Journal of Peace, Development and Communication

PEACE AND DEVELOPMENT

Volume 06, Issue 02, June 2022
pISSN: 2663-7898, eISSN: 2663-7901
Article DOI: https://doi.org/10.36968/JPDC-V06-I02-32
Homepage: https://pdfpk.net/pdf/
Email: se.jpdc@pdfpk.net

Article:	**Two Notions of Frustration of Contract—Impossibility Viz-A-Viz Impracticability: Case Study of Pakistan**
Author(s):	Hafiz Muhammad Usman Nawaz Assistant Professor of Law, Associate Editor, Islamabad Law Review, International Islamic University, Islamabad.
	Dr Muhammad Asim Iqbal Assistant Professor of Law, International Islamic University, Islamabad. Email: drmaiqbal@live.com
	Syed Mudasser Fida Gardazi Assistant Professor of Law, University of Azad Jammu & Kashmir, Muzaffarabad. Email: smgardazi@ajku.edu.pk
Published:	30th June 2022
Publisher Information:	Journal of Peace, Development and Communication (JPDC)
To Cite this Article:	Nawaz, M. U., Iqbal, M. A., & Gardazi, M. F. (2022). Two Notions of Frustration of Contract—Impossibility Viz-A-Viz Impracticability: Case Study of Pakistan. In *Journal of Peace, Development and Communication (JPDC)*. Vol. 06, Issue 02, pp. 457–468. https://doi.org/10.36968/JPDC-V06-I02-32
Author(s) Note:	Hafiz Muhammad Usman Nawaz is serving as an Assistant Professor of Law at International Islamic University, Islamabad and also serving as Associate Editor at Islamabad Law Review Email: usman.nawaz@iiu.edu.pk
	Dr Muhammad Asim Iqbal is serving as an Assistant Professor of Law at International Islamic University, Islamabad. Email: drmaiqbal@live.com
	Syed Mudasser Fida Gardaz is serving as an Assistant Professor of Law at University of Azad Jammu & Kashmir, Muzaffarabad. Email: smgardazi@ajku.edu.pk

ABSTRACT

Frustration of contract is one of the modes of discharge of contracts. It is the doctrine which ensures automatic termination of respective obligations of the parties as well as adjustment of rights and obligations accrued before the frustrating event. There are two famous notions dealing with frustration of contract i.e. physical impossibility and commercial impracticability. Physical impossibility notion is developed and currently is being practice by English Courts. While commercial impracticability notion is recognized and applied by American Courts and Statutes. This article will analyze the both notions in the context of Pakistani legal system to find the application of relevant notion of the doctrine. This article will also discuss different modes of discharge of contracts along with frustration of contract. For that purpose Pakistani law and Case laws of superior courts will be cited and analyzed. This article will be an effort to find the jurisprudence of Pakistan with reference to commercial law generally and with reference to doctrine of frustration of contract especially.

Keywords: Frustration, notion, impossibility, impracticability, Pakistani Courts

INTRODUCTION

Contracts not only create rights of one party but they create corresponding obligations of another (*Niranjan Das Case, 1964*). These mutual rights and obligations are to be determined in the light of agreement between the parties. But the question whether parties have concluded a contract or not is a question of fact. That can be deducted from the circumstances of the case, oral evidence and documentary proof if any. In *Al-Huda Hotels and Tourism Co. Case* (2002), Sindh High Court held by referring Justice I. Mahmood observations in *Hoshang M. Dastur and 6 others* about the nature of concluded contract,

> But, the question whether the parties had reached a concluded contract or not, is a question of fact to be deducted from the corresponding and other documentary and oral evidence. The true test for deciding the question is to ascertain whether the parties were of one mind on all the material terms at the time it is said to have been finalized between them and whether they intended that the matter was closed and concluded between them.

The phenomenon or methodology described here to determine the existence of contract is also known as *consensus ad idem* i.e. consent of both parties on the same subject matter in the same sense. It is the most important test existed to determine the nature and scope of any contract.

