FORCE MAJEURE IN COVID-19: INDIAN JUDICIAL RESPONSE

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The commercial world depends on sanctity of contracts for its growth and stability. English common law as well as Indian Contract Act, 1872 is based on the principle of '*pacta sunt servanda*'. The said Latin maxim finds place in Section 37 of the Indian Contract Act, which states that parties to a contract must in good faith perform or offer to perform their respective promises.

'Force majeure', a French term equivalent to '*Vis majeure'* in Latin, means 'superior force'. The doctrine of *force majeure* aims at exempting a party from a contract which has become impossible of performance, due to intervention of a superior force. This doctrine has gained significance in the present COVID-19 situation.

The English common law as well as the Indian Judicial response to the doctrine of *force majeure* has been rigid. The courts have not allowed economic inability, inconvenience, difficulty in performance, onerousness etc. as grounds of *force majeure* for a party to terminate or get exemption from a contract.

The latest view of the Supreme Court relating to *force majeure* is laid down in *Energy Watchdog v. Central Electricity Regulatory Commission reported in (2017) (14) SCC Pg. 80*. In the said case, the Apex Court did not accept the argument that rise of prices of coal imported from Indonesia would attract *force majeure* in respect of power purchasing agreement.

Justice R.F. Nariman, in the said judgement has referred to previous English cases, Indian cases as well as works of scholars in the field. The prominent amongst them are *Taylor v. Caldwell (1861-73) All ER Rep 24,* the first English case and *Satyabrata Ghose v. Mugneram Bangur and Co. 1954 SCR 310*, the first Indian case, where *force majeure* was recognized. Analysis of these judgements lead us to the following inferences:

1. Clauses in a contract and the nature of the contract must be carefully ascertained.
2. If there is a *force majeure* clause in the contract, inclusions and exclusions therefrom must be ascertained.
3. If there is a mention of pandemics or epidemics in the *force majeure* clause (which is not commonly found), the present COVID-19 situation will definitely attract it. Section 32 of the Indian Contract Act relating to contingent contracts will support the same.
4. If there is a clause in the contract which does not directly mention pandemics or epidemics, general words like 'extraordinary events' or 'circumstances beyond reasonable control of the parties' may be interpreted as attracting *force majeure* in COVID-19 situation.
5. In the absence of any *force majeure* clause in the contract, Section 56 of the Indian Contract Act, making a provision of frustration of contract, will apply. This

provision states that an agreement to do an act impossible in itself or which becomes impossible or unlawful later is void. However, where such a *force majeure* clause is present in the contract, Section 56 cannot be made applicable.

It is to be noted, in this context that the Govt. of India Office Memo No. F.18/4/2020 PPD dated 19-2-2020 issued by the Deputy Secretary to Govt. of India, Ministry of Finance states as follows: "A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in *force majeure* clause. In this regard it is clarified that it should be considered as a case of natural calamity and *force majeure* clause may be invoked whenever considered appropriate, following the due procedure." Though this Office Memo gives government recognition to COVID-19 as giving rise to *force majeure* in respect of the contracts dependent on the supply chains, the courts may not apply the same principle for all commercial contracts. The courts in India would rather go by aforesaid principles and decide the cases on the basis of facts and clauses in each contract. The courts will delve into whether the COVID-19 situation has affected the fundamental basis of the contract.

Recently, the Bombay High Court passed an *ad-interim* order on March 30, 2020 in the matter of *Rural Fair Price Whoelsale Ltd. And Anr. v. IDBI Trusteeship Services Ltd., IA No. 1/2020 in Commercial Suit No. 307/2020.* In the said case, the plaintiffs sought an injunction in respect of shares pledged by them against the defendants. The plaintiffs submitted that an outstanding loan payable to the defendants is near about Rupees 610 Crores. Further, 8% of the equity shares are pledged with the defendants. As on the date of the Debenture Trust Deed, the market value per share was Rupees 350. It was submitted that because of the present situation of COVID-19, the market has collapsed and on 1/3/2020, market value per share was below Rupees 303. It was submitted that the defendants are fully secured and hence, they be restrained from taking any steps for selling these shares in the market at present as in that event, irreparable loss will be caused to the plaintiffs. The said submission was opposed by the defendants stating that they have to recover more than Rupees 610 Crores and hence, relief should not be granted. The Court, taking note of the effect of COVID-19 on the market has granted ad-interim protection and passed the restraining order against the defendants.

Conclusion –

The present COVID-19 situation may give rise to a lot of litigation in the corporate world, invoking the principle of *force majeure*. It will be therefore in the interest of the parties to renegotiate the contracts which are genuinely affected by COVID-19. The parties can after negotiation either terminate the contracts if found impossible of performance, or compensate a party if performance is extremely difficult, or accept suspension of the contract for certain period, or relax certain clauses in the contract.