

LEGAL LOCK JOURNAL
2583-0384

VOLUME 2 || ISSUE 4

2023

This Article is brought to you for “free” and “open access” by the Legal Lock Journal. It has been accepted for inclusion in the Journal after due review.

To submit your Manuscript for Publication at Legal Lock Journal, kindly email your Manuscript at legallockjournal@gmail.com.

IMPACT OF COVID-19 ON LEASE UNDER TRANSFER OF PROPERTY ACT,1882

Himani Verma¹

ABSTRACT

The 2019 coronavirus (also known as COVID 19) has had a profound effect on the global health and economy. Small company owners and tenants have experienced severe losses, financial instability, and relocation since the pandemic's start. Even large business owners such as PVR and Reliance Retail are unable to fulfill their rental obligations. The landlords and tenants of both commercial as well as residential properties are witnessing unprecedented circumstances. Many tenants have moved to invoke the force majeure clause and the doctrine of frustration in their contracts. This paper aims to study the legal effect of COVID 19 on lease agreements. Unavoidably, the economic shortage has strained landlord-tenant relationships and their lease arrangements. Many renters have moved to rely on the doctrine of frustration and the force majeure provision in their contracts. The purpose of this essay is to examine how the COVID-19 epidemic has affected lease and license/leasing agreements in India and to determine whether such agreements allow for the inclusion of such events as events of force majeure.

The Transfer of Property Act (hence, TPA), 1882, and concepts from the Indian Contract Act, 1872 (hereinafter, ICA), are compared to see how applicable they are to lease agreements in India and common law jurisdictions.

I. INTRODUCTION

In India, lease agreement are covered under Transfer of property Act, 1882. A lease is the transfer of a property's interest for a predetermined amount of time without the transfer of the property's ownership. Instead of transferring ownership rights, a lease transfers the right of possession. Here, the transferor is referred to as the lessor, and the transferee, or the person using the property for a specific time, is referred to as the lessee. The Transfer of Property Act, 1882 governs lease, which is provided in Sections 105 to 117. A lease agreement is an accord whereby the owner (lessor) from his bundle of rights, transfers the right of enjoyment in the

¹ The author is a student of law at Guru Gobind Singh Indraprastha University.

immovable property to the tenant (lessee), for an ascertained period of time, in exchange of payment, payable as per the terms of the lease agreement¹. Leases are usually for a longer period of time. Long-term lease agreements with force majeure clauses or those where payment is deducted annually from the sales turnover % are also possible. Since COVID 19, many of these agreements have been in dispute as concerns of waiver, suspension, or remission of rental payment arise when renters are unable to pay their rent.

II. FORCE MAJEURE CLAUSE

According to a Latin word that translates to "chance occurrence, unavoidable accident," force majeure literally means "superior force" or "Vis major. "It refers to an unstoppable natural catastrophe that occurs without human intervention and causes harm or disturbance but cannot be avoided even with the highest skill, care, diligence, or caution. In the context of a contract, "force majeure" is defined as "an unexpected event or situation that cannot be anticipated or controlled and prevents the person from doing or fulfilling the promise he or she had made under a contract."² Commercial contracts typically have "Force Majeure clauses" that justify non-performance in the event of uncontrollable circumstances. These terms will be included in the consequences of one of the parties choosing that provision are stated in the contract as an obligation. In general, these clauses expressly designate one or more grounds as Force Majeure occurrences, such as natural disasters, the beginning of war, labour unrest, diseases, etc. In the current situation, if the contract deed includes the words "epidemic" or "pandemic" in the Force Majeure clause, then under Section 32 of the Contract Act, the event will be treated as a contingent event to perform the contract and the performance is deemed to be impossible due to the occurrence of that event, therefore that agreement becomes void³.

This indicates two things for lease agreements: First, a lease must include a force majeure clause that particularly covers pandemics and epidemics. Second, the clause itself must be included in the contract even if COVID 19 is designated a case of force majeure by government notification. Finally, the lessor must demonstrate that the exigency was unexpected or what is commonly referred to as a "Act of God" and that it "has caused the lessor to fail to perform its responsibility⁴." Therefore, a leasing agreement may contain a separate force majeure clause that specifies situations like a pandemic or epidemic that would constitute a force majeure.