MODES OF DISCHARGE OF CONTRACTS

A contract creates obligations between the parties and these obligations come to an end by way of discharge of contract. A contract is said to be discharged when contractual relations between the parties are terminated or come to an end. In other words, parties are have performed the contract or absolved from performing their respective obligations of the contract due to any other reason. The primary mode of discharge of contract is the performance of contract. It is the ultimate purpose of contracts. Parties enter into contracts so that their expectations from the contracts may be fulfilled. There are number of grounds of discharge of contracts under Pakistani law of Contract i.e. The Contract Act, 1872. Here is a glimpse of those grounds only. Following are different grounds of discharge of contract under the provisions of the Contract Act, 1872.

- Performance of Contract (Section 37 & 38)
- Mutual Agreement (Section 62, 63 & 67)
- Operation of Law (Death or Insolvency)
- Frustration of Contract (Section 56)
- Lapse of Time (Limitation Period)
- Breach of Contract (Section 39)

Contracts may come to an end by performance either actual or attempted performance (offer to perform performance). Section 37 of the Contract Act, 1972 provides:

> **Obligation of parties to contracts.** The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.
>
> Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Section 38 specifically talks about attempted performance and its consequences.

> **Effect to refusal of accept offer of performance.** Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted the promisor is not responsible for nonperformance, nor does he thereby lose his rights under the contract.

Contractual obligations may come to end by another mutual covenant or contract between the parties without performance. This may be termed as discharge of contract by mutual agreement. It includes novation, rescission, alteration, dispensation with or remission of performance. Section 62 of the Contract Act, 1872 provides:

> **Effect of novation, rescission and alternation of contract.** If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Section 63 of the Contract Act, 1872 provides:

> **Promisee may dispense with or remit performance of promise.** Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance1, or may accept instead of it any satisfaction which he thinks fit.

Contracts may be discharged by operation of law in some cases. In case of death of the promisor, in a contract involving personal skills or liability, contract will come to an end. Same consequences will be in case of insolvency of the promisor.

Contractual rights cannot be recovered after the expiry of limitation period specified under the Limitation Act, 1908. In case of non-performance of the contract, the aggrieved party can seek his remedy within a specific time. In case of failure to do so, rights become time barred and cannot be sought through court of law.

Breach of contract may be a ground for discharge of contracts. If one party commits breach of contract, the other party to a contract is absolved from performing his part of the contract. Breach may be actual or anticipatory. Section 39 of the Contract Act, 1872 provides:

> **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.

Another ground for discharge of contracts is frustration of contracts. Contractual obligations may be terminated due to subsequent impossibility or illegality without any fault of either party. Its operation is automatic and parties are absolved from their obligations without

any further process. Para II of Section 56 of the Contract Act, 1872 provides for this mode of discharge of contract.

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

This mode of discharge of contract will be discussed here in detail in Pakistani context.

FRUSTRATION OF CONTRACT AS A MODE OF DISCHARGE

Historically, there had been no way of setting aside an impossible contract after formation. Parties were liable in any case to perform the contract or to pay damages for non-performance. The normal route of discharge of contract was only performance of contractual duty absolutely and the circumstances beyond the control of the parties had no weightage in relaxing the contractual duty. The principle was settled in *Paradine v Jane* (1647). The rule was in practice till 19th century and was replaced by the doctrine of frustration of contract in *Taylor v Caldwell* (1863) which provided the practical and justiciable approach to deal the circumstances beyond the control of contracting parties and they affect the performance of contract.

Frustration of contract has been recognized by Pakistani law as a ground of discharge of contracts. Statutory law as well as case laws well define the attitude of Pakistani courts towards the application of this doctrine to discharge the parties from their respective contractual obligations.

Firstly statutory provisions will be analyzed to identify the basics of doctrine of frustration of contract in Pakistani law. Section 56 of the Contract Act, 1872 primarily deals with frustration of contracts. Words of the Section 56 are reproduced here for discussion.

