(1958) 08 GAU CK 0002

Gauhati High Court

Case No: Frist Appeal No. 5 of 1954

Ka Ron Lanong		APPELLANT
	Vs	
The State of Assam		RESPONDENT

Date of Decision: Aug. 29, 1958

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 7
- Contract Act, 1872 - Section 10, 213, 31, 32, 56

Citation: AIR 1959 Guw 75

Hon'ble Judges: Sarjoo Prosad, C.J; H. Deka, J; G. Mehrotra, J

Bench: Full Bench

Advocate: S.K. Ghose and N.M. Lahiri, for the Appellant; R.K. Goswami, Jr. Govt. Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Sarjoo Prosad, C.J.
This appeal relates to a money claim for recovery of a sum of Rs. 22,500/- on account of refund of licence fees, paid in advance to the defendant. Added to it is a claim for Rs. 1,500/- as compensation for illegal detention of the money.

2. Three liquor shops for retail sale of country spirit, situate in Laban, Mawkhar and Police Bazaar in the town of Shillong were settled by the defendant, the State of Assam, with the plaintiff-appellant for the year 1948-49, under different licences. The aggregate licence fee payable for all the three shops in question amounted to a sum of Rs. 2,70,000/-, while the proportionate monthly fee came to Rs. 22,500/-. The terms of the licence will be adverted to at a later stage as they naturally have an important bearing on the decision of the case.

But an essential term in the licence was that the plaintiff had to depend for his supply of liquor for sale in the retail shops aforesaid upon certain licensed still owners of Umjajew, about 29 in number; and in order to get the supplies, the

plaintiff had to deposit the price thereof at rates specified by the Government in the office of the Deputy Commissioner on the third of every month. The plaintiff was prohibited from selling liquor of any other variety except the kind of liquor locally called kiad thnam, supplied by the said licensed distillers. The plaintiff claimed that the licence fee payable by the plaintiff was determined on the basis of the average supply of liquor by each of the distillers at the rate of 200 to 300 bottles of liquor per month and that the plaintiff''s position under the licences was that of a Government Agent for the sale of liquor, the liquor being supplied by the Government through their other agents, the still owners.

These claims as mentioned in paragraphs 2 and 3 of the plaint were categorially admitted, in paragraph 7 of the defendant''s written statement. On the grant of the licences, the plaintiff had also to deposit by way of security, a sum of Rs. 22,500/- equal to the monthly instalment of the fees payable and also deposit a similar amount by way of one month''s fees in advance on the first of each month. These deposits were made in pursuance of the terms of the licences, failure to comply with which involved the penalty of forfeiture.

It is stated that during the material period, Shillong was a rationed area in respect of rice, among other commodities, and the said distillers of Umjajew used to receive their supply of rice for purposes of distillation from an authorised permit-holder of the Government. In June, 1948, the Government failed to supply rice to the distillers owing to scarcity of rice in the locality and on that account from 19th June, 1948, to 21st July, 1948, the distilleries ceased to function and did not supply any liquor to the plaintiff for sale in the shops in question.

As a result of this non-supply of liquor, the plaintiff had no alternative but to close his shops in the aforesaid period after giving due notice to the Government. The plaintiff alleges that the State Government was solely responsible for the non-supply of liquor to the plaintiff''s shops through the distillers, their agents, which resulted in the closure of his business during the period in question. He accordingly made repeated prayers to the Government for remission of the licence fee to which the plaintiff was entitled, but the prayer was eventually rejected on 22-11-1949 and the defendant realised the entire licence fee out of the security amount and the advance deposits. The plaintiff, therefore, instituted the suit for the above reliefs after serving a notice on the defendant u/s 80 of the Code of Civil Procedure. The original plaintiff died after the institution of the suit and his heir under the customary law has been substituted.

3. The suit was resisted by the defendant mainly on the ground that there was neither any condition in the licence nor any understanding given by the Deputy Commissioner at the time of the settlement of the shops in question that Government '' would supply rice to the still owners at Umjajew. The defendant, therefore, claimed that they were not bound by any failure of the arrangement in the supply of rice to the distillers and the resultant closure of the distilleries during

the period in question. According to the defendant, they tried to help the distillers and the vendor, but the overall scarcity of rice made their attempts infructuous.

They, therefore, denied liability for the closure of plaintiff''s shops. The defendant further asserted that under the letter of the Excise Commissioner dated 11-12-1947, which also laid down the conditions of settlement of the excise shops in question, the defendant was not liable for any compensation for the closure of plaintiff''s shops during the relevant period due to unforeseen circumstances. The defendant also stated that the plaintiff''s shops actually reopened on the 21st of July, 1948, and the defendant was entitled to realise the entire licence fee even for the period in claim without any remission for the advance deposits.

4. On the above pleadings a number of issues were framed by the learned Subordinate Judge, who tried the suit. It is unnecessary to refer to those issues. The main question, which the learned Subordinate Judge had to decide, was whether the plaintiff was entitled to the remission of licence tee during the period 19th June, 1948 to 21st July, 1948, as claimed by him. This question was covered by Issues 6, 8 and 9, all of which material issues he decided against the plaintiff. He held that there was no condition in the plaintiff''s licences or in the licences issued to the distillers that the liquor to be supplied to the plaintiff for sale was to be prepared from rice supplied by the Government.

Therefore, there was no legal responsibility cast on the defendant, when owing to unavoidable circumstances there was failure of supply of rice to the distilleries and there was resultant closure of the plaintiff''s shops during the period. The learned Subordinate Judge also appears to have thought that the remission claimed was a matter of favour or grace from the Government and not a matter of legal claim and when Government refused to grant the favour, the claim could not be enforced in a Court of Law.

He also held that the plaintiff was bound by the terms and conditions contained in the letter of the Excise Commissioner under which no compensation was payable to the plaintiff for the upkeep of his establishment during the period that the shops were closed. He also opined that there was some kind of waiver or estoppel against the plaintiff, because he allowed the adjustment for the dues o July from the money already in deposit pending the final decision of the Government on the claim of remission. The correctness of the judgment under appeal has been challenged on all the above points and it has been contended that the findings are both misconceived and not borne out by the record.

5. At the outset, it may be observed that the judgment under appeal almost opens with a discussion of the letter of the Excise Commissioner dated 11-12-1947 (Exhibit C). This letter was evidently put in by the defendant to prove that the settlement of the liquor shops with the plaintiff was not only subject to the usual conditions of the licences, but also subject to the conditions laid down in that letter. It is of course not

disputed that this is so. The conditions on which the defendant mainly relied are embodied in para 2 of that letter wherein it is recited, inter alia, that the Government would not be liable for any compensation for irregular supply of liquor; and that the lessees will not be entitled to any compensation for abolition or temporary closure of any shop or shops during the currency of the licences due to any unforeseen circumstances.

On the strength of this condition, it appears to have been urged that plaintiffs suit was not maintainable, as if it was a suit for compensation. This contention prevailed with the Court below as it appears from its decision of Issue No. 7, where it held that the defendant was not liable for the payment of any compensation for the upkeep of his establishment during the closure of his shops. How this question of liability to pay compensation was germane to the scope of the suit is difficult for me to understand. It is true that in the written statement a plea was taken that the defendant was not liable to pay any compensation for the temporary closure of the shops; but Mr. Ghose rightly contends that the matter had nothing to do with the real scope of the suit.

The suit as framed was a suit for refund or remission of the proportionate licence fee during the period that the shops were closed and not for any compensation for maintenance of the shop establishments during the period. The letter of the Deputy Commissioner to the Commissioner of Excise (Ext. 10) on which also reliance has been placed in this context by the defendant brings out the same distinction that Government would not be responsible for any compensation that the distillers as well as the vendor might claim towards the upkeep of their establishment. These documents had, therefore, no bearing on the claim in suit and the learned Subordinate Judge was in error in allowing and entertaining this plea of the defendant, so as to cloud his decision on the material issue in the case.

6. The real question, therefore, which fell to be decided was the question of remission and refund of the proportionate licence fee realised by the Government for the period in claim. Incidentally also comes in the question of estoppel and waiver. The learned counsel for the appellant contends and, in my opinion, rightly that in deciding those points the Court should keep in view certain broad features of the case, which are admitted either on the evidence or in the pleadings and then proceed to apply the law regulating the right and liability of the parties. The licences granted to the plaintiff for the retail sale of country spirits in the three shops in question have been duly exhibited. They" are Exhibits 1, 2 and 3.

Except for the variation in the respective amount of licence fee payable, the terms of the licences are identical and as they are material to the question at issue, it would be sufficient if I refer to the terms of the licence (Ext. 1), which related to the shop at Police Bazaar. The licence, which was issued by the Deputy Commissioner, authorised the licensee to sell country spirit in the shop in question from the date of the licence, i.e. from 1st April 1948 to the 31st March 1949. The licensee was further

required in order that his licence should remain in force to perform duly and faithfully and abide by the terms of the licence, any infringement whereof or of the rules under which the licence was granted, entailed forfeiture of the licence and the security deposit, in addition to other penal consequences.

The licensee was to pay to Government an annual fee of Rs. 1,44,992/- in instalments of Rs. 12,082-10-8, one instalment to be deposited in advance as security, and a like amount on the 1st of each month from April, 1948, to February, 1949, towards fees. The terms of the licence show that the quantity of the liquor to be sold to each individual, the hours of sale, and even the prices payable to the licensed dealers for supply thereof and that to be charged from the purchasers for each quart bottle of the liquor sold, were fixed. The most relevant conditions, however, to the point under investigation are contained in paragraphs 7, 8 and 9 of the licence.

These conditions are that the licensee was directed to sell only a particular kind of liquor, locally called kiad thnam and no other spirit; and that he was not permitted to bring any other spirituous liquors for sale under cover of his licence, except from a licensed still and under a pass. The licensee was further directed to pay and deposit the price of the liquor supplied to the shop by the licensed distillers in the office of the Deputy Commissioner, Khasi and Jaintia Hills, on the 3rd of every month. These conditions clearly indicate that the licensee could not buy liquor for sale from any other source, except the licensed distillers, for which he had to deposit the price with the Deputy Commissioner within a certain time in the beginning of the month and that it was not permissible for him to sell any other liquor, except the particular variety mentioned in the licence.

It follows, therefore, that if the licensee was unable to obtain the supply of liquor from the licensed distillers, it was impossible for him to carry on his business of sale. As the licence was operative for an year, the annual tee payable under the licence was indicated; but, the fee was actually payable in monthly instalments with an advance deposit of the amount on the first of each month, while a similar amount was held in security deposit. Failure to deposit the amounts, as required, would result in the forfeiture of the licence. As already noted, the case of the plaintiff is that these 29 licensed still owners of Umjajew, who had to supply liquor to the plaintiff''s shops, were agents of the Government and that the licence fee payable by the plaintiff was determined on the basis of the average Supply of liquor by the distillers, each distiller generally supplying from 200 to 300 bottles of liquor per month.

These facts have been also admitted by the defendant. On the above premises, the short and simple issue, which needs answer is whether the Government can insist upon their right to realise the entire licence fee when for nearly a period of one month, the plaintiff was unable to carry on his business of sale owing to the failure of the Government or their agents to supply liquor to the plaintiff--no matter for

whatever causes: and if Government are not so entitled, whether the plaintiff can claim refund of the proportionate amount unjustly realised from him.

It is to be remembered that a licence fee is not in the nature of a tax, which Government as sovereign authority are entitled to levy. There is an element of quid pro quo in all cases of fees. In the instant case, while there was an obligation on the plaintiff to pay the licence fee, under the terms of the licence, there was equally an obligation on the part of the Government and their agents, the licensed distillers, to supply liquor to the plaintiff for sale in his shops without which the plaintiff could not carry on his business, inasmuch as he was prevented from buying or selling liquor from any other source or of any other variety.

It is the admitted case of the parties that the fee had been determined on the basis of the average supply of liquor by each of the distillers per month. The simple issue could thus be answered in favour of the plaintiff even on the terms and conditions contained in the licences, and on the state of the pleadings; but before I proceed to do so, I will turn to the evidence to ascertain the situation, which resulted in the closure of the plaintiffs shops and the stoppage of his business of sale on account of non-supply of liquor by the distillers during the period in question, that is from the 19th June, 1948, to 20th July, 1948. The evidence shows that the shops actually had opened on the 21st July, 1948.

7. The plaintiff has stated that at the material time, Shillong was a rationed area in respect, amongst other commodities, of rice and the distillers of Umjajew used to have their supply of rice from the Government. In June, 1948, the Government of Assam failed to supply the usual quota of rice to the distillers on the ground of scarcity of rice with the result that during the said period, the distilleries altogether ceased to function and did not supply any liquor to the plaintiff''s aforesaid three shops and the plaintiff, in the circumstances, had no alternative left but to close down his shops as well after giving notice to the Government.

In the written statement, the Government have not denied these facts, but they have merely taken the plea that neither under the terms and conditions of the licence issued to the plaintiff, nor under the conditions of licence given to the distillers, Government undertook any obligation to supply rice to these distillers and if, therefore, the distillers tailed to supply liquor to the plaintiff for sale, thereby causing stoppage of his business, Government had no liability in the matter. The fact that the arrangement pleaded by the plaintiff is true and correct is amply borne out by the evidence on record.

It is true that in the licences granted to the still owners of Umjajew, there is no condition that Government undertook the responsibility of supplying rice to them. One of such licences, in favour of a still owner Ka Klien dated the 1st April, 1947 (Ext. D) has been exhibited in the case. The licence merely shows that the still owner was to manufacture spirit solely for the requirements of the shops, duly licensed to sell

such spirit in retail within the limits of Shillong and for no one else and was to sell her produce only to those shops and that there was a minimum quantity fixed, which the licensee was under an obligation to supply per month to the licensed retail vendor according to the specifications fixed by the Government.