¹ Section 105 & 106, The Transfer of Property Act, 1882.

² Section-32, Indian contract Act, 1872

³ (<https://conventuslaw.com/report/india-a-closer-look-at-force-majeure-frustration/>)

⁴ ICA

III. FRUSTRATION OF CONTRACT

Where an implied or expressed force majeure condition is absent from the agreement and a “force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act.”⁵ In accordance with Section 56's notion of frustration of contract, a contract is deemed invalid when it is "impossible" to carry it out⁶. The term "impossibility" to execute refers to a clause that has yet to be fulfilled but has become impossible to do so within the term of the contract. Frustration has the power to dissolve a contract; it is not a way for one side to get out of a sticky position or an equitable justification. In the context of a lease agreement, frustration would entail the creation of an impossibility such that the right to use or possess the property has been terminated by an unforeseeable, permanent event. Less evidence exists to support the notion that an epidemic-related inability to pay rent will count as a "impossibility," frustrating the terms of the contract. However, a few common law examples can be useful in figuring out when a lease arrangement can be broken.

It's interesting to note that a Hong Kong court decided a residential lease matter during the SARS outbreak. In contrast to the Chinese mainland, English legal principles are applied in Hong Kong. In the case of *Li Ching Wing v. Xuan Yi Xiong*, a two-year residential lease was signed, but the tenant was forced to depart because of an isolation order since the neighbourhood had contracted SARS⁷.

The issue was whether the tenant could break the lease and if the isolation order would prevent that from happening. The length of the annoying incident in comparison to the lease's predetermined length was highlighted by the court. The court determined that the isolation order, which was only in place for 10 days, was "quite insignificant in terms of the overall use of the premises," which was for two years⁸.

Similarly, in the English case *National Carriers (NCL)Ltd v Panalpina (Northern) Ltd.* (also cited in *Li Ching*), a ten-year lease for a warehouse was granted out of the which the tenant could not access it for 20 months as a road was closed due to dangerous conditions of the nearby property.⁹ The tenant did not pay the rent claiming the lease had been frustrated. The court held that although ‘*a lease is more than a simple contract because it creates an interest*

⁵ *Energy Watchdog v. CERC & Ors.*, (2017) 14 SCC 80.

⁶ SECTION 56 OF Indian contract Act, 1872.

⁷ (2004)1 HKC 353.

⁸ ICA.

⁹ (1981) AC 675.

in the land', the doctrine is applicable, but in this case, the interruption of 20 months is not significant enough to destroy the contract or discharge the parties from any further performance¹⁰.

In another English case, Lord Russell has said:

"The contractual obligations [under a lease] of each party are merely obligations which are incidental to the relationship of landlord and tenant created by the demise, and which necessarily vary with the character and duration of the particular lease."¹¹

So, in addition to the duration of a lease, a temporary or impermanent change cannot lead to frustration of a lease. Thus, it is unlikely that COVID 19 will render long term lease agreements frustrated even in common law nations.

IV. THE FRUSTRATION OF CONTRACT VIS À VIS THE TPA, 1882

While some common law jurisdictions may allow the possibility of frustration in lease agreements, the Indian courts have held that section 56 of the ICA does not apply to lease agreements. Lease agreements are contractual in nature but section 56 and doctrine of frustration are applicable to contracts that are yet to be concluded.

The Supreme Court draws an interesting distinction between a "executory contract" and a "completed conveyance" in *Raja Dhruv Dev Chand v. Harmohinder Singh*¹². The 1947 Partition prevented the tenant in this case from using the agricultural land he had rented in Punjab; thus, he requested a refund of his rent. According to the court, section 56 frustration provision is a "positive rule" that applies to contracts. However, a lease is more than just a simple contract for performance because it grants the lessee an exclusive stake. Thus, the lease becomes a "completed conveyance" after the lessee has ownership of the leased land.