> **Agreement to do impossible act.** An agreement to do an act impossible in itself is void.
>
> **Contract to do act afterwards becoming impossible or unlawful.** A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> **Compensation for loss through nonperformance of act known to be impossible or unlawful.** Where one person has promised to do something which he knew, or, with 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 nonperformance of the promise.

Analysis of the above provision reveals that there are two types of impossibilities i.e. initial impossibility and subsequent impossibility. It also explains the effect of those impossibilities.

Second paragraph explicitly divide the doctrine of frustration of contract into two types i.e. physical impossibility and legal impossibility.

The third paragraph deals with the effect of foreseen or foreseeable events on the contracts considered as frustrated being the limitations of the doctrine.

Pakistani courts have well defined and applied the doctrine of frustration of contract. For example, the connotation of word "impossible" used in section 56 is provided in *Haji Khudai Dad v Ghulam Yasin* (2004); "Vendor in the present case was under legal obligation to transfer title to vendee which not only he failed to do, but it had become impossible to be done due to refusal of Municipal Corporation to transfer title in the name of vendee". Here the word impossibility is explained as legal impossibility not physical impossibility.

Elements of frustration i.e. externality, unpredictability and irresistibility have been defined in *Messrs Venus Pakistan (Pvt.) Ltd. Case* (2014) as well as by the Sindh High Court in these words:

> In order that the section 56 would apply the following conditions must be fulfilled: (1) that the act should have become impossible, (2) that impossibility should be by reason of some event which the promisor could not prevent and (3) that the impossibility should not be self-induced by the promisor or due to his negligence (*A R Mohamed Siddik and others v The Trans-Oceanic Steamship Co. Ltd and another*, 1988).

CJ Hamood ur Rahman expressed the scope of application of the doctrine of frustration of contract in *Abdul Mutaleb v Mst. Rezia Begum* (1970):

> The doctrine of frustration, as embodied in section 56 of the Contract Act, is applicable only to executory contracts where under performance or further performance of a promise is outstanding, but does not apply to a transaction which is complete and has already created a right in immovable property in favor of a party.

Above case clearly defines the application of doctrine of frustration in executory contracts. A complete and concluded contract cannot be subjected to the application of doctrine of frustration.

Another basic element of the application of frustration of contract is 'fundamental change of circumstances'. To invoke the doctrine of frustration of contract, test of 'fundamental change of circumstances' is applied. The court observes:

> It has now been generally accepted as correct that the doctrine of frustration of contract would apply to cases, where the very foundation of a contract disappears by virtue of circumstances coming into existence and which were not within the contemplation of the parties to the contract (*A R Mohamed Siddik and others v The Trans-Oceanic Steamship Co. Ltd and another*, 1988).

In *Messrs Taj Oil Industries Limited v Messrs Bengal Oil Mills Ltd* (1990), it was held that 'the doctrine of frustration applies only when something which is unanticipated happens.

It does not apply to a case where anticipated circumstances take place for which provision has already made in the contract'.

In *Pakistan Industrial Credit and Investment Corporation Ltd. v Habib Enterprises Ltd. and another* (1989), it was held turn of events subsequent to the contract is imperative to invoke the doctrine of frustration.

> The doctrine of frustration of contract comes into play on account of unfolding of events, subsequent to contract, under section 56 of the Contract Act, 1872, which subsequent turn of events were not in contemplation of parties.

The term 'beyond the control' is also important to understand the true application of doctrine of frustration. For the application of doctrine of frustration, it is imperative that the event must be beyond the control of the parties. The same phenomenon was discussed in *Rice Export Corporation v Int. Exports* (2004) in these words:

> It was contractual obligation of the defendant to have exercised all care in respect of stocks including its byproducts entrusted to it. However, in the instant case there was no breach of such obligation by the defendant and the short fail of 1278.95 metric tons of rice has occurred due to natural causes, which were beyond the control of defendant. The defendant is therefore, not liable to make good any such loss or damages.

