

APPLICABILITY OF “DOCTRINE OF FRUSTRATION IN RELATION TO LEASES”

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Introduction

This project report deals with the scope of applicability of doctrine of frustration in relation to different types of lease contracts. This project seeks to find out whether the doctrine of frustration will apply to leases in the same manner as it governs the other form of contracts or the legal position in this regard is different. Ordinarily, the cases of frustration are governed under the Section 56 of Indian Contract Act, 1872.

Section 56 of the Indian Contract Act, 1872 contains a provision in relation to frustration of contract. This section provides that in case of supervening impossibility to perform the contract, the contract will be rendered void by virtue of such subsequent impossibility to perform the contract. Under the Transfer of Property Act, 1882, provision is incorporated under clause (e) of Section 108 covering some of the grounds of frustration. But under this section unlike section 56 of Contract Act, the lease is not rendered automatically void and rather option is provided only to lessee to treat the lease void. Therefore the question to be considered is as to what should be the legal position in relation the lease contracts.

Thus this project report seeks to find out as to what should be the legal position in relation to different types of lease contracts in the light of relevant statutory provisions and case laws.

Analysis

Under Section 108(e) of Transfer of Property Act option is provided only to lessee to treat the lease void when due to some irresistible force the subject matter of lease is rendered unfit for use. Clause (e) of Section 108 is based on the assumption that there is no frustration in the sense

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that the lease automatically comes to an end since the clause gives the lessee an option whether to treat the lease as void or not.¹

Section 56 of Indian Contract Act finds its applicability in absence of an express or implied covenant wherein due to some subsequent event the performance of an act agreed to be done is rendered impossible and this section does not leave the matter to be determined according to the intention of parties. But Section 108 (e) deals with rights and liabilities of the parties and does not describe the effect of destruction of subject matter of the lease upon the lease itself. By going through the language of Section 108(e) it becomes clear that the lease will be rendered void only if the lessee exercises the option available to him under clause (e) of Section 108.

The case explaining this point is *Dr. Kundan Lal vs. Shamshad Ahmad and others*² wherein after the shop room was demolished the tenant has not exercised the option under 108(e) to treat the lease void. The lessor filed a suit for arrears of rent and for ejectment of the lessee. The lessee filed the suit for ejectment as well as arrears of rent and contended that no rent was due from him after shop had been completely destroyed. The issue before the court was whether on destruction of shop premises the lease stood terminated or not. Court was of the view that if the destruction automatically results in ouster of lessee then there was no need for enacting clause (e) of Section 108 Transfer of Property Act. Court explained that clause (e) of Section 108 was enacted to safeguard the rights of tenant in case of destruction of property leased to him. It gives him the right to escape his liability as a tenant by declaring the lease void. However if tenant does not exercise the option then the lease continues to exist. Court finally held that the lessee can avoid the payment of rent only by exercising the option available under Section 108 (e) and if he fails to do so then he would be liable to pay the rent.

This case clearly explains the point that in case of a lease the option has to be exercised by the lessee to treat the lease void and there is no automatic termination of lease. Further this case also explains the objective behind the enactment of Section 108 (e). The tenant has been

¹ Row, Sanjiva, "*Transfer of Property Act*", Universal Law Publishing Co. New Delhi, 2nd Volume, 7th Edition Page- 1673.

² AIR 1966 All 225.

given an option under Section 108(e) as after destruction of the subject matter the tenant cannot use the premises for carrying on his business and is saddled with the liability to pay the rent.

Moreover after the perusal of the provisions related to lease it becomes clear that destruction of subject matter is not a ground for determination of tenancy. If the intention behind the incorporation of provision contained in Section 108(e) was to explain the effect of destruction on lease then the provision would have been incorporated under Section 111 of Transfer of Property Act which deals with the grounds of determination of lease and not under Section 108 dealing with rights and liabilities of parties to lease.

If a lease is to be treated under Section 56 of Indian Contract Act then it would contradict the clause (e) of Section 108 as under Section 56 the Indian Contract Act stands automatically discharged but under Section 108(e) it stands discharged only at the option of the lessee.

In the case of *T. Lakshmipathy and others vs. P. Nithyanand Reddy and others*³, the issue before the court was whether on destruction of the building the lease stood automatically terminated or not. The Supreme Court in this case was of the view that doctrine of frustration as contained under Section 56 of the Contract Act does not apply in case of a lease and held that even on destruction of building the lease continues to exist. Court was of the view that the lease of a building would normally include the land as well and in the present case since the entire subject matter does not cease to exist, the lease continued. Court opined that the lease could terminate only if not only the building but the site of the building also ceases to exist.

This case also helps to understand that in case of lease the doctrine of frustration as contained in Section 56 will not apply and the lease will be governed by Section 108 (e) of Transfer of Property Act. The option to has to be exercised by the lessee to treat the lease void in case the subject matter is materially destroyed as was the situation in the present case wherein the subject matter was materially destroyed and in the absence of such option being exercised by the lessee the lease continues to exist and there is no automatic termination of lease.

³ 2003 (5) SCC 150.

In another case of *Krishna Laxman Yadav vs. Narsingh Rao Vithalrao Sonawale*⁴, due to floods the house was excessively damaged. Tenants filed a suit for a declaration that their tenancy had not been extinguished and they were entitled to occupy as tenants in newly constructed tenements at the places equivalent to the original tenements occupied by them. The issue was whether the tenancy continued even after the destruction of premises due to floods. Court was of the view that the tenancy has continued to exist between the parties and the right of occupation is incidental to the contract of tenancy which has continued between the parties. Court finally held that the tenants would be entitled to specific performance of their rights and held them entitled to occupy the tenements of equal proportion.

