(1961) 03 MAD CK 0048

Madras High Court

Case No: Appeal No. 101 of 1958

Sri Amuruvi Perumal Devasthanam		APPELLANT
	Vs	
K.R. Sabapathi Pillai and Another		RESPONDENT

Date of Decision: March 14, 1961

Acts Referred:

- Contract Act, 1872 - Section 56
- Representation of the People Act, 1951 - Section 7

Citation: AIR 1962 Mad 132

Hon'ble Judges: Venkatadri, J; Jagadisan, J

Bench: Division Bench

Judgement

Venkatadri, J.

(1) This in an appeal by the plaintiff against the judgment and decree in O. S. No. 49 of 1956 on the file of the Sub Court, Mayarvaram. The plaintiff Sri Amuruvi Perumal Devastanam at Teralandur filed a suit for recovery of a sum of Rs. 21744-11-4, being arrears of lease payable by the defendants. The learned Subordinate Judge, Mayavaram, decreed the suit for Rs. 7422. Now the appeal is filed for the disallowed portion of the claim by the appellant.

(2) The facts in this case are the following :

The plaintiff-devastanam possesses the properties described in schedules A to A-2 to the plaint. At the time of the suit the plaintiff was represented by its trustee Sri Raghavan, who was validly appointed by the Hindu Religious and Charitable Endowments department. The devastanam as usual leased the suit lands in open auction held on 26-6-1952 as per the table Endowments Act for three faslis 1362, 1363 and 1364 (1952), 1953 and 1954) subject to the terms and conditions prescribed in the lease auction notice. In the auction held on 26-6-1952 in the

presence of the Inspector by the Devastanam authorities, the 2nd defendant was the highest bidder for 2536 kalams of paddy and 323 bundles of straw as annual rental for the said lands. The said bid was accepted by the plaintiff Devastanam and was duly confirmed by the Commissioner, Hindu Religious and Charitable Endowments, Madras.

Accordingly, a lease was executed on 31-8-1952 by the plaintiff devastanam, which was then represented by the managing trustee N. Subramania Pillai, and the defendants. Though the 2nd defendant was the highest bidder the first defendant also joined the 2nd defendant in executing the lease deed and has also given his properties as security for the due performance of the conditions of the lese. The main terms and conditions of the lease are (a) that the defendants should deliver unconditionally 2536 kalams of paddy and 323 bundles of straw as rent due for each of the faslis 1362, 1363 and 1364 (b) that the defendants should not under any circumstances claim any remission in the rent due and payable to Devastanam authorities, and (c)that the defendants also have no right or claim to remission on behalf of sub-tenants under their responsibility.

The plaintiff further states, that at the time when the Devastanam properties were leased in open auction on 26-6-1952, the defendants were also aware of the agrarian conditions prevailing in the Tanjore district and the contemplation of the Government to introduce a legislation in regard to the quantum of the rent payable by the tenants to their landlords. AS expected the Governor of Madras promulgated Ordinance IV of 1952 called the Tanjore Tenants and Panniyal (Protection) Ordinance 1952, on 23-8-1952. Therefore, on the date of the execution of the lease deed, the defendants were aware of Ordinance IV of 1952. After the execution of the lease deed the defendants committed default in paying the full rent payable to the plaintiff with the result that at the end of the lease there was a large accumulation of arrears of paddy and bundles of straw, which the plaintiff estimates at a sum of Rs. 21,744-11-4. After the expiry of the lease period, the defendants surrendered possession of the demised lands, but neglected to pay the arrears and failed to comply with the terms of the lease deed. The plaintiff called upon the defendants to clear the arrears due and payable by them to the plaintiff-devastanam but they did not accede to the r request with the result that the plaintiff filed the present suit for the recovery of the said amount from the defendants.

