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BALANCING :: COVID-19 AND RIGHTS OF LESSOR/LESSEE



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A. Force Majeure - layman language:

- 1 Force majeure translates literally from French as 'superior force' and is a contractual provision usually agreed upon by parties to a contract.
- 2 Force majeure means extraordinary events or circumstances beyond the control of parties to a contract and typically includes events described as act of god or natural disasters, war or war-like situations, labour unrest or strikes, epidemics or pandemics.
- 3 The intention of a force majeure clause is to save the performing party from consequences of something, over which it has no control. Force majeure is therefore an exception to what would ordinarily otherwise amount to a breach of contract.

B. Provisions of The Indian Contract Act, 1872 (in short "Contract Act") and Lease Agreement:

- 1 The General rule of Force Majeure as contained in section 56 of the Contract Act relating to the Frustration of the Contract is not applicable to the Lease agreements.
- 2 **The doctrine of frustration is envisaged in section 56 of the Contract Act, which states that:**
 - Any act which was to be performed after the contract is made;
 - Becomes unlawful or impossible to perform, for reasons beyond the control of the promisor
 - Then the contract being impossible of performance for on fault of any party and the same is known as Doctrine of Frustration
 - The doctrine of frustration could not be availed by the promisor when the non- performance of the contract was attributable to his own decision.
- 3 **The lease Agreement are governed by the Transfer of property Act, 1872 (in short "TP Act")**

C Force Majeure - layman language:

- 1 Frustration is an English contract law doctrine, which acts as a device to set aside contracts, where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract.
- 2 On the other hand, Force majeure is a term used to describe a "superior force" event. The purpose of a force majeure clause is two-fold, i.e., it allocates risk and puts the parties on notice of events that may suspend or excuse performance. A force majeure clause relieves one or both parties from liability to perform contract obligations when performance is prevented by an event or circumstance beyond the control of the parties.
- 3 The essential idea upon which the doctrine of frustration of contract is based is that of the impossibility of performance of the contract and in fact 'impossibility' and 'frustration' are often used as interchangeable expressions.
- 4 While the doctrine of frustration is a common law principle, the force majeure clause is a creature of contract. It is a civil law concept that has no settled meaning in the common law and must be expressly referred to and defined in a contract.

D Provisions of TP Act

- 1 The position of non-applicability of section 56 of the Contract Act was clarified by the Hon'ble Supreme Court as early as 1968 in the matter of Raja Dhruv v. Raja Harmohinder Singh [1968 AIR 1024]
 - Agricultural land was leased in undivided Punjab
 - Since no cultivation could be done on account of partition, the lessee filed suit for recovery of lease rent paid on the ground of force majeure

- Hon'ble Court dismissed the claim basically on the two grounds
- Firstly, it was held that rights under the Lease Agreement were not contractual rights but falls specifically under the provisions of TP Act
- Secondly, the Hon'ble Court held that section 56 does not apply to the Concluded contract wherein no further performance was required
- Under lease agreement, it is only the transfer of right to enjoy the land/property
- In the event, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let out, because of fire, tempest, flood, violence of an army or a mob, or other irresistible force, the lease may, at the option of the lessee, be avoided as per the rule incorporated in section 108(B) (e) of the TP Act
- The Judgment was affirmed subsequently in Sushila Devi v. Hari Singh [1971 AIR 1756]

2 TP Act provides certain 'unforeseen situations', which provide the grounds under which Lease shall be treated as terminated. The same is provided under section 108(B)(e), the essentials of which are as follows:-

- the existence of an 'irresistible force';
- Property becomes substantially and permanently unfit for use for which it was let
- Lessor must be informed of the lessee's decision to render the lease deed void, i.e., a notice must be compulsorily sent by the Lessee.

3 Therefore, under section 108(B) (e) it is imminent to establish that the leased property became permanently unfit for the purpose for which it was let and as such COVID-19 is itself an 'irresistible force'.

4 The question as to what is an 'irresistible force' has not been dealt upon by the Hon'ble Courts.

5 Whether COVID-19 is irresistible force or not shall most likely depend on the case to case basis. However, the Order dated 24.03.2020 passed by the Government of India imposing country wide lockdown can be argued to being an irresistible force from using of the lease property.