This case also explains the point that by mere destruction of premises the lease will not come to an end and thus the doctrine of frustration as contained in Section 56 of Indian Contract Act is inapplicable in relation to lease.

It has been observed in the case of *V. Kalpakam Amma vs. Muthurama Iyer and another*⁵ that Section 108(e) is a specific provision which deals with frustration of lease and the law of frustration of lease is codified in Section 108(e). In this case lessor had filed a suit for declaration of title and recovery of possession after the building had collapsed. Issue before the High Court was whether the destruction of building automatically terminated the lease without the option being exercised by lessee under Section 108(e). While deciding this issue Court explained that Section 108(e) would apply in case of lease. Court held that the lease was not only of the superstructure and it also included land as well. Court was of the view that when there is a lease of building it will normally take in the site as well unless it is specifically excluded from land. Court further held that the site continues as part of building and unless and until the site is also destroyed there cannot be any termination of lease. Court finally held that in view of the continued relationship between the landlord and tenant in spite of the collapse of structure the recovery cannot be allowed.

This case makes it amply clear that in case of lease on destruction of the superstructure the lease will not automatically come to an end and

⁴ AIR 1973 Bom 358

⁵ AIR 1995 Ker 55

the lease will be governed by the provision contained under Section 108(e) Transfer of Property Act. However it is only in certain exceptional cases where the site which forms the part of subject matter of lease is also destroyed, the lease will come to an end as there will remain nothing in existence which forms part of the subject matter of the lease.

In another case *Dr. V. Sidharthan vs. Pattiori Ramadasan*⁶ the lessor brought a suit for recovery of possession of leased premises after the premises got destroyed. The issue before the court was whether on destruction of shop room the lease stood terminated. The High Court came to the conclusion that in the present case the subject matter of the lease was only the superstructure and not the site. Court held that the superstructure which formed the subject matter of lease was completely destroyed and therefore the lease stood terminated.

Both *V. Kalpakam Amma* and *Dr. V. Sidharthan* cases make it clear that Section 108(e) will apply in the cases of the lease and it is only when the subject matter of lease is entirely destroyed and nothing remained behind, the lease will come to an end and all other cases where the subject matter includes both land and building and only building is destroyed the lease will continue to exist unless the lessee decides to treat the lease void as per Section 108(e).

In the case of *Shaha Ratansi Khimji and Sons vs. Proposed Kumbhar Sons Hotel Pvt. Ltd.*⁷, building of the godown collapsed and the tenant filed a suit for either allowing him to reconstruct the wall or to direct the respondent to construct it. It was contented on behalf of the tenant that even after the destruction of the tenanted premises the tenancy is not determined and that the tenant is entitled to the benefit of Section 108(e). The Supreme Court was of the view that when there is a lease of premises normally it can't be treated as a lease of structure alone but includes also a lease of the site unless the lease specifically excluded the land. In this regard the court agreed with the view of the Kerala High Court in the case of *V. Kalpakam Amma vs Muthurama Iyer* and another that when there is a lease of the building then it will normally include the site as well unless it is specifically excluded. In the present case court

⁶ AIR 1984 Ker 181

⁷ AIR 2014 SC 2895

came to the conclusion that the subject matter of the lease was both the godown and the site and therefore by mere destruction of the superstructure the lease cannot be said to have terminated. The Supreme Court further held that it is only on the basis of the grounds mentioned under Section 111 of Transfer of Property Act that the lease can be said to have terminated. Court was of the view that if a right is not conferred by a statute on the lessor for determination of lease then lessor cannot have such a right. Court finally came to the conclusion that by mere destruction of superstructure the lease cannot be said to have terminated.

Conclusion

After perusal of the relevant statutory provisions and case laws it becomes clear that in case of lease there is no automatic termination of lease on account of damage caused to subject matter by some irresistible force. In this sense the doctrine of frustration which renders the contract void on account of supervening impossibility is inapplicable and for the lease to come to an end in those cases where damage is caused to the subject matter of lease by some irresistible force the option has to be exercised by the lessee to treat the lease void. It is unlike the doctrine of frustration which automatically rendered the contract void, there is no automatic termination of lease on account of damage caused to the subject matter. Section 108(e) governs those situations wherein the subject matter is materially destroyed by some irresistible force and by virtue of this section the lease will come to an end only if the lessee elects to treat the lease void. Therefore the doctrine of frustration as contained in Section 56 of Indian Contract Act does not apply in such cases.

Moreover it can also be seen that the decisions of various courts have made it clear that the subject matter of lease will normally include the site as well. The site forms an integral part of the subject matter of lease. Therefore in all those cases wherein only superstructure is destroyed the lease will not come to an end automatically unless the lessee decides to treat the lease void under Section 108(e). It is only in certain exceptional cases wherein the site is also destroyed or where the site is excluded from being part of the subject matter of the lease then on destruction of superstructure, the lease will come to an end as there remains nothing which can be said to form the subject matter of the lease.

Thus it can be concluded that as far as lease is concerned it will be governed by Section 108(e) of Transfer of Property Act. Section 108(e) provides an option only to the lessee to treat the lease as void and there is no automatic termination of lease. This becomes clear also from the fact that the grounds of determination of lease are contained in Section 111 of Transfer of Property Act and destruction of subject matter is not one of the grounds covered under the abovementioned section, therefore it can be said that clause (e) of Section 108 does not provide the effect of destruction of subject matter of lease on the lease and the lease will continue to exist in the absence of contract to contrary unless the lessee exercises the option available to him under Section 108(e) of Transfer of Property Act.

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