There is no question that the other licences to the distillers were in the same terms. The fact, however, that these licensed dealers depended on the Government for their supply of rice for distillation of spirit and that the Umjajew distillers were the distillers of the Government cannot be doubted. Sri A. Parriot (P. W. 3), who was Excise Superintendent at Shillong at the relevant time and retired in September, 1948, has been examined in the case. He says that the distillers of Umjajew used to get rice for their distilleries from the Supply Department of the Government.

These distillers were to supply liquor to the three liquor shops of the plaintiff at Shillong and they could not sell to anybody else. There was a supervisor at Umjajew under the Department of Excise to supervise these distilleries. Umjajew was a prohibited area and nobody could go or come from there without a permit. In case the Umjajew distillers failed to supply liquor, the Excise Department was to search for liquor from other distillers within five miles of radius from Shillong for supply to the vendors. Such Umjajew distillers were not allowed to distil liquor from any material other than rice.

The rice position appears to have been acute in 1948-49 and even Khasi rice could not be had then for distillation and as the Umjajew distillers could not supply liquor in the months of Tune and July, 1948, nor could other distillers within five miles radius during the relevant period, there was no sale of liquor. According to the witness, the distillers got payment from the Excise office, which was within the compound of the Deputy Commissioner''s office at Shillong. This is also admitted by F. Grene (D. W. 2), a witness examined for the defendant, who has been serving in the Excise office of the Deputy Commissioner since 1945.

He deposes that the Umjajew distillers'' were the distillers of the Government and they used to get rice from the Government since the control system was introduced. He further says that the distillers stopped supply of liquor for non-supply of rice by the Government and the vendor (meaning the plaintiff) re-opened his shops in July, 1948, when the distillers began to distil and supply liquor on getting rice from the Government. One of the distillers, Delington was also examined for the plaintiff and he deposes to the same effect.

He also states that the Government used to supply rice to the distillers, as rice was controlled during the period. The distillers used to distil liquor from rice and as Government could not supply rice for distillation for about a month in 1948, the distillers could not supply liquor to the plaintiff. He also admits that they were all licensed distillers under the Government. Khasi rice was not available during that time for the purpose of distillation and that they used to get payment from the

Excise Department.

I am unable to understand why the Subordinate Judge was pleased to hold that the witness Delington was untrustworthly and could not be relied upon, simply on the ground that there was no written undertaking to supply liquor to the vendor or rice to the distillers. The witness has deposed to the actual arrangement existing at the time for distillation of liquor and the supply of such liquor to the plaintiff and his evidence is well supported in material details by the then Excise Superintendent himself.

It seems to me clearly unfair to criticise the witness without any regard to the corroboration, which his evidence receives from other unimpeachable sources on the record. The statement of the Excise Superintendent that in case of the distillers'' failure to make the requisite supply, the Excise Department had to find liquor from distillers within a radius of five miles of Umjajew for sale to the plaintiff, shows the special responsibility of the Government in the matter.

8. The documentary evidence also leads to the same conclusion. The situation about the non-availability of rice appears to have started worsening even from the end of May or the beginning of June. The relevant period with which we are concerned is the 19th of June 1948 to 20th of July, 1948. On the 12th of June, 1948, there is a petition on record presented by the 29th still owners of Umjajew to the Deputy Commissioner, Shillong (Ext. 13). It states that only two bags of rice had been supplied to each distiller of Umjajew since the 1st of June, 1948. The distillers had requested the rice supplier to the distilling area of Umjajew to supply rice to them, but the latter told them that no rice was available from the Government.

The situation, therefore, was that they had no more rice for preparing liquor and if immediate supply of rice to them failed, they would have to -stop distilling and supplying liquor to the Government shops of Shillong; and in the above circumstances, they requested the Deputy Commissioner to make necessary arrangement for supplying rice to them immediately. By "Government shops" they actually meant the licensed shops of the plaintiff. It is to be remembered that in the plaint, the plaintiff also stated that his position under the licence was that of a Government agent for sale of liquor which position was admitted in the written statement. The above petition was signed amongst others by the witness Delington also. The plaintiff also sent a petition on the 15th June, 1948, to the Deputy Commissioner stating the same facts (Ext. 14).

The petition shows that it was in continuation of a report which the plaintiff had already sent on 31-5-1948. He informed the Deputy Commissioner that the rice supplier of Umjajew distillery area could no longer supply rice to the distillers and that the distillers had informed him a day earlier that after a day or two, they would have to stop supplying liquor for want of rice. The shops, therefore, would have to be closed down unless Government found out means to supply rice to the distillers.

The endorsement on the petition shows that a copy of it was forwarded to the Excise Commissioner with a note by some officer that the Superintendent of Supply may favour the issuing of rice necessary for these distillers, if available.

This endorsement is dated 15-6-1948; but another endorsement on the same date presumably by the Superintendent of Supply shows that he had consulted the Deputy Commissioner, who observed that in the existing circumstances, nothing should be given to the distillers; the stock was not improving and that they were not in a position to meet even half the requirements in the villages. The Deputy Commissioner, however, appeared to be anxious that some arrangement should be made at an early date so as the shops could be opened at least from the beginning of July, 1948, and the licence fee payable should not be seriously affected.

He, therefore, discussed the matter with the licensed vendor and the distillers so as to evolve a formula regarding the price of liquor without affecting the licence fees paid by them for the stills and the shops. This is apparent from his letter, dated 26-6-1948, to the Commissioner of Excise (Ext. 12). In this letter, Mr. Jarman, the then Deputy Commissioner, points out that the Khasis do not know how to distil liquor from gur, but millets and maize were not the unusual materials used, when rice was unobtainable. He expected that with the control of rice, there will be no need for the distillers to have recourse to maize and millets; but, as the price of rice was likely to be rather high for the first few months, the price of liquor will have to be raised accordingly.

He, therefore, fixed a fresh scale of prices for the price to be paid to the distillers per quart bottle of liquor and the retail price at which the liquor was to be sold by the vendors, in accordance with the rise or fall of the price of rice until the current level was obtained. The formula so devised by him was accepted by both the vendor and the distillers and it was suggested that the price of liquor would have to be modified month by month in proportion to the variation in the price of rice until the current cost prices, as mentioned in the licences were attained. It has been suggested that the distillers could prepare liquor from millets and maize when rice was not available; but the suggestion is of little importance in the context of the facts, which have been established in this case.

The fact remains that the distillers did not, and it stands to reason that as businessmen familiar with the trade, they would not allow their business to suffer, if other crops could be conveniently utilised for distillation in the absence of rice. In any case, that would not affect the responsibility of the Government to supply liquor for sale to the plaintiff. On 30-6-1948, there is a letter from the Deputy Secretary to the Government in the Excise Branch to the Commissioner of Excise, Assam (Ext. 10).

This was with reference to a letter from the Commissioner of Excise dated 28-5-1948, on the subject of supply of rice to the distillers of Umjajew. It is stated in this letter that owing to overall scarcity of rice, Government were not in a position to

supply rice to the distillers until possibly the end of the current year, when the rice position might improve and Government further wanted it to be made clear to the distillers that Government would not be responsible for any compensation that the distillers as well as the vendor might claim towards the upkeep of their establishment.

These documents indicate that the distillers of Umjajew had to depend for the supply of rice upon the Government for the purpose of distillation and that during the relevant period, although efforts were being made to ensure such a supply to the distillers, yet on account of scarcity of rice, it could not be done. Information to this effect was sent by the Additional Deputy Commissioner, Khasi and Jaintia Hills to the plaintiff, the vendor of the three country liquor shops. This is as per letter dated 10-7-1948 (Ext. 6). This part of the discussion I may close with reference to another letter dated 5-8-1948, sent by the Deputy Commissioner to the Commissioner of Excise, Assam (Ext. 15).

The letter in question was probably in reply to some information sought by the Commissioner of Excise in his letter dated 26-7-1948. The letter shows that the three shops stationed at Shillong were actually reopened from 21-7-1948. It also gives certain details of the bottles of liquor supplied to the plaintiff''s shops in June 1948 and in July following the reopening of the shops. In June, the total supply upto 18th June, as the stops closed on the 19th, appears to have been 5067 bottles while in July after the shop was reopened on the 20th July, the total supply was 2404 bottles only.

The letter further shows that the majority of the distillers generally supplied from 200 to 300 bottles per month to the vendor''s shops and the licence fee of the shops was determined and sold in auction with reference to the average general supply per month. The Deputy Commissioner further recommended that since these three shops were entirely closed from the 19th June to the 20th July, a remission of the full licence fee of Rs. 750/-per diem should be given to the licensee during the .period. He observed further that although the licences of the distillers were liable to be forfeited for breach of contract, but as in the case in question the breach was due to scarcity of rice, which was not foreseen and was beyond the control of the distillers and those responsible for the supply of rice to them, there could be no such forfeiture.

On the above facts, the plaintiff''s case appears to be fully established. The position as it emerges from the evidence is that the plaintiff in order to carry on his business had to depend upon the licensed distillers for the supply of the particular variety of liquor, which alone he was entitled to sell; that these licensed distillers, who were the agents of the Government, in turn depended upon the Government for the supply of rice for purposes of distillation; that for causes, which were unavoidable and to some extent unforeseen, the distillers could not get their supply of rice from the Government; and on that account, they failed to supply liquor for sale to the

plaintiff, during the period in question.

9. The terms and conditions and the nature of the contract between the parties have to be ascertained from all the facts and circumstances of the case. The terms of the licences, which were unilateral documents, contained certain directions and prohibitions with which the plaintiff was certainly bound; but the Court was not prevented from judging the nature of the transaction and the rights and liabilities of the parties from the other materials on record. Even on the terms of the licences granted to the plaintiff, the Government had to bear the responsibility for the non-supply of liquor by their agents, which caused the stoppage of the plaintiff''s business.

It is, therefore, clear that when the Government were unable to fulfil their part of the obligation of supplying liquor to the plaintiff resulting in the closure of his shops and the stoppage of his business during the period in question, the plaintiff could not be forced to pay the licence fee for that period to the defendant, for during the period the consideration practically failed, the plaintiff could not carry on his business because the defendant and their agents did not supply liquor, to him. Therefore, the plaintiff can legitimately say that the defendant also is proportionately not entitled to the licence fee for that period.

Indeed, the Deputy Commissioner, Mr. Jarman, in his letter of 5-8-1948, to which I have just referred, was conscious of the legal position and recommended the remission claimed. That the vendor and the distillers were not entitled to any compensation for the upkeep of their establishment during the period in question is entirely a different aspect of the matter. I hold, therefore, that the plaintiff is entitled to remission of the licence fee even on the terms of the contract, irrespective of any doctrine of frustration or contingent contract to which reference has been made in the course of arguments.

10. The contention of the learned counsel for the defendant that there being nothing in the contract throwing an obligation on the defendant to supply rice to the distillers, the defendant had no legal responsibility in the matter for any non-supply of liquor by the distillers to the plaintiff, presupposes that the distillers had really nothing to do with the defendant and loses sight of the admitted position that the distillers were Government agents. It also sweeps away from view all the evidence on record, which proves beyond any shadow of doubt that in actual practice the distillers themselves had to depend upon the Government for their supply of rice in order to enable them to manufacture the requisite variety and class of liquor, which alone the plaintiff was authorised to sell.

The failure to supply liquor on the part of the distillers is a failure on the part of the Government and therefore, Government cannot claim to enforce the obligation of payment of the licence fee against the plaintiff during the period in question. It follows, therefore, that the plaintiff is entitled to a refund of the licence fee for the

said period, if the Government have realised the same out of the advance deposits of security or monthly instalments. The learned counsel for the defendant further contends that the licence fee was annual, although payable in instalments; it was not a monthly fee and although the shops may have been closed during a certain period of the year, that would not entitle the plaintiff to split up the fees and claim any remission on that account.

I find it somewhat difficult to appreciate this argument. The contention that it was an annual fee and not a monthly fee payable in respect of the shops, in question is against the weight of the evidence on record. The licence was of course operative for a year and therefore, the aggregate amount of the licence fee is indicated; but, these fees were payable definitely in monthly instalments and indeed one of the essential conditions of the licence was that a sum equal to the monthly fees had to be deposited in advance as security and a similar amount had to be paid on the 1st of each month beginning from the date of the licence as advance fee.

Exhibit C, the letter of the Commissioner of Excise, on which much reliance has been placed for the defendant, also speaks of the fee being calculated on the monthly basis. In respect of the Police Bazaar shop, the letter says that the monthly reserved fee for that shop should be fixed at least at Rs. 11,000/- for the year 1948-49; and again at the end of the letter, it suggests, that, subject to any orders of the Government, one month''s advance fee may be accepted for the country spirit shops in Shillong. It was stated in the plaint and admitted in the written statement that the licence fee payable by the plaintiff was determined on the basis of the average supply of liquor by the distillers, each distiller generally supplying 200 to 300 bottles per month.

The letter of the Deputy Commissioner (Ext. 15) also refers to the same position that the licence fee of the shops was determined and sold in auction with reference to the average general supply per month. In the face of all this material, there is no meaning in contending that it was not intended to be a monthly fee payable by the plaintiff, based upon the average supply of liquor for sale per month by each of the distillers. But, even if it were held to be an annual fee, I do not understand how when the defendant were unable to carry out their part of the obligation on account of which the plaintiff could not run his business, the plaintiff could still be made to pay the entire amount of the licence fee.

When the argument was pressed to its logical sequence, the learned counsel for the defendant had to admit that even if the shops functioned for a month in the course of a year or even for a day, or not at all, the plaintiff could still be liable to pay the entire amount of the licence fee. The fallacy underlying the argument is too palpable to need refutation. The argument assumes that there is no quid pro quo on the part of the Government; that it is ail one way traffic; and whether the plaintiff is able to carry on his business or not, due to the default of the defendant or their agent or other supervening causes rendering the performance of the contract practically

impossible, he must still continue to pay the licence fee.

