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Article:	**Development of Doctrine of Frustration: Departure from Absolutism in Contracts**
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Abstract

Absolute liability in contracts or absolutism is traced back to seventeenth century. The famous case of *Paradine v Jane* (1647) laid down the basic rule of absolute liability in contracts. The rule stated that contracting parties are bound to fulfill their promises irrespective of circumstances. This case is considered as an authority in absolute liability in contracts. In order to excuse the party not performing his contractual obligations due to no fault on his part, doctrine of frustration of contract was developed. *Taylor v Caldwell* (1863) is generally considered a turning point in the application of absolute liability in contracts. It provided a new avenue for discharge of contracts on the ground of supervening impossibility. This article deals with the factors responsible for the development of doctrine of frustration of contract. Especially case laws will be discussed which had changed the doctrine of absolute liability in the performance of contracts and this new doctrine has been emerged.

Keywords: Frustration, Absolutism, Performance, Impossibility

1. Doctrine of Absolute Liability of Contracts

This is an old common law doctrine which makes the performance of the contract mandatory in *stricto senso* whatever the circumstances may be. The famous case of *Paradine v Jane* (1647) created the doctrine of absolute liability of contracts where it was held that when a party creates a duty or charge upon himself, he is bound to make it good. Until the nineteenth century, the common law had adopted the rule of absolutism in performance of contractual obligations.

1.1. *Paradine v Jane* (1647)

The facts of this classical case are as under:

"Paradine (Plaintiff) sued Jane (Defendant) under a lease for three years for unpaid rent. Defendant pleaded that as a result of the invasion of an enemy of the King Defendant was forced out of possession of the property and was unable to take the profits. Defendant refused to pay Plaintiff rent for the time he was forced out of possession by the army. Plaintiff demurred and the plea was held to be insufficient."

From the facts it is clear that the defendant could not make payment of rent due to invasion of enemy forces. Now the question arises whether the defendant was excused from performance of the contract on the basis of frustration of purpose or due to fundamental change in circumstances. If the performance of the contract was excused then what are those grounds on the basis of which it was happened. And if it was not so then what are the reasons behind this. This was addressed in the decision of the case as under:

> "Defendant must pay the required rent to the Plaintiff. The law creates a duty, however, the law will excuse him of performance if the party was disabled to perform without any default in him and he has no other available remedy. When a party by his own contract creates a duty upon himself, he is bound to make it good notwithstanding accident because he could have provided against it in the contract.

> Here, the rent is a duty created by the parties, and the Defendant must make it good, notwithstanding interruption by enemies, for the law would not protect him beyond his agreement. The Defendant lessee must run the burden of casual losses and cannot place the burden on the Plaintiff lessor. Therefore, the Defendant here remains liable for the unpaid rent" (Ibbetson, 1996, p.2).

This was the decision of the classical case establishing the doctrine of absolute liability in contracts. Here it was said that the law could not provide the mechanism for allocation of risk in case of loss due to invasion by outsiders. Once the risk has been allocated by the terms of the contract, now the impossibility of the contract will not void the contract and reallocation and redistribution of risk will not be possible. The argument which had been taken by the Council for the defendant is that 'There should be no liability to pay rent if the lessee had not received the benefit of land' (Ibbetson, 1997, p.3). But this argument was failed because in contract law it is an established rule that the obligations might be mutually independent.

It is also an established rule that contracts must be performed strict senso according to the intentions of the parties. In other words, parties may become discharged or released by performance. In this regard classical approach of performance of contracts is useful i.e., the contracts must be performed precise and exact and payment can only be claimed if the entire contract is performed.

There are some case laws which explain this historical approach in a very good way. In *Cutter v Powell* (1795), damages have been paid due to non-performance of the contractual obligations irrespective of the change of circumstances. Another case law which represents the same principle of discharge by performance is *Bolton v Mahadeva* (1972), the plaintiff was refused to pay by the Court of Appeal due to poor performance and hence the plaintiff could recover nothing. These two decisions are representing the harsh rule which

may be known as absolute liability rule, according to which contracts must be performed irrespective of the circumstances.