JUDICIAL INTERPRETATION OF SUPERVENING EVENTS

After analysis of statutory provision and its interpretation by the superior courts of Pakistan, it is essential to look into the judicial response towards the interpretation of supervening events. Generally Pakistani courts have considered following events as cause of frustration of contract.

- Perishing of Goods
- Destruction of Subject-Matter
- Death of Party
- Flood & Heavy Rains
- Nationalization
- Legislative Interventions
- Non-Issuance of NOC/License etc.
- Fundamental Change in Circumstances
- Outbreak of War
- Terrorist Attacks

Following events have not been considered as ground of frustration of contract.

- Foreseeability
- Self-Induced Frustration
- Express Provisions
- Loan Agreements
- Contingent Contracts
- Protests on Results of Election

- Appeal Cases
- Performance becomes Burdensome or Onerous
- Executed Contracts
- Lease Contracts
- Imposition of Ban due to Illegal Orders
- Devaluation of Currency/Increase in Taxes, Custom Duties etc.
- Arbitration Clause

To avoid unnecessary length of arguments, some important judgments are being referred here to understand the attitude of Pakistani courts to interpret the supervening event causing the contract as frustrated.

In *Begum Zia Farhat Awan Case* (1993), banks were nationalized and by this legislative intervention, some petitioners filed a petition to claim their deposits on the ground of frustration of contract due to legislative intervention. The court accepted their stance and declared the contracts as frustrated due to legislative interventions and ordered the respondent to return the securities within one month.

Floods and heavy rains are also contended as frustrating event by the parties. In *Daud Shah Case* (1996);

> The respondent was assigned a contract by the petitioners for 'Repair of Existing Apron of Syphon at Warsak Gravity Canal. The work assigned was started. Due to floods in the 'Nullah' the respondent could not continue the work. Nonetheless, the Engineer Incharge recorded the quantum of work done by the respondent in the measurement book whereof the latter submitted him bill which was declined by the former due to the natural calamity falling within the purview of Clause 29 of the Contract Agreement. Having failed in his attempt to get his claim settled, the respondent filed a suit against the petitioners for recovery in the Court of Senior Civil Judge, Peshawar.

Clause 29 of the contract provides that the Government will not be responsible for any loss caused by floods, fire, force majeure, or act of God to partly completed work. On this ground, the Government took the plea that it was expressly provided by the contract, so no amount for partly completed work may be claimed. But the Trial court decided in favor of Respondent on the ground that the situation was declared as abnormal and serious by the Petitioners and they had themselves declared the situation beyond the control of the Respondent. Trial court ordered the Petitioners to make payment of the work done and recorded. The Petitioners filed an appeal to the Additional District Judge but that was also dismissed on the ground that ‘if the work done stands recorded in the official measurement book then it would not be hit by ' force majeure.'

The petitioners challenged the findings of Two Courts in a revision petition before High Court contending that the Two Courts had not interpreted the Clause 29 of the Contract in a right way. Secondly, it was nowhere written in Clause 29 of the Contract that if the work is recorded, this clause will not be implemented. His appeal was dismissed and the learned judge observed:

> But the position in this case is not like this as the record indicates. The contractor has been given a decree for the work done by him at the spot and for which the Incharge Engineer has duly recorded measurements in his 'Measurement Book' and the payment had been sought in line with those measurements. The Sub-Engineer Incharge who has been examined in Court has stated that the work done by the Contractor was satisfactory. In this view of the matter the Contractor was entitled to receive payment from the Department for the work done in accordance with clause 8 of the Agreement and. a decree as such was rightly passed by the Trial Court and affirmed subsequently by the Appellate Court.