I cannot but hold in the circumstances, that the plaintiff was entitled to claim remission of the licence fee from the Government for the period in question and that the Government were not justified in appropriating the licence fee for that period out of the advance deposits in hand. This claim of the plaintiff is not as a matter of grace or favour from the Government, but as a matter of right arising under the contract and from the very nature of the agreement between the parties.

11. I find myself generally in agreement with the principle of the decision in Goculdas Madhavji v. Narsu Venkuji ILR Bom 630. In that case, the defendant, who was a stone cutter, agreed to pay to the plaintiff a certain sum of money per month for one year for permission to the defendant to blast stones and carry on the work of quarrying oh plaintiff''s land. It was also agreed that the defendant should obtain at his own expense the necessary licence for blasting stones. At the time of the agreement, the defendant had licence from the authorities, but it expired during the term of the agreement and thereafter, the authorities refused to renew it.

The defendant thereupon declined to pay the rent for the unexpired period of the agreement. In a suit by the plaintiff for the rent, it was held that the question was one of construction and that looking at the nature of the contract, it must be taken to have been the intention of the parties that the monthly payment should only be payable so long as quarrying was permitted by the authorities and that there was no unconditional contract in all events to pay the monthly amount payable by the defendant during the course of the year.

12. The case before me is even stronger. I have already found that under the contract there was a liability on the defendant or their agents, the distillers, to supply liquor for sale to the plaintiff in his shops in question; and they having failed to do so, the Government could not claim any licence fee from the plaintiff for the period during which his shops remained closed due to Government''s default, and when, under the terms of the licence, the plaintiff could not buy or sell liquor from any other source.

13. Mr. Ghose has, however, argued that the principle of frustration of contract or contingent contract should be also held to apply to this case. He suggests that even if it is found that the distillers were not the agents of the Government and that the closure of the plaintiff''s shops was due to supervening causes beyond the control of either the plaintiff or the defendant, even then the plaintiff should be entitled to the remission of the licence fee, on the doctrine of frustration during the period that the plaintiff found it impossible to carry on the sale of liquor in his shops.

He argues that it is quite clear on the evidence that the whole object of the grant of the licence was to enable the plaintiff to carry on the business of sale of liquor in his shops, and this he could not do unless the requisite variety of liquor was available for that purpose; and when such liquor was not available due to unavoidable

circumstances during the period, the intention of the agreement between the parties could never be that the plaintiff should even then be compelled to discharge his part of the obligation, namely to pay the licence fee to the defendant for that period.

He relies upon the decision in Parshotam Das Shankar Das v. Municipal Committee, Batala AIR 1949 EP 301, to show that frustration may take place even where the parties have foreseen the event as probable, but have made no express provision with respect to it. In the case in question the plaintiff sought to recover from the Municipal Committee a sum of money which he had paid in advance for a tonga stand contract for one year. No tonga driver in fact used the stand and the plaintiff was held entitled to recover the advance, as the Court found that the contract was frustrated and Section 65 of the Contract Act was applicable.

As the facts show, the Municipality was not at fault and had even tried to persuade the tonga drivers to use the stand, but without any effect. Although the learned Judges in that case thought that Section 56 was not exhaustive, a view which has not found favour with the Supreme Court in Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, yet the same result could be achieved by assigning a wide meaning to the word "impossible" as used in Section 56 of the Contract Act.

The principle of the rule in Krell v. Henry (1903) 2 KB 740, the well-known Coronation case, was also applied to the facts in that case. The decision in the Coronation case itself has come in for attack on certain occasions, because it tends to extend the doctrine of frustration beyond its so called orthodox limits, so as to include cases of foreseen probable events rendering the contract infructuous without expressly providing against them. There can be, however, no doubt that the decision in the above case accords with fairness and justice and even in England, judicial opinion has moved away from the mere subjectve aspect to an objective consideration of what the law should impute to the parties as fair dealers in the bargain.

The rule of frustration is a part of the law of discharge of contracts. If the parties do not mean their agreement to be unconditional, it is for the to qualify it by such conditions as they think fit but a condition need not always be expressed in words. There are conditions, which may be implied from the nature of the transaction. For instance, where an event or state of things assumed as the foundation of the contract does not happen or fails to exist, although the performance of the contract according to its terms may be literally possible, the contract will be held to be discharged. The principle of frustration though based on different theories, in its practical effect is the same, namely that the performance of the contract becomes impossible or impracticable.

14. In Ram Kumar Agarwalla Vs. P.C. Roy and Co. (India) Ltd., it was held that whether the doctrine of frustration is based on the doctrine of implied term or supervening impossibility or doing what is just and reasonable as between parties,

having regard to the actual occurrences, the legal consequence is the same. The real question is whether the event, which occurred is such and whether its relation to the contract is such that a Judge considering the contract and the surrounding circumstances could decide that it would not be just and reasonable to hold the parties any longer to the terms of the contract.

In order to do that, the Court must find that there was a common intention and common purpose for entering into the contract and that purpose and intention have been frustrated by the occurrence of a subsequent event. In a recent decision of the Supreme Court in Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, the doctrine of frustration as embodied in Section 56 of the Contract Act has been elaborately discussed and enunciated. It was there held that the word "impossible" occurring in Section 56 had not been used in the sense of physical or literal impossibility.

The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view: and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act, which he promised to do. It is further observed that although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration yet the essential idea upon which the doctrine is based, is that of impossibility of performance of the contract; in fact, impossibility and frustration are often used as interchangeable expressions.

The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. It is hardly necessary for me to dilate upon the subject any further. Courts in India may have been at times reluctant to apply this principle of frustration even in a deserving case on some rigid or technical notion of the law; but, where the justice of a case demands it, I see no reason why it should not be acted upon to meet the exigencies of the situation. Even the language of Section 56 of the Contract Act is wide enough to embrace cases of this nature; but, as I said, in this case upon the terms and nature of the contract itself, the plaintiff would be entitled to the relief, which he seeks.

15. It has also been contended on behalf of the respondent that the plaintiff had waived his right to get compensation. The learned Subordinate Judge has found it to be so; but, I find no justification on the record for that assumption. For the defendant, a good deal of reliance has been placed upon the application of the plaintiff dated 20-8-1948, sent to the Deputy Commissioner, Khasi and Jaintia Hills (Ext. A). In that letter, the plaintiff invited attention to his previous petition dated 14-8-1948 and he claimed that no vendor would be in a position to pay the monthly licence fees to the Government unless there was business, a position the

correctness of which cannot be doubted.

He then proceeded to say that he had already deposited one month''s fees and security to the tune of Rs. 45,000/- which was at the disposal of the Government at the time of settlement and since there was no sale business from the 19th June upto 20th July, 1948, due to circumstances beyond his control, the licence fees for the month of July may be met from the above amount of Rs. 45,000/-pending final decision of the Government in his application for remission. He also agreed that in case there was delay in getting necessary orders for remission, he was prepared to pay the licence fees on the 1st of every month till March, 1949, as usual.

In the end, he prayed that Government may be moved for obtaining necessary orders. His undertaking to pay the licence fee on the first of each month in subsequent months till March, 1949, was in accordance with the terms of the licence, but he never conceded or waived his right to get remission even on the face of the document. The set off to which he agreed was only conditional and was meant to satisfy the authorities pending the final decision of the Government. It was merely a conditional offer in view of the threat of distress warrant given to him under an earlier letter of the Deputy Commissioner dated 18-8-1948 (Ext. 16).

The subsequent correspondence shows that Government also understood the offer of the vendor in the same light (vide Exts. II and 5). Ultimately, however, Government rejected the prayer of the plaintiff to sanction the proposed refund or remission on 29-8-1949, after the expiry of the licence period and without refunding his security deposit. The plaintiff then instituted the suit. As the security deposit was held by the defendant until the expiry of the licence period, the plaintiff legitimately hoped to get back the security and it is only when Government refused to refund that the necessity for the suit arose.

The letter of refusal (Ext. 9) dated 29-8-1949, is with reference to an official letter of the Com missioner of Excise dated 8-3-1949, regarding remission of licence fees for the three liquor shops of Shillong. This shows that at no stage the plain tiff gave up his claim to the remission of the licence fees and in the circumstances, there could be no waiver or estoppel against the plaintiff. It has been suggested that the plaintiff should have surrender ed the lease; but the plaintiff had no reason to assume that the Government would eventually reject his legitimate prayer for remission, specially when the Deputy Commissioner had recognised the justness of his claim and recommended for the grant of remission.

The prayer was rejected by the Government long after the period of the licence had run out and there was no occasion then for the plaintiff to surrender the licence in protest. His surrender also would have made no difference, because in any case, the Government held the security deposit on which they could operate and the plaintiff could legitimately claim refund of the amount on the expiry of the licence.

16. The only question, which then remains is about the quantum of remission claimed by the plaintiff. It has been found that the shops remained entirely closed from the 19th June to 20th July, 1948, for a little over a month and that the total monthly licence fees for these shops were Rs. 22,500/-. The letter of the Deputy Commissioner (Ext. 15) shows that he recommended a remission of the full licence fee of Rs. 750/- per diem for the period, which on calculation would make it a little higher than the claim of the plaintiff. In the circumstances, it appears to me that the claim of the plaintiff for remission of Rs. 22,500/- only is reasonable and should be upheld.

I am unable, however, to grant a decree to the plaintiff for the additional sum of Rs. 1,500/-, which he claims for illegal detention of the money by the Government and costs of establishment. There was no agreement to that effect between the parties nor is this amount payable under any law. As to the establishment costs, it has already been found that the plaintiff was not entitled to the same. In the circumstances, in my opinion, there should be a decree in favour of the plaintiff for a sum of Rs. 22,500/- only, which roughly represents the proportionate licence fee for the period during which the plaintiff was unable to run his shops, with pendente lite interest at 6 per cent.

17. The appeal should accordingly be allowed. The judgment and decree of the learned Subordinate Judge should be set aside and the plaintiff''s suit decreed to that extent with costs throughout. I would give six months'' time to the defendant to pay the amount failing which the plaintiff would be entitled to levy execution of the decree.

H. Deka, J.

18. This is an appeal by the plaintiff against the decision of Sri R. Medhi, Subordinate Judge, Lower Assam Districts, Gauhati, dismissing the plaintiff''s suit for recovery of a sum of Rs. 24,000/-from the State of Assam. Late S. R. Lanong was the plaintiff and he having died during the pendency of the suit, his mother Ka Ron Lanong got substituted in his place and proceeded with the matter. The plaintiff''s case was that he got the settlement of three retailed shops of country spirit in three different areas of the Shillong town, namely Laban, Mawkhar & Police Bazar for the year 1948-49 for a total license fee of Rs. 2,70,000/- (three being three different licenses for the three shops) and the fee was payable in each case in twelve monthly instalments,--one instalment being payable as security deposit before the shop started on the 1st April, 1948.

The monthly instalment for the shops aggregated to Rs. 22,500/- and an advance payment of Rs. 22,500/- was paid as security under the terms of the licenses. The licensee Lanong used to get his supply of liquor for all his shops from twentynine or twenty-eight still-owners of Umjajew village in the Khasi and Jaintia Hills and they in turn were given permits for distilling liquor. The plaintiff claimed to be a

Government agent for the sale of liquor,--the liquor being supplied through Government agents--the still-owners. It is alleged that due to failure of supply of rice by the State Government due to scarcity of rice the distillers or the still-owners failed to supply the bottled liquors to the plaintiff for sale in his shop and he had to close down his shops for want of supply from 19th June, 1948 to 21st July 1948, and thereafter the shops were reopened and he continued to sell liquor under the license granted to him till the expiry of the licenses on 30th March, 1949.

The plaintiff alleged that the State Government was solely responsible for plaintiffs failure to keep his shop running from 19th June 21st July, 1948 due to failure of the Government to maintain the arrangement of supplying rice to the distillers. The plaintiff prayed for remission of the proportionate amount of license fee which the Government refused to grant by their order dated 23rd November, 1949. The State Government realised the full quota of the license fees for the year under the license from the plaintiff and adjusted the advance of Rs. 22,500/- towards this amount. The plaintiff''s case is that he was entitled to a refund of the proportionate license fee for the period for which his shops were closed and that Government had wrongly adjusted the advance of Rs. 22,500/-towards his due as license fee.

According to him this amount of Rs. 22,500/-represented the license fee for July 1948 corresponding to the fee payable for the period for which his shop was closed and he was entitled to get back the same together with interest and he was also to be compensated for the cost incurred in maintaining his establishments in three different shops for the above period. He accordingly valued his relief at Rs. 24,000/-, assessing the cost of running the establishment at Rs. 15,000/- together with interest on the advance of Rs. 22,500/- which he claimed as a refund.

19. The defendant denied total liability and pleaded inter alia that there was no cause of action for the suit and that the plaintiff was not entitled to get refund of Rs. 22,500/- which was adjusted towards his dues and that the Government was in no sense responsible for compensating his loss in maintaining the establishments. The Government denied the plaintiff''s allegation that the plaintiff was an agent of the Government for the purpose of selling the liquor or that the Government was liable to allow any remission or refund of proportionate license fee for the period the shop was closed. The Government further denied that it was under any obligation to supply rice to the still owners for supply of country liquor to the plaintiff and that their failure due to scarcity of rice could not in any way bind the Government to compensate the plaintiff''s loss if at all sustained.