6 The obligation as to whether the Lessee is duty bound to pay the rent in times of non- access to the Leased Property shall depend on the fact as to who was in possession, which is turn shall depend as to whether the lease terminated or not.

- The lease shall be terminated only on issuance of notice by lessee under section 108(B) (e) of the TP Act
- **Below Judicial precedents establishes that unless the Lessee has satisfactorily surrendered the Property by way of Notice u/s 108(B) (e), the lessee being in possession is bound to pay rent.**

- Shankar Prasad and Ors. v. State of M.P. and Ors. [ILR (2013) MP 2146] [High Court of Madhya Pradesh]
- Amalgamated Bean Coffee Trading Company v. Surjit Singh Jolly [FAO No. 189/ 2017; dated 25.04.2017] [High Court of Delhi]
- Chamber of Colours and Chemicals Pvt. Ltd. v. Trilok Chand [(1973) RLR 68] [High Court of Delhi]
- Airport Authority of India v. Hotel Leela Venture Ltd [OMP/1206/2012; dated 15.07.2016] [High Court of Delhi]

7 Similarly, section 111(b) allows parties to consent to termination of lease on happening of certain events, such as force majeure

8 However, the COVID-19 being a reason for automatic termination shall only be applicable if the force majeure clause is included in the Lease Agreement and not otherwise

9 To conclude, the financial difficulty in making payment of the lease rent during the current country wide lockdown shall and will not qualify as a 'irresistible force' event and neither does temporarily restriction on using of leased premises. However, what must a prudent parties to the Lease Agreement keep in mind that:

- Lockdown on account of COVID-19 pandemic is not permanent but only temporary
- It is clear that for some certain time period, the Lessee was restrained from enjoyment of his right to the leased property on account of lockdown
- However, effectively the possession of the Property was with the Lessee, who under the lease agreement was bound to pay lease rent
- But at the same time, the payment of lease rent to the Lessor can also be considered as 'unjust enrichment', since the Lease rent was paid by Lessee without the enjoyment of Property by Lessee
- In coming times, the Courts will be bound to interpret the meaning of 'irresistible force' amongst other grounds in view of the circumstances arising out of the COVID-19 pandemic
- However, for the time being many large conglomerates such as Tata Starbucks India, Jubilant Food Works, etc. have written to its country wide landlords for waiver of the lease rent, probably, if the Landlords don't agree, leaving conglomerates with no option but likely termination
- In future, it shall be imminent upon the drafters of the Lease Agreement to include waiver clause operating at such unforeseeable circumstances such as lockdown, as to balance the interest of both the parties
- In essential, the waiver clause can also be incorporated in the existing Lease Agreement with retrospective effect through an addendum, in case both the parties agree

- The incorporation of the waiver clause may not only balance the interest of both the parties but shall also assist both in diversion of the unnecessary implications and disputes arising out of the forced payment of lease rent and/or termination of lease deed u/s 108(B) (e) of TP Act.

- **A sample waiver clause is stated herein below:-**

“WAIVER CLAUSE

- (a) Notwithstanding any to the contrary contained in the lease agreement, If the Lessee is restrained for enjoyment of the lease property or the Premises by reason of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, country wide pandemics, etc., the obligation of the lessee to pay the lease Rent shall abate from the date of such occurrence of event subject to the Lessee not terminating the Lease agreement during the continuance of such events under the force majeure clause and/ or under the Provisions of The Transfer of Property Act, 1872.

- (b) On invocation of the waiver clause the obligations, rights and duties of both the parties under the agreement including but not limited to those of termination shall remain suspended till the time the waiver clause is in operation.
- (c) The Lessee seeking to invoke the waiver clause is to inform the Lessor within 7 days from the occurrence of the event through a written notice.
- (d) The lessor on receipt of the notice under sub-clause (b) shall be bound to waive off the lease rent payable for the time period of the occurrence of the event and intimate the same to the lessee within a period of 7 days.
- (e) On expiry of the waiver period, the Lessor shall be bound to inform the Lessee that the same has expired and the Lessee shall be bound to pay the lease rent according to the terms of the contract.”