1.2. Doctrine of Substantial Performance

For the sake of justice between the contracting parties, the judges have recognized some doctrines. The famous doctrine of substantial performance is one of them. Under this doctrine, if exact or entire performance of contract is rendered but substantial part of the contract is performed, the aggrieved party has no right to repudiate the contract and cannot treat himself discharged from the liability of payment. However that party can claim set-off right to be compensated for incomplete performance (*Jacob & Youngs v Kent, 1921*).

1.3. Prevention of performance

If one party prevents the other from performing his part of contract, the other party has a right to repudiate the contract and can claim damages for such act. Additionally he can claim remuneration on the basis of *quantum meruit* for part performance if any. The doctrine is well explained in the Contract Act, 1872. Section 53 of the Act provides:

> **Liability of party preventing event on which the contract is to take effect:**
>
> When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented ; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the nonperformance of the contract.

This doctrine is still present in different legal systems to ensure the proper performance of contracts as well as to avoid any misuse of certain circumstances. This doctrine is also well explained in Chapter III the *California Civil Code, 2005*.

2. Changes in the Doctrine of Absolute Liability of Contracts

We have seen that the doctrine of absolute liability of contracts was in vogue and redistribution of risk was not permitted after the conclusion of the contract. Slowly and steadily this doctrine has been affected and subsequently changed with the introduction of doctrine of frustration. Judicial decisions and legislation have played an important role to introduce this new doctrine which has abolished the classical doctrine of absolute liability. What are significant developments which led towards the doctrine of frustration? These developments in the form of judicial decisions and legislation are following:

2.1. *Taylor v Caldwell (1863)*

This was a case of great importance with regard to the doctrine of absolute liability. In this case the doctrine of frustration was evolved. It is the point of evolution of this doctrine. The principle which was settled down by this case law is that if the performance of contract becomes impossible due to no fault of either party, contractual obligations will come to an end by frustration of contract (Atiyah, 1981, p.200). The facts of *Taylor v Caldwell (1863) are as following:*

> "Caldwell (D) contracted to permit Taylor (P) the use of the Musical Hall at Newington. Caldwell was to retain possession of the hall and Taylor merely had the use of it for four days to present four concerts in exchange for 100 pounds per day. The contract stated that the Hall must be fit for a concert but there was no express stipulation regarding disasters. The Hall was destroyed by fire before the first concert was to be held and neither party was at fault. The concerts could not be performed at any other location and Taylor sued for breach and sought reimbursement for costs in preparing for the concerts."

The close analysis of the facts of the case law shows that the performance of the contractual obligations became impossible due to no fault of either party. But the person

aggrieved by this non-performance went to the court for damages because specific performance could not be possible. Now the question arises that if we apply the doctrine of absolute liability or absolutism then the decision will go against that person who could not perform his contractual obligations whatever the circumstances may be. But this is not just and equitable. If any impossibility is happened due to no fault of any party then how they can be made liable. Now we see what the decision of the court is in this regard. The court had given decision against the plaintiff rejecting the doctrine of absolutism and creating an exception to that rule. It was said that the contract between the parties was dissolved due to impossibility of performance of the contract and no party will be liable for damages or for specific performance. In this way the court had introduced a new doctrine which is known as doctrine of frustration. This doctrine has minimized the difficulties about the issues of non-performance of contractual obligations. So we can say that this is the first case of frustration which had changed the dimensions of the law of contract.

2.2. *Krell v Henry* (1903)

This is the second most important case on the development of doctrine of frustration of contract. This case is helpful to know the theory of implied conditions in this doctrine. The facts of *Krell v Henry* (1903) are as:

> "Krell offered to rent out his rooms in London overlooking a street where processions to the royal coronation were going to take place. Henry offered to pay £75 to rent the rooms in order to watch the processions (a lot of money in 1903). Henry put down £25. Nowhere in their written correspondence did either of them explicitly mention the coronation ceremony. The king got sick and the processions didn't happen. Henry refused to pay. Krell sued for the remaining £50 and Henry countersued for the £25 deposit" (Tillotson, 1985, p.201)

This was the situation of this case. The analysis of the facts of the case tells us different points.