(3) The defence set up by the respondents (defendants) was that at the time when they entered into the lease agreement with the plaintiff-devastanam, Ordinance V of 1952 had come into force and the ordinance was subsequently repealed and replaced by a regular Act XIV of 1952 called the Tanjore Tenants and Pannaiyal Protection Act 1952, which came into force on 21-12-1952, the result of which was that the tenants were entitled to remain in possession of the lands and get the benefits of the said. Act The defendants were not able to do pannai cultivation nor collect the usual rents from the tenants. On the other hand all the tenants filed

applications before the Conciliation Officer for fixation of fair rent under the provisions of the said Act; the tenants who were evicted by the defendants applied for restoration of the land and some of the tenants claimed remission on account of adverse season and also wanted division of the produce according to the provisions of the Act.

In addition to this the defendants suffered loss on account of the heavy cyclone on 30-1-1952. (1953?) The defendants also stated that whatever amount they had collected from the tenants they had paid to the last pie to the plaintiff-devastanam. They claimed a remission of rent of 221/2 per cent for the year 1952-23 and a 15 per cent reduction of rent for faslis 1363 and 1364. They denied their liability to pay the arrears on account of the passing of the Act XIV of 1952 which prevented them from realising the contractual rent from the tenants.

(4) On these pleadings the learned Subordinate Judge of Mayuram framed as many as eight issues of which the important issues are:

1. Whether the defendants are not liable to measure the rent as per the lease deed executed by them to the plaintiff for all or any of the reasons stated by them?

2. Whether the defendants are entitled to a remission of 221/2 per cent in the rent agreed for 1952-53?

3. Whether the defendants are entitled to 15 per cent remission in the rent agreed for faslis 1363 and 1364?

The learned Subordinate Judge gave a finding that as the defendants received only the fair rent under Act XIV of 1952 from their sub-tenants it was but just and proper that the plaintiff devastanam should also receive the same fair rent which the defendants have received from their sub-tenants. In effect, he directed the plaintiff to take from the defendants only whatever rent they have collected from their sub-tenants under Act XIV of 1952. He further held that the defendants are bound to pay to the plaintiff only the fair rent fixed by the Conciliation Officer and that the plaintiff was not entitled to claim anything more than that, much less the rent fixed in the rent deed, Ex. A. 1. Finally he gave a decree for a sum of Rs. 7422-1-4 with proportionate costs and dismissed the rest of the claim without castes. Now, as stated already, the appeal is preferred by the plaintiff for the disallowed portion of the arrears of lease payable by the defendant.

(5) The questions for our consideration in this appeal are (1) whether the defendants are liable to pay the rent fixed in the lease deed notwithstanding the promulgation of Ordinance IV of 1952, which was subsequently repealed and replaced by Act XIV of 1952, and (2) whether the plaintiff-devastanam is bound to receive only the fair rent fixed by the Conciliation Officer.

(6) Mr. Sundaralingam, the learned counsel for the appellant, contended that the defendants are bound to pay the rent fixed under the lease deed. The defendants

were aware of the conditions then prevailing in the District of Tanjore. The subsequent promulgation of the Ordinance after the defendants were declared the highest bidders in the public auction will not relieve them from discharging their obligations under the lease agreement entered into between the defendants with the plaintiff-devastanam. Further, the lease is an unconditional lease and they should not claim any remission or concession in regard to the rent payable to the devastanam. The defendants had taken full responsibility in realising the rent from the tenants or taking possession of the lands themselves from the tenants and do pannai cultivation. The plaintiff-devasstanam is not at all concerned whether the defendants were able to collect full rent or not.

(7) Mr. Ramamurthi, learned counsel for the respondents on the other hand, raised before us for the first time the argument that there was an impossibility of performance of the obligations by the defendants on account of the sudden promulgation of the Ordinance IV of 1952 just before the lease was executed and the subsequent passing of the regular Act XIV of 1952 replacing the Ordinance. His clients, according to him, were taken by surprise by these statutes with the result that they were virtually prevented from fulfilling the terms of the contract. The tenants taking advantage of the provisions of the Act filed an application before the Conciliation officer and had the fair rent fixed. The defendants were not able to do pannai cultivation so as to enable them to pay the rent stipulated in the rental agreement to the devastanam. As they were prohibited by the Act from collecting the contractual rent from the tenants it has not become possible for them to observe the conditions of the lease. In any event, they are entitled to remission for the lease period as the plaintiff devastanam itself promised at the time of the execution of the lease deed that it would settle the matter later even though the Act might come into force.