The same case was heard by the Supreme Court and refused to grant leave to appeal. The findings of the Supreme Court were as:

> We do not find that the High Court had construed the clause containing 'force majeure' in the contract agreement in the case in hand against any accepted principles of interpretation of documents. Hence no ground for interference in the instant case exists.

This is an historical case of Pakistani legal system with respect to frustration. It laid down many principles for the purpose of allocation of risk as well as the importance of force majeure clauses in the contracts. Primarily, express provisions of the contracts provide limitations to the doctrine of frustration of contract. But this case provided the exceptions to express provisions limitation. It has the effect of undermining such provision of contracts by interpretation which is unjust and unreasonable.

Self-induced frustration or self-imposed frustration is a limitation on the application of doctrine of frustration. In *Messrs Balagamwalla Cotton Ginning and Pressing Factory, Karachi v Lalchand* (1961), it was held that unavailability of one mode of transport will not make the contract as frustrated. It made the contract onerous and not impossible to perform. On failure of availing on mode of transport, the other modes were not tried; it was held that this was the case of self-imposed frustration.

TWO NOTIONS OF FRUSTRATION OF CONTRACT

There are two famous notions/approaches of doctrine of frustration of contract i.e. Physical impossibility and commercial impracticability. Under English Law, to invoke the doctrine of frustration of contract, physical impossibility must be there. Difficulty of performance or commercial hardship will not be treated as ground of frustration of contract. Denning LJ said:

> Was that [payment of the higher price] a step which they could reasonably be expected to take? This depends on how much was the price they had to pay to get the license. If it was…100 times as much as the contract price, that would be a "fundamentally different situation" which had unexpectedly emerged, and they would not be bound to pay it.

On the other hand, American Uniform Commercial Code sets the minimum standards for excusing the performance of contracts. The Restatement Second of Contracts provides the term 'impracticability' rather than 'impossibility'. Section 261 provides:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption, on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary (The Restatement Second of Contracts, 1981).

In Pakistan, statutory law as well as case law provide the application of the doctrine on the basis of impossibility not on the basis of impracticability. This is general trend of Pakistani courts. If the performance becomes burdensome or onerous, contracts do not frustrate and parties are not absolved from their respective obligations. In *Messrs Jaffer Bros. Ltd v Islamic Republic of Pakistan and another* (1978), it was held:

> Contract, notwithstanding uncontemplated turn of events, not becoming impossible to perform, parties, held, continue bound by terms of contract and Court left with no power on discretion to qualify contract and depart from express terms on ground of change of circumstances being unforeseen or performance of contract becoming more onerous.

In *Pakland Cement Company and others v CITI Bank N.A. and 5 others* (2001), it was held that increase in duty or tax will not work as frustrating event. The Supreme Court observed:

> Non-payment of instalments due to alleged increase in customs duty and sales tax was not a valid ground. Close scrutiny of the facts reveals that' the petitioners were not absolved from their obligations on the pleas mentioned earlier. Section 56 of the Contract Act is not attracted to these matters.

In *Gulam Ali v Pakistan* (1960), it was held that where the unexpected turn of events made the performance of contract more onerous and burdensome only but not physically impossible, the doctrine of frustration will not be invoked. And the defaulting party will be liable to pay fair compensation to the sufferer on the basis of *quantum meruit*.

From the above discussion it is evident that Pakistani courts have relied on the notion of impossibility not on impracticability to invoke the doctrine of frustration of contract.

EFFECTS OF FRUSTRATION OF CONTRACT

The doctrine of frustration of contract terminates the contract automatically without an option of the parties and absolve them from future obligations. But the performance or benefit accrued by the parties before the frustrating event will be adjusted according to the principle stated in the section 65 of the Contract Act, 1872 which reads:

> **Obligation of person who has received advantage under void agreement or contract that becomes void.** When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Above referred section contains the principle of *quantum meruit* which means in proportion to work done. This is equitable doctrine which ensures restoration of benefits

received by the parties before that event. Principle of *quantum meruit* is also linked with the principle of restoration and doctrine of unjust enrichment. Doctrine of unjust enrichment is recognized and applied by the Courts in Pakistan in these words: "No one can be permitted to derive benefit from an undue advantage to become unjustifiably rich at the expense of another (*Arabian Sea Enterprises Limited*, 2013).