Therefore, a "concluded transfer" or a completed transfer like a lease could not be invalidated by terms relating to the discharge of a contract like frustration. The court further ruled that section 4 of the TPA¹³, which deals with contracts that are a component of the ICA, cannot be interpreted as implementing the ICA's rules into the TPA.

Again, in *Amir Chand v. Chuni Lal*, the Punjab and Haryana High Court held that the rights and liabilities of the parties in a lease agreement rest in the lease provisions of TP so, section 4

¹⁰ *Id.*

¹¹ *Leightons Investment Trust Ltd. v. Cricklewood Property Ltd.*, 1943 KB 493.

¹² AIR 1968 SC 1024.

¹³ Section 4, The Transfer of Property Act, 1882.

of TPA is not applicable to lease. Consequently, frustration (section 56, ICA) would not apply to the cases of lease as those are governed by the TPA.¹⁴

In *Hotel Leela Venture Ltd. v. Airports Authority of India*, the court explains this situation with an example:

“A' a retailer of shoes purchases shoes from 'B' who is the manufacturer of shoes. The agreed quantities of shoes are delivered and part sale consideration paid. On account of change in import policy the market is flooded with imported shoes which are much cheaper vis-a-vis the price payable by 'A' to 'B'. 'A' cannot plead frustration requiring the Court to reduce the price and relieve him the obligation to pay the balance sale consideration to 'B.'

A contract for lease whereunder the lessee obtains possession from the lessor is an executed contract and during the duration of the lease, since it is a term of the agreement that consideration shall be rendered periodically, the agreed consideration has to be paid and it hardly matters that rents have fallen in the meanwhile. The result of a lease is the creation of a privity of estate in as much as lease is the transfer of an interest in immovable property within the meaning of Section 5 of the Transfer of Property Act, 1882.”¹⁵

The judgment goes on to clarify section 108(e) which defines the obligations of a lessee is a special law. So, it would supersede the doctrine of frustration which is part of a general law under section 56, ICA¹⁶.

V. APPLICABILITY OF FORCE MAJEURE AND DOCTRINE OF FRUSTRATION TO LEASE DEEDS

In *Raja Dhruv Dev Chand (supra)*, the Hon'ble Supreme Court observed that where the property leased is not destroyed or substantially and permanently unfit, the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him.

Subsequently, in *Sushila Devi and Anr v. Hari Singh and Ors*¹⁷, although the case was one of agreement to lease and not a lease, the Hon'ble Supreme Court referred to the decision of *Raja Dhruv Dev Chand (supra)* held that there is a clear distinction between a completed

¹⁴ AIR 1990 P&H 345.

¹⁵ 2016 (160) DRJ 186.

¹⁶ Kidar Lall Seal & Anr. Vs. Hari Lall Seal, 1952 AIR 47.

¹⁷ (1971) 2 SCC 288.

conveyance and an executory contract. Section 56 applies only to a contract. Once a valid lease comes into existence, the agreement to lease disappears and its place is taken by the lease.

In *Amir Chand v. Chuni Lal*¹⁸, , the Punjab and Haryana High Court held as under :-

“4. The doctrine of frustration embodied in S. 56 of the Contract Act which renders a contract void by reason of the impossibility of performing the act required on account of some event, which the promissor could not prevent, would not apply in the case of a lease. The rights of the parties after a lease was granted rest not in contract. Though under S. 4 of the Transfer of Property Act, the chapters and sections of the said Act relating to contracts are to be taken as part of the Contract Act yet that does not mean that the provisions of Contract Act are to be read into the Transfer of Property Act. The doctrine of frustration cannot apply to a lease of the present nature..... ”

The Section 108(e) of the Transfer of Property Act, 1881 does not preclude the parties from including a Force Majeure clause in the deeds. The Section 108(e) begins with the words “In the absence of a contract or local usage to the contrary”, *meaning* thereby, that the provisions of Section 108(e) would apply if a contract to the contrary does not exist between the parties. Furthermore, if Section 108(e) of the TPA is attracted, the lease does not fail automatically in the absence of option to avoid the lease not having been exercised by the tenant. In other words, even though the lease-hold property is destroyed, the tenancy does not automatically come to an end. Section 108(e) confers an option on the lessee to treat the lease as void and thereby avoid the liability of paying the rent in future. Thus, another aspect of Section 108(e) of the TPA is the requirement of the lessee to give notice to the lessor if the lessee opts to treat the lease as void upon occurrence of an “irresistible force”.