(8) In regard to the first contention of Mr. Ramamurthi, that his clients w ere taken by surprise by the sudden promulgation of Ordinance IV of 1952 and the subsequent passing of Act XIV of 1952, we are not very much impressed with his plea. At the relevant period there were agrarian troubles, especially in the Tanjore district. In the year 1950 the Government had appointed a Committee headed by Mr. M. V. Subramaniam I. C. S., to report on land reforms to be effected. He submitted his report suggesting that the landlord''s share of rent should be 45 and that of the tenant 55. The report was published on 1-7-1951.

(9) In Santhanakrishna Odayar Vs. Vaithilingam and Others, , the question that arose for decision before a Bench of this court consisting of the learned Chief Justice and Venkatarama Aiyar J., was the validity of the Tanjore Tenants and Pannaiyal Protection Ordinance IV of 1952, which was modified by Ordinances V and VI of 1952. Dealing with the background for the ordinance and Act XIV of 1952 Vnkatarama Aiyar J., observed at page 327 (of Mad LJ) : (at p. 53 AIR),

"The tenants all over the district started an agitation that the recommendation contained in the Subramaniam report should immediately be given effect to. On the other hand, the landlords who were deeply dissatisfied with the proposals contained therein decided to stop the tenants and start personal cultivation with hired labor imported from Ramand and other outlying district. The tenants and panniyals who were thus frustrated in their attempts at getting better terms took to violence as a means of achieving their ends. There were widespread disorders resulting in theft, arson and murder and proceedings had to be taken under the provisions of the Criminal Procedure Code for maintain order and ensuring security of life and property. It was during this state of emergency that the Government promulgated on 23-8-1952, Ordinance IV of 1952. The preamble landowners on the hand and tenants and laborers on the other hand become stained, that there were displacements of tenants and dismissal of farm laborers resulting in agrarian crimes and disturbances, that the situation threatened to cause deterioration in agricultural production and that it was necessary to take immediate action in regard to the matter.... This Ordinance after having undergone modifications and alteration under Ordinances V and VI of 1952 was eventually replaced by an Act of the Madras Legislature called the Tanjore Tenants and Panniyal Protection Act XIV of 1952."

(10) In the face of the above observations made by Venkatarma Aiyar J., with regard to the back-ground for the Act, it is impossible to believe that the defendants were taken by surprise and that they were unaware that some legislation would be introduced to settle the grain problem between the landlords and the tenants. On the other hand, we are convinced that the defendants must have been aware on the date of the lease deed of the impending legislation in regard to the dispute between the landlords and tenants.

(11) Further, the defendants did not take the plea of impossibility of performance in clear terms in the written statement; nor did they put forth their case on the principle of frustration before the learned Subordinate Judge. We have seen the written statement and it is impossible for us to say that the defendants took this defence of impossibility of performance of contract in the written statement. On pursuing the judgment of the learned Subordinate Judge carefully, we are also convinced that the advocate for the defendants in the lower court did not at all advance his arguments an the lines now raised by Mr. Ramamurthi, that is impossibility of performance, or in other words, the special defence of frustration of contract, if not pleaded by a party, the opposite party gets no opportunity to show that frustration was gets no opportunity to sh0w that frustration was due to the neglect or default of the party pleading the defence. The plea of impossibility of performance is one form of discharge of contract as pleaded by Mr. Ramamurthi. If the defendant really wanted to plead that the contract was discharged on the principle of frustration, they should have stated so in their written statement. As pointed in Mullah''s C.P.C., 12th Edn., volume 1 page 582,

"Where he (the defendant) alleges that he is released from or exonerated and discharged from, the performance his contract, he must in his written statement give sufficient information to his opponent as to how and when he was so released or discharged."