I. There was no express condition in the contract about the procession of coronation ceremony.

II. No condition was present regarding non happening of the procession for which purpose the room was taken on rent.

III. Quantum of damages had not been mentioned or agreed between the parties in case of non-performance of the contract.

Keeping in view the above points, we can say that the contract between the parties was without express conditions of damages. Now the question arises, what will be the solution of this dispute? Does the doctrine of absolute liability or doctrine of sanctity of contract be applicable in this situation? If we apply these doctrines, then Henry has to pay the remaining amount whatever the circumstances may be. But here the court had applied the doctrine of frustration of contract on the basis of implied condition. Therefore Darling J. the judge of 'the English Trial Court dismissed the Krell's complaint and found for Henry on his counterclaim. The Trial Court found that there was an *implicit condition* in the contract. Namely that there would be a coronation.'

The plaintiff appealed. In the Court of Appeal, panel consisted of Vaughan Williams LJ, Romer LJ, and Stirling, LJ. The judgment of Vaughan Williams LJ is as:

> "The subsequent impossibility does not affect rights already acquired, because the defendant had the whole of June 24 to pay the balance, and the public announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed."

Romer LJ opined:

> "I concur in the conclusions arrived at by Vaughan Williams L.J. in his judgment, and I do not desire to add anything to what he has said so fully and completely."

Stirling, LJ said:

> "He had had an opportunity of reading the judgment delivered by Vaughan Williams L.J., with which he entirely agreed. Though the case was one of very great difficulty, he thought it came within the principle of Taylor v. Caldwell."

In this way the Appeal was dismissed and the doctrine of frustration of contract was respected in this case. But this case has got great attention of Judges in order to conclude the case. And this fact was accepted by the panel also.

2.3. *Walton Harvey Ltd v Walker & Homfrays Ltd* (1931)

The performance of the contract must be implemented in stricto senso. It means that preference should be given to the rule of performance not to the frustration. This is the doctrine of sanctity of contract. Therefore according to this doctrine, parties should respect their obligations. There is another point of importance in this regard that if any impossibility to the performance of contract has been occurred due to default of either party. Now the doctrine of frustration will not apply and in this regard the aggrieved party can claim damages for non-performance of contractual obligations.

Walton Harvey Ltd v Walker & Homfrays Ltd (1931) is a case which describes limitations of the doctrine of frustration of contract. If a party is aware of future circumstances and in spite of this fact, the party enters into a contract whose performance might be impossible. Now the second party will claim damages for non-performance of the contract by the first party who has knowledge of the facts. This case law also tells the same situation. Now we see the facts of case precisely to know the actual position of the parties in the case. The facts of the case are as:

> "A hotel owner entered a contract with an advertising agency enabling them to put illuminated adverts on the roof of their hotel. The hotel was then compulsorily purchased by the Local Authority and demolished. The advertising agency sued for breach of contract and the owner of hotel argued the contract had become frustrated."

The close analysis of the facts of the case tells us different points. But the most important point is that the owner of hotel was aware of the fact that his hotel will be compulsorily purchased by the concerned authority. Now if we see the doctrine of frustration of contract generally, then here the owner of the hotel is right on the point that the contract has been frustrated. And if we apply the rule of absolutism, then the owner of the hotel is liable for breach of contract and he has to pay damages. Let see what the decision of the court in this case law. It was held:

> "The contract was not frustrated as the hotel owners were aware that the Local Authority was looking to purchase the hotel at the time they entered the contract. They should have foreseen the fact that this could happen in the life time of the contract and made provision in the contract for such an eventuality. They were therefore liable to pay damages for breach of contract."

Now the situation is clear that if ant party is aware of the future circumstances, then the contract will not frustrate and the doctrine of absolutism will be applied in that case.