The Government relied for its defence mainly on the licenses by virtue of which the plaintiff held the shops and contended that he was bound by terms of the license and the conditions of settlement which the plaintiff accepted at the time of settlement. The Government denied that the plaintiff had any cause for refund of any portion of the license fee paid by him and the sum of Rs. 22,5007-paid as advance was appropriated towards license fee with the consent, rather at the

request, of the plaintiff and he had no cause for refund of the same.

20. The material issues framed in this connection may be stated as follows, though I might say that the issues were not properly worded:--

Issue No. 2--Is the suit barred by estoppel and waiver?

Issue No. 5--What were the terms of settlement of the license with the plaintiff for 1948-49?

Was it subject to the conditions laid down by the Commissioner of Excise in 1947 in addition to the usual conditions of the licence and other provisions of the Excise Act and rules and instructions thereunder as announced by the Deputy Commissioner at the time of settlement?

Did the plaintiff agree to abide by the above terms and conditions laid down by the defendant?

Issue No. 6--Was there any condition in the licence or was there any announcement made by the Deputy Commissioner, Khasi and Jaintia Hills at the time of settlement of the shops that the Government would supply rice to the distillers of Umjajew?

Was the defendant responsible for any failure of arrangement of supply of rice to the distillers and the resultant closure of the shops?

Issue No. 7 -- Is the defendant liable for payment of any compensation to the plaintiff for the upkeep of his establishment during the closure of the shops for reasons stated in Issue No. 6?

Issue No. 8--Was the plaintiff entitled under the rules for the proportionate remission 19th, June, 1948 to 21st July, 1948 for which he applied?

Under what conditions the Government agreed to the re-opening of the shops on 21st July, 1948?

Issue No. 9--Was the plaintiff entitled to the full refund of his one month''s licence fee amounting to Rs. 22,500/- and the defendant was wrong in adjusting this amount against the licence fee payable in July, 1948?

Is the plaintiff entitled to Rs. 1,500/- for the adjustment?

21. The substituted plaintiff examined five witnesses in support of the plaintiff''s case and the State Government examined two witnesses and proved certain documents which are of material importance. The learned Subordinate Judge decided all these issues in favour of the defendant and dismissed the plaintiff''s suit with costs. The learned Subordinate Judge found in substance that the plaintiff''s claim was barred by estoppel and waiver, that under the terms of settlement the plaintiff was not entitled to get any refund for the period for which the shop was closed, that there was no condition in the license for payment of any compensation

for the period the shop was closed and that Government was under no obligation to pay either interest or cost for the upkeep of the plaintiffs establishment for the closed period, that the plaintiff was not an agent of the Government for the purpose of selling the liquor and that the plaintiff had no claim to the refund of the advance that was made under the terms of the licenses and the plaintiff had no cause of action for the suit and it was liable to be dismissed.

22. The oral evidence is not of much consequence,--and it was connected more or less with the issue as to whether there was any obligation on the State Government to supply any rice to the licensed distillers--and it was found that there was neither such undertaking given nor was there any obligation. On the evaluation of the evidence we have no reason to differ from that finding. The case rests mainly on the documents that have been proved. The licenses which are of the same nature are marked as Exts. 1, 2 and 3 for the three shops maintained by Sahon Roy Lanong. We might quote only the relevant portion of one of these licenses--Licence No. 1/B dated 1st April, 1948,--the other licenses being identical except for the amounts mentioned therein:--

"No. 1/B.

Be it known to all concerned that Mr. Sahon Roy Lanong, resident of Barabazar, Shillong, is hereby authorised by the Deputy Commissioner of the Khasi and Jaintia Hills to open a shop at Police Bazar, Shillong for the sale of country spirits from the date of this licence to the 31st of March. 1949.

It is required of the holder of this licence, as the condition of this licence remaining in force, that he shall duly and faithfully perform and abide by the following articles : --

I. That he shall pay to Government an annual tax fee of Rs. 1,44,992 in the following instalments, viz., Rs. 12,082-10-8 to be deposited in advance as security, and Rs. 12,082-10-8 on the 1st of each month from April 1948 to February 1949.

II. That he shall effect sales of spirit only in the shop for which this licence is granted, and that he shall not sell spirit in any other place, or establish a second shop, without another separate licence.

X X X X

VI. That he shall not charge less than Rs. 5 per ordinary quart bottle of kiad thnam and that he shall pay the licensed distillers Rs. 2-4-0 per ordinary quart bottle of kiad thnam.

VII. That he shall pay and deposit the price of liquor supplied to his shop by the licensed distillers in the Office of the Deputy Commissioner, Khasi and Jaintia Hills, on the 3rd of every month".

Another document that is of material importance is a letter No. 7365E dated 11th December, 1947 (Ext. C) from the Commissioner of Excise Assam to the Deputy Commissioner, Khasi and Jaintia Hills in reply to a letter dated 27th November, 1947 from the Deputy Commissioner in regard to the settlement of the Police Bazar and Laban Country Spirit Shops for the year 1948-49. This letter (Ex. C) is alleged to have been read out and the terms announced to the lessee at the time of the settlement of the shops and it bears the signature of the lessee which was marked as Ext. B. The relevant portion of this letter reads as follows:--

"Sir,

I have the honour to sanction your proposals for settlement of Police Bazar and Laban C. S. shops for the year 1948-49, subject to the following conditions.

(1) The minimum monthly reserved fee for the Police Bazar C. S. shop should be fixed at Rs. 11,000 for the year 1948-49.

(2)(a) it may be announced at the time of settlement of the C. S. shops that the rates of cost price and retail price of liquor are liable to alteration during the currency of the licences :

(b) it may be announced at the time of settlement of the shops that Government, will not be liable for any compensation for irregular supply of liquor; and

(c) the lessees will not be entitled to any compensation for abolition or temporary closure of any shop or shops during the currency of the licences due to any unforeseen circumstances."

It is admitted by both sides that the scarcity of rice was a fact and it was the result of unforeseen circumstances. The closure of the shops was admittedly a result of this scarcity of rice in the area. One of the licenses given to the still-owners for the year 1947-48 is also proved in this case which is marked as Ext. D and it is admitted that similar licenses were issued for the year under consideration. The material clauses therein are reproduced below:

"Be it known to all concerned, that Ka Klien of Umjajew, owner of registered still No. 12/5 in the area at Umjajew is licensed to supply spirit to the licensed retail vendors within the limits of the Station of Shillong on the following conditions, during the period from the date of this licence to 31-3-1948:

I. That she shall manufacture spirit solely for the requirements of the shops duly licensed to sell such spirit by retail within the limits of the Station of Shillong, and shall sell her produce only to those shops and to no one else either within or without her premises.

II. That the spirit conveyed by her to the licensed shops within the Station of Shillong shall be accompanied by a pass which shall be issued for the purpose by the Political Officer."

It may be mentioned here that there was no undertaking given by the Government to supply any rice to those still-owners, nor any undertaking to the licensee to supply him any liquor direct. One of the P. Ws. namely Delington (P. W. 4) who is one of the distillers, deposed in his examination-in-chief to the effect that the Government undertook to supply rice to the distillers for the purpose of preparing liquor but he had to admit in the cross-examination that their relations were regulated by the patta and there was no condition in the present patta for supply of rice since control of rice was introduced in the area. There was no other evidence in support of this allegation. The learned Subordinate Judge rightly disbelieved his story given in the examination-in-chief,--whereas the defence evidence read with Ext. 12 would prove conclusively that there was no such undertaking given by the State Government. Even if the distillers got rice from ration shops that would create no contractual liability as against the Government and there is further nothing to show that these distillers were Government agents for supply of liquor.

23. After disposal of this aspect of the case, the other point for consideration is whether there was any cause or liability for refund of any part of the license fee for the period for which the plaintiff''s shop was closed and whether the plaintiff succeeded in proving that he was so entitled. His case made in the plaint was that the plaintiff was an agent of the Government for the sale of the liquor and the Government undertook the responsibility of supplying him 200 to 300 bottles of liquor per month through each distiller and since the Government failed to do so for the period, they would be liable to compensate him. He further alleged that it was Government''s responsibility to supply rice to the distillers and since they failed in their undertaking to supply rice to the distillers, they were constructively responsible for the loss sustained by him in keeping his shop closed and he was not bound to pay proportionate amount of the license fee for the period of one month from 19-6-1948 to 20-7-1948.

It might be stated that though it is mentioned in the plaint that the shop was closed till 21-7-1948, the evidence conclusively shows that the shop was actually reopened on 21st July, from which date he carried on his business till the end of the financial year. The learned Advocate for the appellant argued that the plaintiff was not bound to pay the sum of Rs. 22,500/- which was the licence fee payable for the month of July and accordingly pressed that that amount so paid should be refunded to him. This point does not bear any scrutiny--firstly because there was no monthly fee as loosly spoken, there being only monthly instalment of payment and secondly the shop was open for a part of the month of July.

The plaintiff could succeed only if he could prove that the defendant was liable to refund any part of the license fee for each day the shop was closed. To support his argument the learned Advocate relied on a letter from the Deputy Commissioner, Khasi and Jaintia Hills dated 5-8-1948 (marked Ext. 15) addressed to the Commissioner of Excise, wherein he recommended remission of license fee at the

rate of Rs. 750/- per diem. The relevant paragraph runs as follows:

"(5) As the 3 licensed shops were entirely closed from the 19th June to 20th July 1948 a remission of the full licence fee of Rs. 750/- per diem is recommended. Half of this remission in the case of two out of the 3 licenced shops will have to be borne by the Mylliem State."

This may be read along with paragraph 6 which is as follows:

"(6) For breach of the contract the licences of the distillers may be forfeited but in this case the breach was due to scarcity of rice which was not foreseen and beyond the control of the distillers and those responsible for the supply of rice to them."

The contention of the learned Advocate was that this recommendation of the Deputy Commissioner as contained in paragraph 5 of his letter quoted above ought to have been accepted by the Government. This at best is a recommendation and the Government might or might not accept it. This by itself could create no liability unless it was so provided under the license or any other contract binding the parties. The license as I have quoted above would clearly show that there was no provision for refund of any part of the license fee on any contingency and the condition of sale read out at the time of settlement and accepted by the plaintiff was that there would be no refund for any irregular supply of liquor,--as per Ext. C. There was no stipulation either that certain quantity of bottled liquor will be supplied to the vendor per day or week or any minimum number of bottles during the year. The plaintiff fully knew it and realised the implication of the terms of the license and conditions of settlement and that is why he made his application dated 20-8-1948 (Ext. A) to the Deputy Commissioner, Khasi and Jaintia Hills, wherein he stated as follows:

"3. That as there was no sale business from the 19th June upto the 20th July, 1948 due to circumstances beyond control, the full licence fees for the month of July may please be met from the above amount of Rs. 45,000/- pending final decision of Government in my previous petition for remission.

4. That in case there is delay in obtaining necessary orders regarding remission--I am prepared to pay the licence fees on the 1st of every month till March, 1949.

That Government may please be moved for obtaining the necessary orders. And for which act of kindness I shall as in duty bound ever pray."

This would clearly show that he knew at the time that he had to pay the license fee even though his shop was closed but since he was not in possession of funds to pay the same, he requested the Deputy Commissioner, that he might obtain the permission of the Government to appropriate the security money already deposited towards the license fee payable in the month of July. He only indicated that he had applied to the Government for remission which was undoubtedly an act of mercy but on the other hand he was prepared to pay the license fees on the 1st of every

month thereafter till March 1949, -- to which period his license extended. This application does not show that he asserted any right whatsoever for getting refund of any portion out of the license fees payable by him for the year.

He only asks for certain accommodation since his shops were closed for circumstances beyond control. The plaintiff had already received a letter from the Additional Deputy Commissioner, Khasi and Jaintia Hills on 10-7-1948 (marked Ext. 6), whereby it was indicated to the plaintiff that due to over-all scarcity of rice Government was not in a position to supply rice until possibly the end of the current year when the rice position might improve and that the Government would not be responsible for any compensation that the plaintiff might claim towards the upkeep of his establishment. The plaintiff had also received on 19-8-1948 a letter from the Additional Deputy Commissioner dated 18-8-1948 (marked Ext. 16) in reference to the plaintiff''s letter of 14-8-1948.

He was asked by this letter to deposit the full license fee for July 1948 on or before 20-18-1948, failing which distress warrant would be issued against the plaintiff. His letter Ext. A dated 20-8-1948 was in response to this letter. It clearly shows therefore that apart from other circumstances, the plaintiff knew and admitted that he was liable for the July kist as well even though the shops were closed. He was well aware of the fact at the time that his shops might be closed for an indefinite period but even then he wanted to continue his licenses till the end of the term as was clear from his letter Ext. A dated 20-8-1948.

This letter of 20th August was replied to by the Additional Deputy Commissioner, Khasi and Jaintia Hills by his letter to the plaintiff marked Ext. 5 dated 6-9-1948 and the Government''s decision was conveyed by the Deputy Secretary to the Government of Assam by his letter dated 21-8-1948 (Ext. 11) a copy of which was forwarded to the Deputy Commissioner whereby permission was given to the plaintiff as prayed for by him as a special case to appropriate the deposit towards the July kist. The relevant passage occurring in that letter is:

"Considering all the aspects of the case Government direct you as a special case to realise the full licence fees for July, 1948 out of the above amount pending final decision in the matter of remission of licence fees."

Therefore from all these documents it was evident that the plaintiff did not expect nor claim as a matter of right any refund of proportionate amount of license fee for the period for which his shops were closed and that it was at his instance that the security of Rs. 22,500/- was appropriated towards the kist of the license fee payable in the month of July, 1948. Thereafter the plaintiff went on paying the license fee as usual till the end of the licensing period and he raised no objection whatsoever. In case he thought that it would be to his loss or prejudice to run the shops he might have surrendered his licenses in the month of July if he did not want to continue till the end of the year.