In the first place, in the present case, the facts are not set out clearly in the written statement to make out a case of frustration. Secondly the term ''frustration'' or impossibility of performance is nowhere used in the written statement. Thirdly, it has not been argued in the court below. If the plea of frustration as discharging a contract was specifically pleaded in the written statement, the plaintiff would have taken the opportunity to show that it is not a case of frustration or impossibility of performance of the contract. He could have proved that the doctrine of frustration of the contract fails because the supervening event which is said to have made the performance of the contract impossible was with the contemplation of the members and was before their eyes. AS the defendants have not taken this definite plea of impossibility of performance, we propose not to taken seriously this argument advanced by Mr. Ramamurti. We will however consider whether there was impossibility of performance or whether the doctrine of frustration of contact can be applied in the instant case.

(12) According to Ramamurthi the facts to support the theory of frustration or impossibility of performance are that after the defendants entered into a lease agreement with the plaintiff devastanam, Act XIV of 1952 came into force with the result that the defendants were prevented for collecting the contractual rent from the tenants; they were prohibited from enforcing their terms of the lease to their tenants; the tenants themselves took advantage of the provisions of the Act by filing an application before the Conciliation officer for fixation of fair rent and it has become impossible for the defendants to comply with the terms of the lease agreement entered into with the plaintiff devastanam.

(13) Now we have to consider whether these facts are enough in law to apply to the theory of frustration or to declare that the contract has become impossible of performance. The principal thing to be considered by the court in each case is whether the parties agreed to be bound by the contract notwithstanding supervening circumstances in which case no question of frustration arises. In the absence of such an agreement, the court must see how far the altered circumstances affect the contract itself and the working of it. The nature and the terms of the contract must be noted. Before applying the doctrine, the first duty is to ascertain the facts forming the basis of the contract and to see how far the change in the circumstances is such as would remove the very foundation of the contract itself. The court must as a fact determine whether the circumstances did exist and if so whether they are sufficient to hold that the parties are absolved from their obligation s under the contract. It is the essence of the doctrine that the event which causes frustration must have occurred without the fault of either party.

Therefore, the court ought to see whether it is a case of self-induced frustration in which case there will be no breach at all. The theory of frustration cannot be applied in the instant case as there is no destruction of the specific thing necessary for the performance of the contract; nor can we say that the performance has become impossible by reason of the incapacity of a party. The defendants were aware of the promulgation of Ordinance IV of 1952 when they entered into the agreement. The relationship of landlord and tenant continued even after the promulgation of the Ordinance and after the passing of Act XIV of 1952. The defendants were not prevented from collecting the rents from their tenants. The plaintiff is not at all concerned with how the d defendants collect the rents from their tenants or in hat manner the defendants would settle the rents with the tenants and further the plaintiff devastanam cannot be blamed if the provisions of Act XIV of 1952 benefit the tenants and deprive the defendants of their right to collect the contractual rent. The defendants took the risk of entering into a lease with the tenants when they knew full well that the Ordinance had come into force. The plea of frustration in such a case should fail. As observed by Lord Strendale M. R., in Mertens v. Home Freeholds Co., 1921 2 KB 526,

"It has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself."

Similarly in AIR 1935 128 (Privy Council) Lord Wright laid it down at page 530 (of AC) : (at p. 131 of AIR),

"the essence of frustration is that it should not be due to the act or election of the party."

One of us (Jagadisan J.,) had occasion to consider the question of impossibility of performance or frustration in Sri Mahalingaswami Devasthanam v. Sambanda Mudaliar, S. A. No. 366 of 1958 : AIR 1962 Mad 122. There also a similar religious institution like the plaintiff leased out a large block of lands belonging to it to a lessee. The lessee executed an unconditional lease deed to the devastanam. The lessee committed default in payment of arrears of rent and a suit was filed by the devastanam for the recovery of the arrears of rent. The lessee raised a defence similar to the one now raised by the defendants that after the promulgation of the Ordinance IV of 1952 and the passing of Act XIV of 1952, he was not able to collect the contractual rent from the tenants, as they had filed applications before the Conciliation officer for fixation of fair rent. My learned brother (Jabadisan J.) observed,