2.4. *Fibrosa Spolka v Fairbairn* (1943)

This was an important case due to which a piece of legislation had been introduced. First of all we look towards the facts of the case which are as:

> "A Polish company had ordered certain flax-hackling machines from manufacturers in Leeds shortly before the outbreak of the Second World War. The machines had to be delivered c.i.f. Gdynia within a certain time and the contract provided that in case of war or other events beyond the control of the parties, a reasonable extension of time

of delivery should be granted. After the outbreak of war, Gdynia was occupied by the Germans" (Murray, 2007, p.122).

From the facts we may consider following points to determine the implementation of the doctrine of frustration.

I. The contract provided a provision about reasonable extension of time for performance.

II. Result of the outbreak of ear was that the Germans occupied Gdynia, a place for execution of performance.

III. The contract did not provide any provision regarding adjustment of rights in case of non-performance.

IV. Poland was declared an enemy territory by the Council and it was ordered that any type of trade with Poland is not allowed for British Companies.

By considering above points in this case, it may be said that there was a complete change of circumstances or a fundamental change in circumstances. Now under these circumstances, which doctrine will be applicable? It was decided by the House of Lords in this way.

> **"**The contract was frustrated owing to war and the British manufacturers were discharged from delivering the machines. The clause allowing for extension of the time of delivery did not save the contract because it was intended to cover merely minor delay as distinguished from a prolonged and indefinite interruption of contractual performance."

The crux of this case may be summarized in this way that when the contract becomes impossible to perform due to supervening illegality, then contracts will frustrate.

2.5. Law Reform (Frustrated Contracts) Act 1943

Frustration does not mean that contractual rights come to an end. Adjustment of rights of contractual parties is necessary on the eve of frustration. This is a general rule. In England

the first legislation was made for the purpose of adjustment of rights of the parties. Actually this Act was passed after the *Fibrosa* litigation. The aim of this Act was to enable the Courts to adjust the rights of the parties. The basis for this adjustment of rights will be equity and justice.

This was the first piece of legislation on the topic of frustration. 'The Act aims at the prevention of unjust enrichment of either party at the expense of the other' (Murray, 2007, p.133). According to Goff J.

> "... The Law Reform (Frustrated Contracts) Act 1943 is described as an Act to amend the law relating to the frustration of contracts. In fact, it is concerned not with frustration itself, but with the consequences of frustration; and it creates statutory remedies, enabling the court to award restitution in respect of benefits conferred under contracts thereafter frustrated ..." (BP Exploration, 1982).

'This Act was a great achievement in the development of the doctrine of frustration and its relevant doctrines. There are two key provisions in the Act. Sections 1(2) and 1(3) provide the mechanism of adjustment of rights in case of frustrating events so that there should no violation of rights of any contractual party. These sections deal with adjustment of money paid as well as non-money benefits before the frustrating event.

2.6. *Davis Contractors v Fareham Urban DC* (1956)

When impossibility or impracticability of contract has been caused due to neither fault of any party, the doctrine of frustration operates here. *Davis Contractors* case (1956) is an important development in the application of the doctrine of frustration. The facts of the case are as:

> "…the parties were the Appellants Davis Contractors Limited, a firm of building contractors, and the Respondents the Fareham Urban District Council. On the 9th July, 1946, the parties had entered into a building contract whereby the Appellants

> agreed to build for the Respondents 78 houses at Gudgheath Lane, Fareham, in the county of Southampton within a period of eight months for a sum of £85,836.
>
> For various reasons, the chief of them the lack of skilled labor, the work took not eight but twenty-two months. The Appellants were in due course paid the contract price which, together with stipulated increases and adjustments, amounted to £94,424. They contended, however, that owing to the long delay the contract price had ceased to be applicable and that they were entitled to a payment on a *quantum meruit* basis."