Therefore after the close of the year he cannot set up a case for refund of the security deposit even though no remission was granted by the Government as prayed for by him. The plaintiff knew full well at the time of taking the settlement that the Government would not be responsible for refund of any portion of the license fee even though the supply was irregular and by the letter of 10th July Ext. 6 the same thing was repeated as regards establishment cost and therefore the plaintiff took the full risk. Asking for remission is not making a claim as such but it was only asking for certain concession which the Government might grant if they so desired.

Plaintiff has failed to prove that there was any undertaking given by the State Government to refund any portion of the license fee under any circumstance and therefore the plaintiff has failed to establish any cause for refund of any portion of the license fee or the security deposit which he was bound to pay under the contract on which he was granted the settlement of the shops in question. He has further failed to prove that the Government was under the circumstances responsible to supply rice to the still-owners or that he was an agent of the Government for sale of liquor.

24. The learned Advocate for the appellant contended that in the circumstances of this case the principle of what is known as the ''doctrine of frustration'' applied, and the contract must be construed to be void or ineffective for the period the shops of the plaintiff were closed. In support of this contention he relied on Section 65 of the Contract Act and the ruling reported in AIR 1949 EP 301. There the fact was that the Municipal Committee leased out tonga stands for Rs. 5000/- to the plaintiff but it was found that the tongawalas instead of using those stands used private stands with the result that the plaintiff got nothing by way of fees from the tongawalas.

In a suit brought by the lessee against the Municipal Committee for refund of Rs. 5000/- it was contended by the plaintiff that it was the duty of the Municipal Committee to compel the tongawalas within the municipal limits not to use any other stand except those specified by the Municipal Committee and make them pay the fees for the stands, but since the Municipal Committee failed in fulfilling the above term, this amounted to a breach of the contract and the plaintiff was entitled to refund of the amount paid. It was held by the High Court that in spite of the fact that the Committee had taken all steps to compel tongawalas to use the municipal stands, the tongawalas did not use them & in the result the plaintiff was not able to realise a single pie by way of fees.

The court held accordingly that since the contract as a matter of fact did not fructify in spite of the best efforts of the Municipal Committee and though the Committee was not responsible for the state of affairs that ensued,--they were bound to refund the money paid by the plaintiff. The circumstances of that case were entirely different from the facts of the present case. There the contract did not at all materialise and therefore it was held that the lessee was entitled to a refund of the

sum paid. Here it is nobody''s case that the contract did not materalise at all, or was not worked upon and the contract should be taken as frustrated. This case therefore has no application. Section 65 of the Contract Act also on the face of it, has no application to the circumstances of this case since at no stage the contract became void or voidable.

25. In this connection I might refer to a Supreme Court decision reported in Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, wherein Mukherjea, J., (as he then was) discussed the principle and I might quote the relevant observation from the judgment:

"The essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56.

To the extent that the Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law ''de hors'' these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before Indian Courts. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56, taking the word ''impossible'' in its practical and not literal sense."

In the same judgment, Mukherjea, J., after discussing Section 56 of the Contract Act and the principle of frustration observes as follows:

"The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end".

In this case it was both parties'' case that the contract was not terminated at any stage nor did it come to an end earlier to the stipulated period and the licensee carried on the trade under the licenses till the expiry of his licenses by the end of the financial year. The further fact remains that the Government gave no assurance of regular supply of liquor and that was made clear to the plaintiff before the

settlement was made, vide Ext. C. Therefore u/s 56 of the Contract Act the plaintiff could ask for no refund or any portion of the license fee. Section 56 contemplates that either the contract must become incapable of performance after the contract is made because it is impossible to perform,--or it becomes unlawful by reason of some event that the promisor could not prevent,--and here in this case neither of these contingencies took place--and the contract at no stage became void. Even taking Section 53 of the Contract Act into consideration, we find that 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 sustains in consequence of the non-performance of the contract.

In this particular case there was no prevention or obstruction on the part of the State Government and the plaintiff has not asked for any compensation either on that basis. In the absence of the original application for remission, it is difficult to guess what concession or remission the plaintiff prayed for and on what grounds. He seemed to make only a representation of his hardship to the State authorities and not that he asked for any refund of the license fee on contractual ground, as will appear from Ext. 7--notice u/s 80, Civil Procedure Code. Hardship is something different from a legal right. On the basis of these findings, it is clear that the plaintiff failed to make out any case of refund of the proportionate amount of license fee and it was under the terms of license itself that the Government was justified in appropriating the deposit towards the licence fee due by the plaintiff.

The plaintiff gave consent to the appropriation of the said amount out of the security deposit and even if he did not, that would not matter. There was no cause for refund of the security deposit which formed a part of the licence fee. This suit is clearly the result of an after-thought and it was really of a speculative nature. The act of giving remission as prayed for by the plaintiff was purely discretionary and it rested with the Government to grant such concession if they so willed or thought proper, but since they have refused to grant any such concession, the plaintiff could not lay any claim to any remission as a matter of right. Under these circumstances, the learned Subordinate Judge was fully justified in dismissing the plaintiffs suit with cost. The appeal accordingly fails and is dismissed with costs.

G. Mehrotra, J.

26. This case has been referred to me on a difference of opinion between the two learned Judges of this Court. The appeal has been filed on behalf of the plaintiff against the decision of the Subordinate Judge, Lower Assam Districts at Gauhati, dismissing the suit for recovery of a sum of Rs. 24,000/-from the State of Assam.

27. Three liquor shops for retail sale of country spirit situated in Laban, Mawkhar and Police Bazar in the town of Shillong were settled with the plaintiff-appellant--late S.R. Lanong for the year 1948-49 under three different licences. The plaintiff-licensee

died during the pendency of the suit, his mother Ka Ron Lanong was substituted in his place. The aggregate license fee payable for all the three shops in question amounted to a sum of Rs. 2,70,000/-. The monthly fee proportionately comes to Rs. 22,500/-.

The plaintiff had to depend for his supply of liquor for sale in retail shops upon certain licensed still-owners of Umjajew who were 29 in number. Detail terms of the license will be referred to later. During the relevant period, Shillong was a rationed area in respect of rice and the distillers of Umjajew used to receive their supply of rice for distillation purposes from an authorised permit-holder of the Government. In June, 1948 due to the scarcity of rice, the Government could not supply rice to the distilleries and on that account the distilleries ceased to function from 19-6-1948 to 21-7-1948 and could not supply any liquor for sale to the plaintiff''s shops.

As the liquor was not supplied by the distilleries to the plaintiff, the plaintiff had to close his shops during this period after giving due notice to the Government. As according to the plaintiff, the shops had to be closed due to the non-supply of the liquor which was Government''s responsibility the plaintiff made repeated demands to the Government for remission of the proportionate licence fee, but the prayer was rejected on 22-11-1949. The entire licence fee for the year was realised out of the security amount and the advance deposit.

The present suit was brought on these facts after giving due notice u/s 80 of the CPC against the State of Assam for the refund of Rs. 22,500/-, the amount which was deposited as fee paid in advance and was wrongfully adjusted against the license fee payable in July, 1948. This amount also represents the proportionate licence fee during which the plaintiff was unable to run his shops and he further claimed a sum of Rs. 1,500/- for illegal detention of the money by the Government.

28. The suit was defended by the Government inter alia on the ground that there was neither any condition in the licence nor any understanding given by the Deputy Commissioner at the time of the settlement of the shops that Government will supply rice to the Umjajew distilleries. The Government therefore, neither legally nor under the terms of the contract was liable to supply rice to the distillers and was not responsible for the closure of the plaintiff''s shops due to non-availability of liquor during this period. Due to the scarcity of rice, the defendant could not grant the necessary permit to the distillers at the sacrifice of the rice eating people in general. The plaintiff, according to the defendant, was not entitled to any remission of the licence fee and the claim was not maintainable.

29. The trial Court held that there was no condition in the plaintiff''s licence or in the licences issued to the distillers that the liquor to be supplied to the plaintiff for sale was to be made from rice supplied by the Government. There was no legal responsibility cast on the defendant to remit the fee when owing to unavoidable circumstances there was a failure of supply of rice to the distilleries as a result of

which the plaintiff''s shops had to be closed during the period. There was no obligation under the terms of the contract on the Government, according to the Subordinate Judge, to grant remission of the license fee and therefore the plaintiff could not claim any such remission as a matter of right.

The Government could, as a matter of favour grant the remission; but as in the present case having regard to the entire circumstances, the Government refused to grant that favour, the plaintiff cannot enforce the remission in a Court of law. The specific term that no compensation was payable to the plaintiff for the upkeep of his establishment during the period that the shops were closed contained in the letter of the Excise Commissioner was also relied upon by the Government. Waiver and estoppel was also pleaded by the defendant. In the present appeal, which was filed by the plaintiff, the counsel for the plaintiff-appellant reiterated all the points which had been urged in the Court below.

30. On consideration of the evidence, my lord the Chief Justice is of the opinion that the plaintiff is entitled to remission of the licence fee under the terms of the contract irrespective of any doctrine of frustration or contingent contract, reference to which had been made in the course of the argument. The terms and conditions and the nature of the contract between the parties had to be ascertained from all the facts and circumstances of the case and even on the terms of the licence granted to the plaintiff, the Government in his opinion was responsible for the non-supply of rice which resulted in the stoppage of the plaintiff''s business.

On the principle of frustration argued on behalf of the plaintiff considering the entire law on the subject, he agreed generally with the principle enunciated in the decision of ILR 13 Bom 630 and remarked that

"Courts in India may have been at times reluctant to apply this principle of frustration even in a deserving case on some rigid or technical notion of the law; but, where the justice of a case demands it, he saw no reason why it should not be acted upon to meet the exigencies of the situation. Even the language of Section 56 of the Contract Act is wide enough to embrace cases of this nature."

But he was inclined to rest his decision on the interpretation of the terms of the contract. The claim was based on a right and it was not claimed as a favour from the Government and the Government was not justified in deducting the amount from the plaintiff. On these findings, he was inclined to allow the appeal and grant a relief to the plaintiff to the tune of Rs. 22,500/-.

31. My Lord Mr. Justice Deka was however of different opinion. On consideration of the evidence, both oral and documentary, he came to the conclusion that there was nothing in the terms of the licence which made the Government responsible for the supply of the rice to the distillers and the liquor to the plaintiff. The plaintiff was permitted to carry on business on payment of a licence fee for the whole year and if by certain unavoidable circumstances, the rice could not be procured by the

distillers and consequently the liquor could not be supplied to the plaintiff, he was not entitled under the terms of the contract to the remission of the licence fee for that period nor the doctrine of frustration applied to the present case. The plaintiff, according to him, is not entitled to the remission of the amount as a matter of right. The Government refused to show any favour in the matter of the refund to the plaintiff and the plaintiff cannot enforce that in a Court of law.

32. The case of the plaintiff, as set out in the plaint is that along with the licence granted to the plaintiff, the Government of Assam granted license to about 29 distillery owners in Umjajew for supplying liquor to the plaintiff''s shops. The licence fee payable by the plaintiff was determined on the basis of supply of the liquor by the distillers, each distiller generally supplied from 200 to 300 bottles of liquor per month. In para 3 of the plaint, it is stated that the plaintiff''s position under the licence was that of a Government agent for the sale of liquor, the liquor being supplied through their other agents, namely the distillery owners.

In para 4, it is asserted that the plaintiff on being granted the licence deposited with the Government a sum of Rs. 22,500/- only by way of security and a further sum of Rs. 22,500/- by way of fee of one month paid in advance. In para 6, it is stated that in June, 1948 the Government of Assam failed to supply the usual quota of rice to the said distillers on the ground of scarcity of rice with the result that during the period from 19-6-1948 to 21-7-1948, the said distilleries altogether ceased to function and did not supply any liquor to the plaintiff''s aforesaid three shops.

As a consequence of this non-supply, the shops, had to be closed and the defendant was solely responsible for keeping the plaintiff''s shops running during the period. The plaintiff could not function due to the failure on the part of the Government of Assam under the terms of the plaintiff''s licence to maintain through their agents--the said" distillers--continuous supply of liquor. The cause of action, according to the plaintiff arose for the suit on 29-8-1949 on the date on which the Government rejected his prayer for remission.

The allegations in paras 2 and 3 of the plaint have been admitted by the Government in the written statement in para 7. But it is asserted that there was neither any condition in the licence nor any announcement by the Deputy Commissioner at the time of settlement of the shops that the Government would supply rice to the distillers at Umjajew. It was emphatically denied that the Government was liable to maintain through their agents the said distillers continuous supply of liquor as stated in para 7 of the plaint. On the contrary, at the time of the sale in announcement by the Deputy Commissioner it was definitely stated that the Government would not be liable to pay any compensation for any temporary closure of the shops during the currency of" the licence.

33. Before coming to the points raised by the appellant, it is necessary to examine the effect of the admission by the defendant of the allegations contained in

paragraphs 2 and 3 of the plaint as good deal of emphasis has been laid by the counsel appearing on behalf of the plaintiff on the admission. It is argued that the fact that the position of the plaintiff was that of an agent of the Government under the terms of the licence for the sale of liquor, the liquor being supplied by the Government through their other agents,--namely the still-owners is admitted by the defendant.

Even assuming that this position was admitted, that will not in any way effect the question of the plaintiff''s claim. Under the terms of the licence, the Government permitted the plaintiff to carry on his business at the three liquor shops for a period of one year on payment or certain fee on the liquor being supplied by the Government i.e. the principal through its other agents, the distillers, and as according to the plaintiff, the defendant failed to maintain the supply, the plaintiff was not liable to pay the fee for the period during which the business was suspended due to the failure on the part of the Government to supply the liquor.