"It must be mentioned even at the outset that having regard to the terms of the lease deed Ex. A-1 in and by which the lessee undertook to pay the stipulated rent unconditionally, despite act of State or God the court has no power of jurisdiction to relieve the lessee from the obligation undertaken by him on what may be called equitable grounds. The law on this subject must now be held to have been finally

laid down by a recent decision of a Bench of this Court in A. S. No. 1172 of 1953 dated 2-5-1958 (Mad)..... Ramachandra Iyer J., who delivered the judgment in that case observed as follows: "It is clear from the above decisions that the lessee would be liable to pay in accordance with contract and that there is no power in court to relieve him against his obligations under it....."

In Wazir Sultan and Sons Vs. P. Satchithananda Rao and Others, , Ramaswami J., also held that, where the lease was absolute and unconditional, the lessee was liable to pay in accordance with the contract and that there was no power in the court to relieve him against the obligation under it invoking any equitable principles. The learned Judge followed the decision of the Bench in A. S. No. 1172 of 1953 (Mad) referred to above. Therefore, it has now been settled that the lessee is not entitled to any remission merely because of the promulgation of the ordinance IV of 1952 and the passing of Act XIV of 1952 after he executed the lease deed in favour of the plaintiff devastanam.

(14) Then, in regard to the contention about the applicability of the doctrine of impossibility of performance, Jagadisan J., reviewed the case law or the subject and observed,

"It cannot be contended in the present case by the lessee that Madras Act XIV of 1952 rendered impossible the fulfillment of his contract to pay rent to the lessor, the devastanam. The lessee is not a cultivating tenant within the meaning of the said enactment. He is a mere intermediary who, having taken on lease a large extent of properties as a commercial or speculative venture, was in effect functioning as an Ijaradar or a farmer of rent intending to make profit.... The contract of lease therefore cannot be said to have become impossible of performance or rendered unlawful by the said enactment. On the plain terms of S. 56 of the Indian Contract Act, it is clear that the lessee cannot claim any relief under that section."

A similar case was decided by a Bench of the Andhra High Court consisting of Subba Rao C. J., and Jaganmohan Reddy, J. In that case Mallayya v. Kondappa Naidu, 1958-1 Andh WR 180, the facts are : One Venkataramanayya was the proprietor of Jammavaram village. He executed a usufructuary mortgage of the said village in favour of the plaintiff purchased the right, title and interest of the 2nd defendant. Thereafter the plaintiff leased the village to the defendant for a period of six years. In the meantime the leased lands had been taken over by the Government under the madras Estates (Abolition and Conversion into Ryotwari) Act. When the plaintiff filed a suit for the recovery of the rent due to him, the defendants pleaded that it had become impossible for them to perform the terms of the lease deed and therefore the suit was not maintainable. Subba Rao C. J., who delivered the judgment in that case, while considering the question whether the defendants were relieved of their obligations under the lease deed by reason of the provisions of S. 56 of the Indian Contract Act, referred to the view of the Supreme Court in Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, which was stated

thus:

"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 S. 56 of the Contract Act, taking the word ''impossible'' in its practical and not literal sense. It must be borne in mind, however, that S. 56 lays down a rule` of positive law and does not leave the matter to be determined according to the intentions of the parties."

According to their Lordships of the Supreme Court, the doctrine of frustration as embodied in S. 56 of the Contract Act should be invoked only if the whole purpose or basis of the contract was frustrated by supervening events. Subba Rao C. J., after referring to the above decision of the Supreme Court, observed,

"Even after the Acts came into force, the only result of those Acts was that the ryots were liable to pay only the statutory rent which could only mean that the earlier rents were exorbitant and the statutory rate was the just one. The change in the machinery of collection did not really affect any substantive rights of the defendants..... In the circumstances, we cannot hold that the statutory changes introduced were so fundamental as to be regarded by law to strike at the root of the contract as a whole."