The analytical study of the facts of the case shows different dimensions. For example, the nature of reasons for non-compliance of the terms of the contract should be considered. Another point should be considered that the appellants were paid according to the prescribed increases. Can these reasons be a cause of frustration of the contract? This is the real question. The Appellants presented their arguments in this way. They said that the contract had been entered into on the footing that adequate supplies of labor and material would be available to complete the work within eight months, but, contrary to the expectation of both parties, there was not sufficient skilled labor and the work took twenty-two months, and that this delay amounted to frustration of the contract.

This is the key case law to understand the concept of frustration in contracts. In this case law, it was settled that emergence of new circumstances can make the performance of the contract impossible or more difficult. To clear this concept, Lord Radcliffe has stated his opinion in his case law in this way.

> "… Frustration occurs only whenever the law recognizes that without fault of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract" (Murray, 2007, p.117).

In the light of this case law, it may be concluded that this doctrine has been developed to achieve just, reasonable and equitable results so that rights of neither party would be violated or infringed. Therefore it can be said that both the doctrines i.e. doctrine of frustration and the doctrine of absolutism should be read and used side by side so that the law can be implemented in its true spirit.

2.2.8. Frustrated Contracts Act, 1988

In South Australia, an effort has been made in the shape of a piece of legislation to cover the area of frustrated contracts. This Act has clearly said that on the eve of frustration, parties are discharged from their further obligations with respect to that contract. This Act also deals with the situations known as partly frustration. Section 5 of the *Frustrated Contracts Act 1988* describes this rule in this way.

> "A contract is not wholly frustrated by the frustration of a particular part of the contract if that part is severable from the remainder of the contract."

As we say that the object of the doctrine of frustration is to achieve just, reasonable and equitable results. This Act also describes a phenomenon for the adjustment of losses between the parties so that no party can take unfair advantage of frustration of contract. Section 7(1) of the Act provides:

> "Where a contract is frustrated, there will be an adjustment between the parties so that no party is unfairly advantaged or disadvantaged in consequence of the frustration."

3. Doctrine of Frustration in Pakistan and India

The development of the doctrine of frustration has also its effects on the laws of Sub-Continent. As we know that in Pakistan and India, law regulating the contracts is the Contract Act, 1872. Section 56 of the Contract Act, 1872 contains the doctrine of frustration. Act describes this doctrine in this way.

> "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."

Pakistani courts has defined and elaborated this doctrine in detail. A lot of judicial decisions are found on this issue. The Supreme Court of Pakistan has given its judgment on the issue whether doctrine of frustration is an exception of the rule of absolutism or not. It is said by the Court that doctrine of frustration is not really an exception to the rule that a man must pay damages if he breaks the contract for there can be no default in doing that which the law prohibits (*Messrs Mansukhdas Bodaram v Hussain Brothers Ltd,* 1980, p.122). It is also stated that doctrine of frustration applies only to executory contracts and not to the transactions completed (*Abdul Muttalib v Razia Begum,* 1970, p.185).

About the effects of the frustration, the rule has been prescribed by the Supreme Court. It is observed that when there is frustration the dissolution of the contract occurs automatically. It does not depend upon the choice or election of either party (*Messrs Mansukhdas Bodaram v Hussain Brothers Ltd,* 1980, p.122).

Indian Courts have also discussed this doctrine in detail and accepted this doctrine in the regime of contract law. Indian Supreme Court had explained the term impossible in 1954 with reference to doctrine of frustration (*Satyabrata Ghose v Mugneeram Bengur and Co. and another,* 1954, p.44). With the passage of time this doctrine has been developed in India in the shape of judicial decisions. There is a need of legislation on this issue to cover its core areas so that disputes between parties regarding frustration may be resolved according to the provisions of that legislation.

4. Conclusion

To conclude, I can say that the doctrine of frustration has been developed gradually. Judicial decisions and some pieces of legislation have played their role in its development.

Doctrine of absolutism is also important for our system. There is need of parallel use of these two doctrines to achieve just, reasonable and equitable results so that parties to the contract will no victimized by this doctrine. Another rule is discussed that if any party is not ready to perform his part of contract which can be performed, he cannot plead for frustration.

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