VI. IMPLICATION ON RESIDENTIAL AND COMMERCIAL LEASES.

In the absence of a force majeure clause in a residential lease deed, Section 108(e) of TPA would be of little help as the property has not become “*unfit for the purpose for which it was let*”¹⁹. Therefore, the tenants of a residential property cannot wriggle out of the obligation to pay rent unless the lease deed provides for such an exemption. On the other hand, in the absence of a force majeure clause in case of commercial lease deeds, the applicability of Section 108(e)

¹⁸ AIR 1990 P&H 345.

¹⁹ Section 108(e) of TPA.

of the TPA would depend upon the interpretation of the words “irresistible force” mentioned in the said Section and whether Covid-19 qualifies as an irresistible force.

In this regard, it is pertinent to analyse the approach of various High Courts in interpreting “irresistible force.” The *Hon’ble High Court of Allahabad*, in *Rahim Bux v Mohammad Shafi*²⁰ held that the demolition of a building by the landlord, even though in pursuance of a notice under *Sec. 263(I) of the U.P. Municipalities Act*, cannot be said to be a destruction of the premises by an irresistible force within the meaning of the said clause of *Sec. 108 of the Transfer of Property Act, 1881*.

The *Hon’ble Punjab and Haryana High Court* in *Court of wards Court of Wards Dada Siba Estate and another v. Raja Dharam Dev Chand*²¹ held that the provisions of section 108(e) of the TPA are inapplicable because the land was neither destroyed nor became permanently unfit for the purposes of agriculture. In this case, the lessee was dispossessed of the leased land on account of the acts of beating, looting and violence committed by large mobs.

In *Vidyawati Bhargava v. VIII Addl. District Judge*²², the demolition of the portion of the disputed accommodation done by the Municipal Authority, Kanpur in exercise of its statutory powers was held to be demolition by “irresistible force” as contemplated under section 108(e) of the Transfer of Property Act.

In the light of the aforesaid judgements, it can be concluded that the property being “wholly destroyed” or “rendered substantially and permanently unfit” is a necessary condition for applicability of Section 108(e) of the Transfer of Property Act. However, the circumstances concerning Covid-19 have not rendered the commercial properties permanently unfit for the purpose for which they were let. Therefore, an expansive interpretation of the provisions of Section 108(e) of the TPA will have to be rendered by the Courts in order to accommodate the situation around the pandemic.

V. CONCLUSION

The string of legal rulings shows that section 180(B)(e) of the TPA cannot be used in the absence of a force majeure clause or other contractual provisions that exclude rent (rent abatement clause). As a result, the decision to suspend rent due to temporary non-use of the

²⁰ 1969 SCC Online All 154.

²¹ 1959 SCC Online P&H 164.

²² Kanpur, 2002 SCC Online All 470.

premises can only be made after carefully considering the facts and circumstances of each case under the equitable jurisdiction of the courts.²³

The current situation highlights the TPA's lack of a legislation that would provide for emergencies like pandemics and epidemics, as well as the alleviation of frequently suspending rent. The necessity of having Force Majeure provisions in leasing agreements has also been demonstrated by COVID 19.

Many malls, small enterprises, and retail establishments have closed, and many more are pleading with the government to step in and issue decrees reducing rent for leased properties. The burden of commercial leases has not diminished despite the Government of India and state governments issuing directives and advice about rents for low-wage workers, migrants, and students of residential properties.

²³ Circulars for Covid 19, Ministry of Home Affairs, India.