Recently a Bench of the Patna High Court reported in Badri Narain Singh and Others Vs. Kamdeo Prasad Singh and Another, incidentally considered the question of frustration in a petition filed under Representation of the People Act, 1951. There the petitioner contended that the respondent held Ghatwalitenures and they were disqualified as they held office of profit under S. 7 of the Representation of the People Act. The respondent contended that with the acquisition of Ghatwali tenure of office of Ghatwali lapsed and therefore the respondents cannot be said to have held any office of profit under the Government. In other words the respondent contended there is a frustration of contract, and they cannot be said to have held office of a profit. After discussion the nature of Ghatwali tenure and the effect of acquisition of these Ghatwali tenures, their Lordships observed :

"If the view I have expressed above with regard to Ghatwali tenures in the light of the operation of the Land Reforms Act is correct, then having regard to the object and purpose of Ghatwali tenures, the performance of the contract cannot be deemed to be impossible or impracticable. This legislative enactment cannot be said to have wholly upset the very foundation on which the parties rested their bargain. I need hardly observe that if the foundation remains in substance, the contract will continue to be capable of performance. It is true that the changes introduced y the recent enactment have caused diminution in the amount of remuneration. It is one thing to say that the profit or remuneration has diminished and another thing to say that the performance has been rendered impossible. The decrease in the amount of remuneration has the effect of rendering the contract more burdensome. But o attract the doctrine of frustration burdensomeness is not the necessary

consideration; the impossibility of performance of the contract is the true criterion.

In my considered judgment, notwithstanding the acquisition of Ghatwali tenures by the State, both the grant and the office of the Ghatwala subsist even now, though in an altered from, and the performance of the obligations under the contract cannot be said to have become impossible."

(15) It is also settled that the theory of frustration or impossibility of performance of a contract cannot be applied to cases of commercial transactions. I other words, the impossibility referred to in S. 56 is not commercial impossibility. In his treatise on "Impossibility of performance", 1941 Edn. Roy Grenville McElory states at p. 194 under the heading "Commercial Impossibility is not frustration" :

"So far as existing authorities go, no change in economic conditions, however serious, and however deeply it may affect the contract, can by itself amount to impossibility such as to avoid it. There is no implied condition as to ''commercial'' impossibility. It is false and misleading, therefor, to use the term ''frustration'' to describe such a situation."

This question was considered by the House of Lords in the case of Tenants (Lancashire) Ltd., v. Wilson and Co., Ltd. 1917 AC 495. Earl Loreburn put the matter ery clearly,

"I do not consider that even a great rise of price hinders delivery. If that had been intended different language would have been used, and I cannot regard shortage of cash or inability to buy at a remunerative price as a contingency beyond the seller''s control. The argument that a man can be excused from performance of his contract when it becomes ''commercially'' impossible, which is forcibly criticised by Pickford L. J., seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect. The learned author, Roy Granville McElory, also referred to the following observation of Lord Summer in Larrinage and Co., v. Societe Franco Americaine, 1924 29 Com Cas 1 :

"All the uncertainties of a commercial contract can ultimately be expressed, though not very accurately, in terms of money, and rarely, if ever, is it a ground for inferring frustration of an adventure, that the contract has turned out to be a loss or even a commercial disaster for somebody..... No one can tell how long a spell of commercial depression may last; no suspense can be more harassing than vagaries of the foreign exchanges, but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it."

In Halsbury''s Laws of England, Vol. 8, Simonds Edn., at page 186, paragraph 320, it is stated that,

"The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration."

and reference is made to the decision in Hangkam Kwington Wog v. Liu Lan Fong, 1951 AC 707 in support of this proposition. Jagadisan J., when dealing with commercial impossibility in his judgment in S. A. No. 36 of 1958 : (AIR 1962 Mad 122 referred to this decision, and further referred to Blackburn Bobbin Co. Ltd., v. Allen (T. W.) Sons, 1918 1KB 540 & Re Commptoir Commercial, Annersois and Power Son and Co. 1920 1 KB 868, for the proposition that there is no frustration where performance of the contract remains physically and legally possible though commercially unprofitable. Thus the law is settled that the doctrine of impossibility of performance or frustration cannot be applied to cases of commercial transactions. Impossibility. Mere commercial impossibility will not excuse a party from performing the contract. Mere increased cost of performance or losing in a transaction does not make the contract impossible. A man in not prevented from performing his contract by mere economic unprofitableness.