If the principal undertakes to supply certain goods to his agents for the purpose of selling the goods and supplied and charges certain fee from the agent for carrying on the business for and on behalf of the principal during the subsistence of the contract of agency and if the principal has failed to supply the goods during a particular period, the agent may have a right to sue for accounts at the close of the contract of the agency, but he cannot ask for the refund of specific amount of the fee paid by him as an agent for the non-supply of the goods for a period during the continuance of the contract. The fact that the present licence fee was calculated on the basis of monthly supply and was payable every month will not be material in determining the relationship of the parties.

If the contention of the plaintiff is accepted that he was an agent of the Government for selling its goods, his remedy may be to file a suit for accounts after the termination of the agency. The suit for the recovery of the specific amount can only be maintainable on the basis that the relationship between the plaintiff and the defendant was that of the two independent contracting parties and not on the basis of the relationship of principal and agent. The question as to whether the plaintiff was an agent of the defendant for the purposes of selling the goods to be supplied by the Government would only be relevant in considering the liability of the Government in respect of the contracts entered into by the plaintiff with the third party.

But so far as the rights and obligations inter se between the plaintiff and the defendant are concerned, it will only depend upon the terms of the contract entered into between the parties. The question of the status of the plaintiff in relation to the defendant will be of no consequence so far as the present claim is concerned. To my mind, if the plaintiff bases his claim on the ground that he was the agent of the defendant, his suit as framed will not be maintainable. It will in fact be a suit by an agent for accounting as against his principal,

In substance, the case of the plaintiff will be--you have employed me as your agent for a period of one year to sell goods supplied by you, I have deposited the entire amount of fee for the whole period as the price of the goods in advance and be cause you have failed to supply me the goods during the period of the continuance of the contract of agency, on accounting you have to give back the money which I have paid on the basis that the goods have been supplied to me although in fact they have not been. This is nothing but a suit for accounting as against the principal.

If such a suit is brought, it may be open to the defendant to show that the amount paid by the plaintiff was not the price of the goods supplied by the defendant during the continuance of the agency, but for being permitted to carry on the business of selling the goods belonging to the defendant. Of course in fixing the fee which he is to pay for the business, the actual quantity which may be supplied during the period may have been taken into account in order to facilitate the calculation of the profit which the plaintiff is likely to make in this transaction and the defendant may then have succeeded in such a suit to prove that during the entire period of the agency, the plaintiff suffered no loss and he is thus not entitled to any accounting.

But on the admission that the plaintiff was the agent of the defendant I do not think that the suit as framed would be maintainable. The plaintiff''s counsel has therefore based his argument, on twofold contentions. The first argument is that from the circumstances and the documents on the record, it should be held as an implied term of the contract between the plaintiff and the defendant that the fee was payable only on condition that the supply of the liquor was maintained, and that being the term of the contract, the defendant was not entitled to charge any fee during the period in which he failed to carry out his part of the contract. The contract in this view of the matter will be a contingent contract and the liability of the plaintiff to pay the fee only will only arise on the fulfilment or the contingency i.e., the supply of the liquor by the Government.

34. The second contention raised by the counsel for the appellant is based on the doctrine of frustration as embodied in Section 56 of the Contract Act. The argument in short is that the parties when they entered into contract, did not anticipate that an occasion will arise when the performance of the contract will become impossible by some supervening event. If therefore any such supervening event happens, the Court of law will deem that the contract stood discharged on the happening of that event and each of the party was released from his responsibility under the contract.

In the present case, working out this reasoning, the argument really is that on account of the shortage of the rice and the permission not having been granted to the distillers to get rice from the permit-holders by the Government in the exercise of its sovereign powers, it became impossible for the distillers to manufacture liquor and consequently it became impossible for them as the contracting party on behalf of the Government with the plaintiff to fulfil their obligation of supplying the liquor.

The contract stood discharged and both the parties, namely the plaintiff and the distillers as the agents of the Government were relieved of their responsibility to perform their part of the contract. As in the circumstances, the plaintiff was relieved of his obligation to pay the fee and as in spite of such a discharge, the plaintiff had actually paid the fee, he is entitled to get the refund of the same. This argument is controverted by the counsel for the defendant on the ground that no such contract is deducible from the documents on the record.

On the contrary, there was an absolute contract between the parties under which the plaintiff was liable to pay the licence fee irrespective of the supply of the liquor by the distillers. In the present case, at the very outset, it will be relevant to point out that it is not the case where admittedly the contract terminated at any stage, the plaintiff carried on the business of selling the liquor for the entire period of one year and the contract subsisted for the whole period. It was not permissible for the Government to grant another licence after the 19th June when the supplies stopped.

It is therefore not a case where it can be said that at any stage the contract either on the terms of the contract i.e. the non-fulfilment of the contingency or under the principle embodied u/s 56 of the Contract Act, stood discharged. It was at the highest a case of suspension of the business for a period during the continuance of the contract, and if during the subsistence of the contract, any failure on the part of any of the contracting parties is alleged, the plaintiff to my mind cannot invoke the considerations which will apply in cases where the contract stood discharged, either on the terms of the contract or under any positive law.

35. Coming to the first contention, the terms and conditions and the nature of the contract between the parties have to be ascertained from all the facts and circumstances of the case. The licence for the retail sale of the country spirit in the Khasi Hills granted by the Deputy Commissioner to the plaintiff''s predecessor-in-interest is evidenced by Exs. 1, 2 and 3. The terms of the licence are to be found in Ex. 1 and are as follows :

"It is required of the holder of this license, as the condition of this license remaining in force, that he shall duly and faithfully perform and abide by the following articles: (1) That he shall pay to Government an annual tax fee of Rs. 1,44,992/- in the following instalments viz. Rs. 12,082/10/8 to be deposited in advance as security and Rs. 12,082/10/8 on the 1st of each month from April 1948 to February 1949. (2) That he shall effect sales of spirit only in the shop for which this license is granted, and that he shall not sell spirit in any other place, or establish a second shop without another separate license. (3) That he shall not sell more than one ordinary quart bottle of spirit to any person at one time or within 24 hours except in cases in which the purchaser has written authority from the Deputy Commissioner or Cantonment Magistrate to purchase a larger quantity."

Conditions 3, 4 and 5 regulate the timing and hours of the working. Condition 6 then provides that he shall not charge less than Rs. 5/- per ordinary quart bottle of Kiad thnam and he shall pay the licensed distillers Rs. 2-4-0 per ordinary quart bottle of Kiad thnam. Condition 7 then provides about the payment and deposit of the price of liquor supplied to his shop by the licensed distillers in the office of the Deputy Commissioner, Khasi and Jaintia Hills on the 3rd of every month. Condition 8 then lays down that he shall only sell Kiad thnam and no other spirit and the said Kiad thnam shall not be diluted with water.

Condition 9 thus enjoins upon him not to sell or bring any other spurious drug except under the cover of this license and that is also from the licensed still-owners under a pass. The subsequent condition then prohibits him from selling liquor to certain class of people. Condition 12 then provides that the shops shall be opened for inspection of the Deputy Commissioner or any of his assistants or any police or excise officer under the orders of the Deputy Commissioner and he is not permitted to sub-let his shop or transfer his licence to any other person without the previous sanction of the Commissioner of Excise.

He is then bound to keep a correct daily account showing the sales of country spirit in a printed account book to be purchased at the Deputy Commissioner''s office and lastly it is provided that the infringement of any of the conditions or of the rules framed thereunder will subject him to forfeiture of his license and of his security deposit and he shall be liable to punishment u/s 188 of the Indian Penal Code. This license was granted on the 1st April, 1948.

36. The next document is the letter dated 30th June, 1948 from the Deputy Secretary to the Government of Assam, Medical Department to the Commissioner of Excise, Assam. In reply to his letter, it was stated that owing to over-all scarcity of rice, Government was not in a position to supply rice to the distillers until possibly the end of the current year when the rice position might improve. It was however stated in that letter that the distillers should be informed that the Government would not be responsible for any compensation that the distillers as well as the vendor might claim towards the upkeep of their establishment.

A letter was then sent on the 10th July 1948 by the Additional Deputy Commissioner to the vendor of the three country liquor shops i.e., the plaintiff''s predecessor. In this letter information was sent to him that the Government was not in a position to supply rice until possibly to the end of the current year when the rice position might improve. In that letter it was further stated that the Government will not be responsible for any compensation towards the upkeep of their establishments. Ex. D is the license granted to the still-owners dated 1st April, 1948 embodying the terms and conditions on which they were entitled to manufacture the liquor.

The power to manufacture was given solely to meet the requirements of the shops to sell such spirit in retail. The liquor to be supplied to these three shops was on the

issue of a pass by the Political Officer for the purpose. Clause 5 of this license lays down that the licensee shall supply at least 100 bottles per month for Shillong station if so much is required by the vendor. The other conditions are not relevant for the purposes of this case.

37. There is then a letter dated 11-12-1947 sent by the Commissioner of Excise, Assam to the Deputy Commissioner, Khasi and Jaintia Hills, Shillong. By this letter, the sanction was accorded for the settlement of the Police Bazar and Laban country spirit shops for the year 1948-49 on certain conditions enumerated therein. The minimum monthly reserved fee for the Police Bazar country spirit shop was fixed at Rs. 11,000/- and at the time of the auction it was to be announced that the cost price of the liquor was liable to alterations during the currency of the license.

It was further laid down in that letter that at the time of the settlement of the shops, it was to be announced that the Government will not be liable for any compensation for any irregular supply of the liquor and the licensee will not be entitled to any compensation for abolition or temporary closure of the shops due to any unforeseen circumstances. It is in this letter that it is provided that one month''s advance fee may be accepted for the liquor shops at Shillong. On the 20th January, 1948, through Chalan No. 163 a sum of Rs. 22,500/-was deposited in the Treasury by the plaintiffs predecessor.

This sum comprises of the advance license fee for one month for all the three shops. From reading together the three documents, namely the letter of the Excise Commissioner to the Deputy Commissioner dated 11-12-1947, the Treasury receipt for Rs. 22,500/- and the license granted thereafter on 1-4-1948, it is abundantly clear that the plaintiff''s predecessor accepted the license on the terms and conditions which are embodied in the letter of the Excise Commissioner of 11-12-1947. It is significant to note that it was not a contract of supply of any goods by the Government to the plaintiff.

Under the Eastern Bengal and Assam Excise Act and the rules framed thereunder, no person is authorised to carry on the business of selling the liquor except under the terms and conditions of the license granted to him. Section 25 of the said Act provides as follows:

"Every license, permit or pass granted under this Act--(a) shall be granted--(i) on payment of such fees, if any, (ii) for such period and (iii) subject to such restrictions and on such conditions and (b) shall be in such form and contain such particulars, as the Board subject to any rules made u/s 36, Sub-section (2), Clause (g) may direct either generally or in any particular instance in this behalf: Provided that no fee shall be charged for any permit granted u/s 17 for the possession of an (intoxicant) for bona fide private consumption or use."

Rules 202 to 218 provide the procedure for settlement of shop. Rule 204 reads as follows:

"Sales by auction may be either on the lump sum system or on the vend-fee system as may be prescribed. Under the ''lump sum system'' a licensee is required to pay a monthly fee fixed by auction for the right to sell. This fee is irrespective of the amount of intoxicants sold. Under the ''vend-fee system'' a licensee is required to pay certain fees fixed by auction per seer of ganja or per L. P. gallon of country spirit issued for the shop."

Rule 242 provides for the mode of the realisation of fee and security deposit. Rules 332 provides for payment of compensation for closure of shops u/s 52 of the Act for preservation, of public peace or under Rule 323 on account of the march of troops.

There is no provision for compensation on account of closure on any other ground. The plaintiff''s predecessor therefore was permitted by means of this license to carry on the business of selling liquor on certain conditions. Therefore it cannot be said that there was any contract for supply of the liquor to the plaintiff by the defendant. The plaintiff had to deposit apart from the license fee, the price of the liquor which was supplied to him by the distillers. To that extent, they were the purchasers of the goods supplied by the distillers.

But it cannot be said that the license fee which was deposited by them was the price of the liquor which was to be supplied to them. The plaintiff may have taken the risk of putting a huge sum as a license fee with the Government on the assumption that certain quantity of liquor will be regularly supplied to him and on that basis he was likely to make a huge profits but the license fee even if calculated on the basis of certain estimated supply and even though payable monthly, cannot be said to be the price of the liquor supplied to him.

In the circumstances, it was neither seriously urged by the plaintiff''s counsel nor can it be accepted that the contract was to supply certain goods by the defendant to the plaintiff. If that is not the nature of the contract, then the license was in the nature of a permit granted to the plaintiff to carry on a trade under certain conditions in respect of goods, carrying on business in respect of which was restricted, and the amount of fee which he paid was for such a permission being granted to him. The payment of the fee cannot therefore be conditional on maintenance of the supply by the Government nor can it be contingent on the plaintiff being in a position to carry on his business every day.

It may appear to be inequitable and that the conditions imposed may be unilateral, the conditions imposed on the plaintiff may as well be onerous as they are to be, having regard to the nature of the goods which the plaintiff was permitted to sell, but from that it cannot be inferred that there was any implied or express contract between the plaintiff and the defendant to supply liquor and that the non-supply disentitles the defendant to get the proportionate fee. It cannot be said that the contract was a contingent one inasmuch as the payment of fee depended on the continuance of supply. Cases where there is a simply contract of sale of goods, the

position is entirely different. If the vendor fails to supply the goods, he is not entitled to get the price of the goods as there is a failure of consideration; but cases where a permission is granted to a person to carry on business which is otherwise restricted on certain terms and conditions and on payment of certain fee, howsoever onerous those terms may be, no equitable consideration can arise in interpreting such a contract and holding, that the terms of the contract enjoin upon the Government to maintain regular supply of goods and that the fee is only chargeable on condition of maintaining such a supply.

