord and tenant are governed by Chapter V of the Transfer of Property Act, 1882. The rights and liabilities of lessor and lessee are stated in Section 108 of the T.P. Act which applies subject to the contract or local usage to the contrary. Under Clause (b) and (c) thereof, not only the lessor is bound on the lessee's request to put him in possession of the property but there is also an implied covenant for peaceful possession and enjoyment of the leased property by the tenant.

So long as the lessee pays the rent reserved by the lease and performs the obligations cast on him by the contract of lease, he is entitled to hold and enjoy the property without interruption by anyone including the lessor. Under Clause (l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor. There has developed what is known as the doctrine of suspension of rent based on principles of justice, equity, and good conscience. If the lessee is dispossessed by the lessor from the leased property the obligation of the lessee to pay rent to the lessor is suspended."

The applicability of the doctrine of Suspension of Rent is also dependent on the contractual interpretations but the certain aspects that

need to be ascertained are as follows:

1. Existence of a force majeure event that is beyond the reasonable control of parties;
2. Existence of unforeseeable circumstances;
3. Best endeavors made to mitigate the force majeure events;
4. A notification/ written communication invoking force majeure provision
5. Dispute Resolution of such contracts is as prescribed by or agreed upon between the parties.

CONCLUSION

In the light of the aforesaid, it can be concluded that amidst the outbreak of COVID-19, there is a likelihood of termination or suspension of the tenancy agreements by application of the doctrine of frustration, force majeure clause, or doctrine of suspension of rent, which is subjected to variables and also dependent on the rule of construction followed in the interpretation of the respective contractual obligations. The interpretation of these subjective requisites is different from case to case.

Therefore, to evade the abrupt termination of the tenancy agreement, it is advisable that on the occurrence of any such unforeseeable circumstances, the contracting parties, with mutual consent, explore the possibilities of resorting to the provision of novation, rescission, or alteration of contract as enshrined under Section 62 of the Indian Contract Act.

- [1] AIR 1954 SC 44
- [2] (2017) 14 SCC 80
- [3] 'Force Majeure', 'Act of God', & 'Doctrine of Frustration' under Indian Contract Act,
<https://www.livelaw.in/know-the-law/force-majeure-act-of-god-doctrine-of-frustration-under-indian-contract-act-explainer-154452>; Live Law Research Team, 28 March 2020 1:56 PM.
- [4] COVID-19: A pandemic, a force majeure and a material adverse change, by Rajesh Sivaswamy and Mohana Roy
- [5] Supra.
- [6]
<https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf>
- [7] AIR 1966 SC 1361.
- [8] (2004) 4 SCC 766.

Contributed By - Gaurav Singh Gaur

Designation - Associate

King Stubb & Kasiva,

Advocates & Attorneys

Click Here to Get in Touch

New Delhi | Mumbai | Bangalore | Chennai | Hyderabad | Kochi

Tel: +91 11 41032969 | Email: info@ksandk.com