(16) The next question that arises is whether the doctrine of impossibility of performance or the doctrine of frustration can be applied to leases of immovable property, especially to lease of land. This question is still controversial and has not been decided by the House of Lords. The general view seems to be that leases of immovable property are outside the doctrine of frustration. This is based on the fact that a lease creates not merely a contract but also an estate.

(17) In london and Northern Estaes Co., v. Shlesinger, 1916 1 KB 20 the facts are : A flat was leased to a tenant, an Austrian subject who became an alien enemy after the war broke out in 1914. According to the order made by His Majesty in Council in 9-9-1914 "the tenant cannot reside or continue to reside in the said flat". In an action to recover rent accrued due in respect of the flat from the date of the order, Avory, J., adopted the following language of the common Serjeant i giving judgment in this case.

"By the lease the defendants had a right to the personal occupation of the premises, and the right to assign or sublet them to another person in the absence of any reasonable ground for objection. This latter right was of value and might even enable the defendant to let the premises at a profit to himself, and this right was not affected by the Aliens Restriction Order. That order and the statute under which it was made did not avoid the lease, or, make it illegal for an alien enemy to hold a lease of land in a prohibited area. This being so the lease is not extinguished, nor is the defendant''s title as tenant under it put an end to although this personal enjoyment of the premise under it is prohibited."

(17-A) Lush J., observed at page 24,

"It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see nor reason for saying that because this order disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the

agreement. In my opinion it continues vested in him still."

(18) This question whether the doctrine of frustration can be applied to e lease became the subject matter of serious controversy in the House of Lords in Cricklewood property Investment Trust Ltd., V., Leightons Investment Trust Ltd. 1945 1 All ER 352. The f acts in that case were the following. A building lease for a term of 99 years provided for the building of a number of shops on the demised land and contained the usual provisions of such a lease. Owing to the outbreak of War, it became impossible to erect certain of the shops. In action to recover the rent reserved by the lease, the defendants contended that the lease was a contract which had been frustrated and that a building lease was commercial contract to which the doctrine of frustration applied. When the matter came before the court of Appeal, which is r exported in Leightons Investment Trust Ltd., v. Cricklewood Property and Investment Trust Ltd., 1942 2 All ER 580, Asquith J., observed.

"It is not disputed that the doctrine of frustration has no application to an ordinary lease..... A contract may be frustrated, but a demise is more that a contract. It creates an estate in land. It transfers proprietary as well as personal rights. This seems to be just as true of a building lease as of any other kind of lease."

Though it was argued vehemently by the lessee that the building scheme involved in the lease was a broad commercial undertaking capable of frustration, Asquith J., did not apply the doctrine of frustration. There was an appeal against this judgment in the House of Lords, reported in 1945 AC 221 and there was difference of opinion between the Lors themselves and the decision left the broad question of whether the doctrine of frustration can be applied to a lease in a very unsatisfactory position. Viscount Simon L. C., seems to have disagreed with Asquith J., and he observed at page 230 :

"A careful examination of the decided cases to which the Court of Appeal refers satisfies me that it is erroneous to suppose that there is an authority binding on this House to the effect that a lease cannot in any circumstances be ended by frustration. 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 in building is over."

(19) Lord Russel of Killowen observed in his speech thus :

"On the broader question I confess that I am unable to grasp how the doctrine of frustration can ever apply so as to put an end to a lease and the respective liabilities of landlord and tenant thereunder. A lease is much more than a contract. It creates and vests in the lessee an estate or interest in the land, a chattel interest, it is true, but a vested estate or interest none the less."

(20) Lord Wright observed thus at page 241,

"But the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula. I am not, therefore, prepared to state as a universal principle that it can, in no circumstances be applied to a lease."