In all such auction sales, wherever the bid is offered by a person, it is always on the basis of certain estimate of the supply during the period of the license. The person who makes an offer calculates on the basis of such estimated supply. But that does not mean that the license itself embodies a contract for the supply of the goods nor that the receipt of fee necessarily implies an obligation to maintain the supply. Moreover in the present case, it cannot be said that as the shop remained closed for a certain period, the plaintiff necessarily suffered loss.

Admittedly after 22nd July, the business again commenced and the plaintiff carried on the sale for the remaining terms of the license, in the circumstances, in order to adjust equities between the parties, the total supply may have to be considered and from the mere fact that on account of non-supply of the liquor, the shops had to be closed for a certain period during the continuance of the license, it does not necessarily follow that during the entire period of the license, the plaintiff suffered a loss.

No such equitable consideration therefore can be invoked in interpreting the terms of the contract. It was very strenuously contended by the counsel for the plaintiff that if the interpretation put by the State is accepted, then the result will be that the plaintiff will be liable to pay the entire fee though he could carry on business for a few days only and then close down. I do not think that any such result will follow. If the business is to be closed after a short time due to certain supervening events, it may be open to the plaintiff to plead that the contract stood discharged and further performance may not be obligatory; but the same reasoning will not apply in case where the contract subsists.

If the argument advanced by the counsel for the plaintiff is accepted that the payment of fee was dependant upon the supply, the plaintiff could as well claim refund of proportionate amount of fee if there was no supply for even one day. There is nothing in the license or in the other documents to indicate the actual quantity to be supplied each day of every month although the fixation of the amount of fee may have been made on the basis of minimum supply of 200 to 300 bottles every month. It is not laid down anywhere that the supply was to be made per month and any account of the supply was to be done every month.

Taking 200 to 300 bottles every month as the basis, the daily supply works out to be 7 to 10 bottles and if on any particular day the supply was less than that, the plaintiff could as well ask for the refund of the proportionate fee, although he might have been supplied more than that next day. Such an argument cannot be accepted. It can also not be said that the payment of fee was dependant on the plaintiff being able to open his shop and do business and if he was unable to do his business for sometime, he was entitled to refund of the proportionate fee.

38. In the present case, the shops were closed for a part of June and part of July and taking both the periods together, it comes to approximately one month. It cannot be said that for a whole month there was no supply and the plaintiff''s counsel had to admit that logically his argument will amount to saying that the contract was for daily supply. In my opinion, none of the circumstances pointed out by the counsel for the plaintiff justify such an interpretation of the terms and conditions of the contract.

39. The other line of argument adopted by the counsel for the plaintiff was that the letter sent by the Deputy Commissioner on 10-7-1948 to the vendor only provides that the Government will not be responsible for any compensation claimed towards the upkeep of the establishment. This letter does not disentitle the plaintiff to claim refund of proportionate fee for the non-supply of the liquor. This letter is dated 10-7-1948 and is not material in interpreting the terms of the contract between the parties.

This letter no doubt only refers to the compensation claimed towards the upkeep of the establishment; but this argument loses sight of the letter sent to the Deputy Commissioner by the Commissioner of Excise, Assam on 11-12-1947. This is a letter by which the sanction was accorded to the proposal of the settlement of the shops and is very relevant in interpreting the terms of the contract. In this letter, it is definitely stated that it may be announced at the time of the settlement of the shops that the Government will not be liable for any compensation for non-supply of liquor, and that the lessees will not be entitled to any compensation for abolition or temporary closure of the shops due to any unforeseen circumstances.

This term clearly to my mind negatives the contention of the counsel for the plaintiff. It definitely provides that no liability has been taken over by the Government to compensate the plaintiff for the abolition or the temporary closure of the shops during the period of the license or for any irregular supply. In the absence of anything to the contrary, it can be presumed that the terms embodied in this letter were announced to the plaintiff at the time of the settlement. The next argument of the plaintiff is that this only prohibits the plaintiff from claiming any compensation for irregular supply or for the temporary closure of the shops during the currency of the license.

But this does not disentitle the plaintiff from claiming the refund of the proportionate fee which has been illegally charged by the Government. As I have already pointed out, such a claim can only be on the basis that there was a definite contract of the sale of the goods, deducting from the license or a contingent contract, the payment of fee being dependant on supply of liquor. If the plaintiff as licensee was permitted to carry on his business and the business had to be stopped for sometime during the currency of the contract, the claim of the plaintiff for the refund of the fee for the period of suspension of work is nothing but a claim for damages.

Substance of the claim is to be looked into in order to ascertain its nature and by merely framing the relief as one for the refund of the proportionate fee, the nature of the suit cannot be changed If it is conceded that at no stage, the contract was discharged and that the license continued for the period of one year though the business for which the license was granted had to be suspended during the currency of the license and also that the fee was not the price paid by the plaintiff for the goods supplied to him, obviously the claim could be nothing but compensation for the closure of the business and consequential loss of the plaintiff on account of the breach of the contract on the part of the defendant.

These clauses in the letter of 11-12-1947 to my mind, conclusively prove that there was no contract under which the plaintiff could claim the refund of the proportionate amount of the fee on the basis that the goods were not regularly supplied to him. The amount of fee was no doubt calculated on the basis of certain estimated supply during the period and that though the fee was fixed annually was payable monthly, but that does not necessarily mean that the fee was dependant on the supply and that there was an implied contract that it will not be payable if no supply was made.

For the purposes of the ascertainment of the amount of fee, there was no doubt a corelation between the supply and the fees, but that is no justification to read into the contract a term that the fee was in fact payable upon the supply of liquor. The rice situation started worsening from May .1948. On 12-6-1948 the distillers sent a representation to the Deputy Commissioner, Shillong to arrange for supply of rice vide Ex. 13. Similar communication was sent by the plaintiff to the Deputy Commissioner by Ex. 14 on 15-6-1948.

On 26-6-1948 by Ex. 12 the Deputy Commissioner wrote to the Excise Commissioner that the distillers and vendor had agreed to the following formula in the price of liquor without affecting the license fee paid by them for the stills and shops. These letters show that the vendors were claiming a change in price structure due to non-supply of liquor, but never asserted any right to claim refund of fee. These documents are of no help in construing the contract and further, if at all, they point to the contrary conclusion that the payment of fee was not conditional on supply of liquor.

The other documents are the correspondence in connection with the realisation of fee for July and are not material in ascertaining the terms of the contract. Reliance is placed on the statement of A. Parriot--P. W. 3--a retired Excise Superintendent that the department was to search for liquor from other distilleries within five miles of radius. He does not say that it was a term of the contract that fee was to be paid on supply of the liquor. This statement suggests that liquor from other distilleries could also be available to the vendees. , On consideration of the whole matter, in my opinion, the plaintiff has failed to prove any contract that on closure of shop for non-supply he was entitled to refund of fee or that the payment of fee was conditional on supply of liquor.

The doctrine of frustration is essentially a doctrine of discharge of the contract as will be clear from the following observation in the case reported in Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another,

"The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the prnciples of English law on the subject of frustration. It must be Held also that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law ''de hors'' to these statutory provisions. The decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those which have come before our courts."

In what circumstances the contract stands discharged by subsequent events is really the subject-matter of doctrine of frustration. There may be events subsequent to the contract which render the attainment of the purpose contemplated by the parties either impossible or barren.

There may be cases where the attainment of the purpose by a supervening event is rendered totally impossible. There may be events which though they do not render performance of the contract impossible, yet they defeat the real purpose which was the object of the parties to accomplish i.e. subsequent events may frustrate the adventure or the practical purpose of the contract. Ordinarily the assumption is that neither impossibility nor frustration is a valid excuse for non-performance. Where the law casts a duty upon a man which through no fault of his, he is unable to perform, he is excused for non-performance; but where a man by his own contract binds himself absolutely to do a thing, he cannot escape liability for damages by proof that performance is impossible.

A party to a contract can always guard against unforeseen contingencies by express stipulation, but if he voluntarily undertakes an absolute and unconditional obligation he cannot complain merely because events turn out to his disadvantage. To minimise the rigour of this assumption, the English Courts developed the doctrine of frustration which is designed to implement what the courts presume to be the common intention of the parties.

In some of the cases this doctrine was held to be a device by which the rules as to absolute contracts are reconciled with the special exception which justice demands'' vide Hirji Mulji v. Cheong Yue 1926 AC 497.

40. As Lord Wright pointed out in the case of Denny, Mott and Dickson Ltd. v. James B. Fraser and Co. Ltd., reported in 1944 AC 265--that

"though it has been constantly said by high authorities including Lord Sumner that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might or would as hard bargainers, have agreed.

The doctrine is invented by the court in order to supplement the defects of the actual contract. To my mind the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation."

This expression of opinion by Lord Wright was taken to mean in the case of British Movietonews Ltd. v. London and District Cinemas, Ltd., reported in (1951) 1 KB 190 by Denning L.J., to mean that

"the court really exercises a qualifying power--a power to qualify the absolute, literal or wide terms of the contract in order to do what is just and reasonable in the new situation. The court qualifies the literal meaning of the words so as to bring them into accord with the true scope of the contract".

Denning L.J., observed that the day is gone when we can excuse an unforeseen injustice by saying to the sufferer--''It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself. We no longer credit a party with the foresight of a prophet of his lawyer with the draftsmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that Qui haeret in litera haeret in cortice which being interpreted means: He who clings to the letter, clings to the dry and barren shell and misses the truth and substance of the matter. We have of late in this court paid heed to this warning."

This decision of the court of appeal was however reversed by the House of Lords and the way in which the law was stated by Denning L.J., was not approved by

Viscount Simon. As was pointed out by Viscount Simon while the principle remains the same, particular application of it may greatly vary and theoretical lawyers may debate whether the rule should be regarded as arising from implied term or because the basis of the contract no longer exists.

In any view, it is a question of construction as Lord Wright pointed out in Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd., in 1942 AC 154. It was further observed in the House of Lords case referred to above as follows:

"It is of the utmost importance that the action of a court when it decides that in view of a supervening situation the rights and obligations under a contract have automatically ceased, should not be misunderstood. The suggestion that an ''uncontemplated turn of events is enough to enable a court to substitute its notion of what is ''just and reasonable'' for the contract as it stands, even though there is no ''frustrating event'' appears to be likely to lead to some misunderstanding.

The parties to an executory contract are often faced in the course of carrying it out, with a turn of events which they did not at all anticipate--a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.

When it is said that in such circumstances the court reaches a conclusion which is ''just and reasonable; or one ''which justice demands;'' this result is arrived at by putting a just construction on the contract in accordance with an ''implication .... from the presumed common intention of the parties.'' If the decisions in frustration cases are regarded as illustrations of the power arid duty of a court to put the proper construction on the agreement made between the parties, having regard to the terms in which that agreement is expressed and to the surrounding circumstances in which it was made, including any necessary implication, such decisions are seen to be examples of the general judicial function of interpreting a contract when there is disagreement as to involve the consequence that in view of what has happened, further performance is automatically ended.

This is because the frustrating event (such for example, as war or prolonged delay) must be regarded as introducing a new situation to which no limit can be put. There are, of course, many other examples where the court has to put an interpretation on the agreement made, not with the result that the contract is brought to an end by frustration, but with the result that the contract goes on and continues to bind the parties according to its true construction."

41. It is not however necessary for me to dilate upon the doctrine of frustration as developed in English Courts, because so far as Indian Courts are concerned, the question has been set at rest as regards the scope of the doctrine by the two decisions of the Supreme Court: Ganga Saran Vs. Ram Charan Ram Gopal, Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, In the first case Fazl Ali J., quoted with approval the following observation of Earl Loreburn:

"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract ..... no Court has an absolving power but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

It was further emphasised in this case

"that so far the Indian Courts are concerned, they have to look primarily to Sections 32 and 56 of the Indian Contract Act".

In the second case this point was further cleared by Mukherjee J. After examining in detail the development of the doctrine in the English Courts, it was observed that

"These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word ''impossible'' in its practical and not literary sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties."

It was observed further as follows:

"According to the Indian Contract Act, a promise may be express or implied, vide Section 9. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56 altogether.

Although in English law, these cases are treated as cases of frustration, in India they would be dealt with u/s 32 of the Indian Contract Act which deals with the contingent contracts or similar other provisions contained in the Act. In the large majority of cases however tile doctrine of frustration is applied not on the ground that the parries themselves agreed to an implied term which operated to release them from the performance of the contract.

The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end.

The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of Section 56 of the Indian Contract Act."

42. Keeping in mind these general principles discussed above, it is clear that the essential basis of the doctrine of frustration lies in the discharge of the contract. What are the rights and obligations of the parties having regard to the terms of the contract which stands discharged, or what are the rights and obligations of the parries in respect of the benefit derived under the contract when it stands discharged are questions which will have to be considered on different principles, but the essential element of the doctrine of frustration is that on account of certain supervening events, the contract stands discharged.

Whether the contract itself embodies an implied condition that, on the happening of certain event, the contract will stand discharged has to be dealt with having regard to the provisions of Section 32 of the Indian Conutract Act or such other similar provisions of the Contract Act. In dealing with the matter, the circumstances under which the contract was entered into may be relevant only in determining whether such an event has or has not happened so as to justify the court to declare the contract as having been discharged.

43. In the present case, to my mind, the first hurdle in the way of the plaintiff is that it cannot be said that the contract stood discharged as a whole at any stage of the contract. In fact, as I have already pointed out, the contract subsisted till the end of its period. It is not a case where the plaintiff as soon as the Government failed to make necessary supply said--our obligation and rights under the contract stand terminated as the contract on account of certain event, namely the non-supply of rice to the distillers has made the performance of the contract on the part of the Government an impossibility.