CONCLUSION

Contracts are made for the purpose of performance. There are different modes of discharge of contracts including frustration of contract. Law does not put an unjust burden upon any one. The consequences of an event beyond the control cannot be borne by an innocent party. Primarily law focuses on performance of contracts as observed by Sir William Anson while explaining the object of the law of contract: "the law of contract is intended to ensure that what a man has been led to expect shall come to pass; that what has been promised to him shall be performed" (William Reynell Anson, 1969). But in case of an event beyond the control of the parties, law safeguards the rights of both parties firstly by absolving them from future obligations and secondly by providing them an opportunity of adjustment of rights and obligations accrued before the frustrating event. Among two notions of frustration of contract, Pakistani courts have relied on impossibility doctrine and rejected the commercial impracticability doctrine. This is the closest approach to the English law although not same.

REFERENCES

A R Mohamed Siddik and others v The Trans-Oceanic Steamship Co. Ltd and another, 1988 CLC 299 [Karachi]

Abdul Mutaleb v Mst. Rezia Begum, PLD 1970 SC 185

Al-Huda Hotels and Tourism Co. and Others v Paktel Limited and Others, 2002 CLD 218 [Karachi]

Anson, William Reynell & Anthony Gordon Guest. Anson's Law of Contract, 23rd Edition. Oxford: Clarendon Press, 1969.

Arabian Sea Enterprises Limited v Abid Amin Bhatti, PLD 2013 Sindh 290

Begum Zia Farhat Awan and 2 others v Islamic Republic of Pakistan through Secretary, Ministry of Industries, Islamabad and 3 others, 1993 CLC 365 [Lahore]

Custodian of Enemy Property, Islamabad v Hoshand M Dastur and 6 others, PLD 1977 Karachi 377

Government of N.W.F.P. through Secretary, P.W.D., Peshawar and 4 others v Daud Shah, Contractor, Peshawar, 1996 SCMR 1713 [Supreme Court of Pakistan]

Gulam Ali v Pakistan, PLD 1960 (W.P.) Karachi 581

Haji Khudai Dad v Ghulam Yaseen, 2004 CLC 1302 [Quetta]

Messrs Balagamwalla Cotton Ginning and Pressing Factory, Karachi v Lalchand, PLD 1961 (W.P.) Karachi 1

Messrs Jaffer Bros. Ltd v Islamic Republic of Pakistan and another, PLD 1978 Karachi 585

Messrs Taj Oil Industries Limited v Messrs Bengal Oil Mills Ltd, 1990 MLD 877 [Karachi]

Messrs Venus Pakistan (Pvt.) Ltd. v Additional Collector Customs Preventive, MCC Customs House and another, 2014 PTD (Trib.) 108 [Customs Appellate Tribunal, Karachi]

Niranjan Das v Sm. Charu Bala Das and Others, PLD 1964 Dacca 406

Pakistan Industrial Credit and Investment Corporation Ltd. v Habib Enterprises Ltd. and another, 1989 CLC 2070 [Karachi]

Pakland Cement Company and others v CITI Bank N.A. and 5 others, 2001 SCMR 1341 [Supreme Court of Pakistan]

Paradine v Jane, [1647] 82 ER 897 (KB); [1647] EWHC KB J5; [1647] Aleyn 26

Restatement of the Law Second (1981), Contracts 2d.

Rice Export Corporation v Int. Exports, PLD 2004 Karachi 705

Taylor v Caldwell, [1863] EWHC QB J1; 122 ER 309 (QB); [1863] 3 B & S 826

The Contract Act (1872)

The Limitation Act (1908)

Uniform Commercial Code