But in the present case, the contract continued, the supply was made uptil 19th June and after 22nd July, the business continued from the 22nd July right upto the end of the term of the contract, the parties preferred to carry on the contract; under these circumstances, it cannot be said that the provisions of Sections 32 and 56 of the Contract Act will be attracted, so as to put an end to the contract.

44. Reliance was placed on the case reported in ILR Bom 630. In that case by an agreement the defendant had agreed to pay the plaintiff rent for a piece of hilly ground at a monthly rent for one year and he was allowed to blast stones and carry on the work of quarrying. The rent was arrived at on a calculation of Rs. 47/-per crow-bar. The defendant was a stone contractor and knew that the blasting could not be carried on without a license from the authorities, which was revokable at any time and required renewal annually.

At the time of the agreement, the defendant was in possession of a license which expired during the continuance of the contract, and the authorities refused to renew the license whereupon the defendant also refused to pay the monthly rent. The plaintiff brought a suit for recovery of three months'' rent. The suit was dismissed. It was held by the High Court on a reference that having regard to the nature of the contract, the intention of the parties was that monthly sum of Rs. 329/-should only be payable so long as quarrying was permitted by the authorities and there was no unconditional contract to pay Rs. 329/- per month in all events.

That case firstly depended upon the terms of the contract and secondly the rights and liabilities of the parties in respect of the act already done under the contract was considered in the light of the frustration of the contract. In the present case, the contract was never frustrated. In the Bombay case, after the license was not renewed, the defendant did not carry on the operations although the contract was for a year. In my opinion, therefore, that case cannot be of much assistance to the appellant.

45. The next case is reported in AIR 1949 EP 301. In that case the municipal committee had leased out certain Tanga stand to the plaintiff. The plaintiff was entitled to realise fee from the Tangawallas who used the land for their Tangas. In spite of the efforts by the Board, none of the Tangawallas used the land with the result that the plaintiff was unable to realise any fee; he brought a suit for refund of the fee and it was held that he was entitled to do so as the contract never fructified. This decision is also based on the ground that the contract never became effective.

46. In the case of Sankaran v. District Board of Malabar, reported in 147 Ind Cas 964: AIR 1934 Mad 85 the right to collect tolls at certain toll gates was put up for auction and purchased by the defendants for a certain sum of money payable in instalments. There were serious floods and the traffic was temporarily suspended and considerably reduced. The defendants however continued to collect whatever tolls they could get throughout the rest of the year and also got some remission ex

gratia out of the amounts due to the Municipal Board.

In a suit for recovery of the balance o\ufffd the instalments, the defendants contended that the contract had become incapable of performance and they were not liable to pay the balance of the instalments. It was held that the temporary suspension of the traffic owing to the breaking of bridges fell among the risks contemplated by the parties and as the contract did not cease to be executable and the defendants continued to discharge their functions up to the end of the year, they had no defence to the claim to the balance of the con tract amounts.

47. In the case of Hari Laxman Joshi Vs. The Secretary of State for India, it was held by the Bombay High Court that the fact that there was a strike of the local workmen which rendered it impossible to carry on the work of manufacturing salt will not relieve a lessee of salt-works from his liability to pay rent and make repairs under the lease, in the absence of an express contract that the liability to pay rent and make repairs should subsist only if the salt could be manufactured or if skilled labour was available. The case of Goculdas Madhavji was distingushed on the ground that the contract was different in that case and that case was a case which fell u/s 108(e) of the Transfer of Property Act.

48. In the case of Hurnandrai Fulchand v. Pragdas Budhsen, reported in 72 Ind Cas 485: AIR 1923 PC 54 their Lordships of the Privy Council held that if a contract is for a fixed quantity of goods, to be manufactured and obtained from named mills and less than that quantity is delivered within the time fixed, the sellers must either find in the contract some matter of excuse or discharge or they must pay damages. If sellers fail to perform the contract, because the mills execute an order placed with them by the Government in preference to the one by the sellers, it does not amount to a discharge or frustration of the contract.

49. The plaintiff''s case really is--I have promised to pay fee to you on condition that you would supply liquor to me. Your promise could not be fulfilled because of the unforeseen circumstances, namely the distillers could not make liquor for non-supply of rice, the contract therefore stood frustrated and the money which I have paid was kept by you as a trustee and is refundable to me. I have already discussed in detail the evidence to show that it cannot be said that the promise of the plaintiff to pay the fee was dependant on the supply of liquor.

Further the defendant does not admit that the non-supply of rice to the distillers in any way was an event which made the performance of his promise impossible or impracticable. The only responsibility was to permit the petitioner to sell liquor at particular shops and for the whole period of one year. There was thus, according to him, no frustrating event and the contract did not stand discharged; Section 56 was thus not attracted. As I have said that where there is a total failure of the consideration, the person who has carried out his part of the contract may be entitled to the refund of the money paid by him under the contract either on the

basis of the failure of consideration or on the basis of the money had and received or on the basis of a quasi-contract; but the contract has to terminate before the party may be entitled to the refund of the money paid under the contract.

In the present case, the contract admittedly did not come to an end and as such the question of the refund of the fee on account of frustration of the contract or the contract not having fructified as the consideration totally failed will not arise and unless the plaintiff could establish that there was a specific contract between the parties that in the event of non-supply of the liquor, the plaintiff will be entitled to refund of the fee, he is not entitled to claim the refund. The claim under these circumstances will only be a claim for damages for failure to make the necessary supply.

In cases of licensee where the contract is one which confers a right on a party to the contract to carry on business, it may be doubtful if the doctrine of frustration will apply. As regards the application of the doctrine to the contracts which create an estate in land by demise, the English Courts have held conflicting views. In Halisbury''s Laws of England, Simonds'' Edition Vol. 8 at page 189, the law had been summarised in the following terms :

"The doctrine probably does not apply at all to contracts which create an estate in land by demise, although the point is still open whether in certain rare circumstances it might not do so. It is well settled that such a contract is not frustrated and that the tenant is not relieved from his liability on his covenants, merely by the occurrence of an event which interferes with or temporarily interrupts his occupation or enjoyment of the demised premises."

This statement of law is primarily based on two decisions of the House of Lords (1) Matthey v. Curling, reported in (1922) 2 AC 180 and (2) Cricklewood Property and Investment Trust Ltd. v. Leighton''s Investment Trust Ltd. reported in 1945 AC 221.

In the first case during the currency of a lease of the house and land, the military authorities acting under the powers conferred by the Defence of the Realm Regulations, took possession of the demised premises and continued in occupation thereof until after the expiration of the term. The lease contained covenants in the usual form, by the lessee to repair, to deliver up in repair, to insure and in the event of the demised building being destroyed or damaged by fire at any time during the term forthwith to expend the insurance money in rebuilding. The house was destroyed by fire in February and the terms of the lease expired in March, 1919.

The lessor claimed the last quarter''s rent and damages for breach of the covenants. It was held that the lessee had not been evicted by title paramount and was liable for the rent and the temporary occupation by the military authorities did not excuse him from performance of the repairing covenants. In the second case, a similar point arose and although Viscount Simon and Lord Wright held that the doctrine of frustration may in certain circumstances apply to a lease, Lord Killowen and Lord

Goddard held that it can never apply to put an end to a lease; but it was held in the circumstances of that case that there was no frustration.

Viscount Simon, Lord Justice defined frustration as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement. On the facts of that case, he held that the order requiring a suspension of a building was not sufficient in his opinion to strike at the root of the arrangement.

The lease at that time was for more than 90 years to run and though it could not be said how long the way would run and the emergency regulations were to last, the length of the interruption so caused was presumably a small fraction of the whole term. Frustration, as he observed,

"where it exists, brings the whole arrangement to an inevitable end forthwith. Here, the lease itself contemplates that rent may be payable although no building is going on, and I cannot regard the interruption which has arisen as such as to destroy the identity of the arrangement or make it unreasonable to carry out the lease according to its terms as soon as the interruption is over.

This is the nature of the test for frustration suggested in the well-known case of Metropolitan Water Board v. Dick Kerr and Co. Ltd."

In this view of the matter, it may not be necessary to go into the question of the adjustment of the rights and liabilities of the parties to a frustrated contract. But even on the assumption that there was a temporary suspension of the contract, the parties to a frustrated contract are only released from fulfilment of the further performance.

50. In the case of Chandler v. Webster (1904) 1 KB 493, it was held by the Court of appeal that any loss arising from the termination of the contract must lay where it has failed. In this case the defendant agreed to let a room in Pall Mall to the plaintiff for the purpose of viewing the procession on the coronation of 1902 for the sum of 141 lb. 15 s. By the terms of the contract, the price of the room was payable immediately. The plaintiff paid 100 lb. and the balance was to be paid when the contract was discharged. It was held that not only the plaintiff was not entitled to recover the 100 lb. which he had paid, but also the defendant was entitled to payment of the balance of 41 lb. 15 s.

This was the law in England till this was overruled by the House of Lords in the case of Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., reported in 1943 AC 32. This view of the Chandler v. Webster case (1904) 1 KB 493 was inconsistent with the law prevalent in Scotland and under the Roman law as well. But the House

of Lords case was confined to the fact of that particular case and the House of Lords clearly recognized the rule that money paid cannot be recovered where the interpretation is that the party agreed to pay the money even if the frustration stood. In that case the House of Lords admitted that the question of the liability of the parties under a frustrated contract could only be dealt with by the legislature. This case was further based on the failure of total consideration. The legislation in England therefore stepped in and the Law Reform (Frustrated Contract) Act 1943 was enacted.

51. I have only referred to these cases to show that the right of the plaintiff can only arise on the termination of the contract whether on the ground of frustration u/s 56 of the Contract Act or on the ground that the contingency on the happening of which the plaintiff was bound to perform his part of the promise did not happen, or the substratum of the contract was lost. The right of the plaintiff to recover back the fee paid cannot arise on the mere, temporary suspension of the business when admittedly the contract subsisted.

The plaintiff could only claim the refund under the contract and not on account of the termination of the contract. In the present case therefore, unless the plaintiff succeeds in establishing that there was an express provision in the contract that if the business is stopped for a certain period, the plaintiff will be entitled to the refund of the proportionate fee, he cannot claim the refund under the contract. Any such claim could only be for damages.

52. In the case of French Marine v. Compagnie Napolitaine D''eclairage Et De Chauffage Par Le Gaz (1921) 2 AC 494, the steamer was chartered for four months by a charterparty which provided for payment of a fixed hire per month and pro rata for any fractional part of a month until redelivery to owners. Redelivery was to be at a United Kingdom coal port. If the steamer was on a voyage at the expiry of the period fixed by the charter, the charterers were to have the use of the steamer at the rate and on the conditions therein stipulated to enable them to complete the voyage provided that the voyage was reasonably calculated to be completed about the time fixed for the termination of the charter.

Provisions were further made for the cesser of hire in the event of a breakdown of machinery or of the steamer being lost or missing. The period fixed by the charter expired on 10-8-1919. In July 1919, the charterers loaded the steamer at Antwerp with cargo for Toulon with the intention that she should return to Great Britain with a cargo from Toulon. The steamer arrived at Toulon, but the discharge of her cargo was not completed until August, 16, when she was requisitioned by the Shipping Controller and sent to Australia.

The question which arose for determination in this case was whether the Marine Company were liable to pay the full month''s hire or they were only liable to pay hire from 10th August to 16th August, as the contract was frustrated on the 16th August

when the ship was sent to Australia. According to the French Marine Company, the condition was that the steamer could not be redelivered to the owners at the United Kingdom Coal Port on account of the supervening event; the contract stood frustrated on the 16th August and therefore the Marine Company was only liable to pay freight from 10th to 16th August, the date on which the steamer was delivered to the owners at Toulon.

It was held that the Company was liable to pay full mouth''s hire on the 10th August and that the charterers were not entitled to a pro rata adjustment by reason of the frustration of the adventure. This case was considered in a later case of the House of Lords in 1943 to which I have already referred and was distinguished on two grounds. Firstly that in this case the contract provided for certain events on which the freight was to cease, but not for the particular event in which the contract terminated and secondly that it was treated to be a case of partial failure of consideration.

In the present case also, Having regard to the terms of the contract, the fee became payable in the month of June and July on the first of the month when the contract was subsisting. The liability arose to pay the entire fee for the month and the deduction was made from the advance payment as the fee became payable for the whole month on 1st June and July. Even holding that the contract was frustrated on the 19th June, that will not affect the liability of the plaintiff to pay the license fee for the whole month.

Similarly, if it be held that for the part of the month of July, the contract was ineffective, that will not affect the liability under the contract of the plaintiff to pay up the entire license fee for the month of July. Having considered the whole matter, I fail to find any legal basis for the claim of the plaintiff to get the refund of the fee and my conclusions are that under the terms of the license, viewed in the light of the surrounding circumstances, the fee was payable in advance every month and that there was nothing in the contract expressly to the effect that the license will cease if the Government failed to supply the liquor.

There is nothing in the contract either that on the temporary failure of the supply of the liquor, the plaintiff will be entitled to refund of the license fee pro rata. The plaintiff therefore is not entitled to claim refund on the basis of the contract. The plaintiff is also not entitled, in my opinion, to claim the refund on the ground that the contract was frustrated or otherwise came to an end due to certain supervening event.

Firstly that the contract admittedly subsisted throughout its full period and that at no stage it came to an end either on account of the supervening event u/s 56 of the Contract Act or on account of the contract being ineffective as it was a contingent contract and the contingency did not happen and secondly that even if the contract was frustrated on the 19th June and revived again on 22nd July, the parties were

only relieved of their responsibilities under the contract after the frustration, but could not claim the money which has already been paid in accordance with the terms of the subsisting contract. Cases where the contract is terminated on account of frustrating event or where there is a total failure of the consideration stand on a different footing.

53. I am, therefore, of the opinion, that the appeal should be dismissed with costs.