Lord Porter in his speech observed :

"The exact question for your Lordships, therefore, is not whether the doctrine of frustration applies to lease generally, but, in the circumstances bas this lease been frustrated?.... A lease is more than a contract. It has long been recognised as creating an estate in land and by statute is enacted to do so..... Moreover, the rent is payable for the site and issues out of the land. In these circumstances it obviously is not easy to visualise conditions in which the doctrine of frustration would apply. The land in some form is there and the payment of rent is not prohibited. Some terms of the tenancy may be impossible of performance at least for the time being but the tenancy itself is not thereby necessarily determined. It basis still exist. Building may not be feasible, yet I do not think the tenancy has come out to an end for that reason. But exceptional circumstance might conceivably arise, which could be plausibly put forward as a cause of frustration and until it is necessary to pronounce definitely one way or the other I prefer to reserve the point."

Lord Goddard agreed with Asquith J., that the doctrine of law, usually called frustration, did not apply to a lease. He observed,

"There is no doubt, I think, that the opinion prevails generally in the profession that the doctrine in question does not apply to a lease, and if there is any doubt on the subject I venture to think that it is desirable in the interests of lessors, lessees, and their advisers that it should be resolved."

The noble Lord is of opinion that the decision in 1916-1 KB 20 is correct. He further observed,

"Whatever be the true ground on which the doctrine is based, it is certain that it applied only where the foundation of the contract is destroyed so that performance or further performance is not longer possible. In the case of a lease the foundation of the argument, in my opinion, that the landlord parts with his interest in the deiced property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. So long as the interest remains, in the tenant, there is no frustration though particular use may be prevented. There can also be no doubt that if there be frustration the contract is destroyed so that both parties are released from its bonus. It then, this doctrine applies to a lease some strange and unjust results would follow, though to sue the well known words of Lord Summer in Hirji Mulji v. Cheong Yue Steamship Co., 1926 AC 497, the doctrine..... is..... a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

In the end he agreed with Asquith, J., that the doctrine of frustration cannot be applied to a case of lease of that property. Thus this decision of the House of Lords leaves the broad question whether the doctrine of frustration can be applied to a lease undecided. Two of the Lords have expressed the view that the doctrine can be applied to a lease. Two other Lords have expressed a contrary vie and one Lord expressed no opinion on the question. The result of this conflicting dicta is that until the House of Lords resolve the problem, the judgment of Asquith, J., stand and the doctrine of frustration is excluded in the case of a lease.

(21) As far as our Indian law is concerned, it is a moot point whether the doctrine of frustration can be applied to a lease in India. According to Sec. 56 of the Contract Act, the doctrine of frustration may not be applied to a case of lease. But under Sec. 108(e) of the Transfer of Property Act, where a material part of the property has been destroyed, it is the lessee''s option to treat the lease as void. Even according to this clause, there is not frustration in the sense of the lease automatically coming got an end, but it is left to the lessee to put an end to the lease. In this sense, Sec. 108(3) only partially accepts the doctrine of frustration in its application to a lease. But the a question is, under Sec. 56 of the Contract Act, can we apply this doctrine of frustration in the case of a lease. The earliest case on the point decided by Court in India is Inder Prasad Singh v. Campbell, ILR 7 Cal 474. In that case a contract had been entered into between the plaintiff and the defendant under which the plaintiff agreed to cultivate indigo for the defendant for a specified number of years in certain specified land with respect to the portion of which the plaintiff was a sub-tenant only. During the continuance of the contract, the plaintiff lost possession of these lands as his immediate landlord had failed to pay the rent due from him and had in consequence been ejected by the owner. A Division Bench of the Calcutta High Court held that the prayer of the plaintiff to cancel the contract so far as it related to those lands which had been taken possession of by the owner be terminated on the ground that it had become impossible of performance though no negligence on his part brought the case within Sec. 56 of the Contract Act. That case was decided under S. 56 Contract Act without reference to the Transfer of Property Act. The doctrine of frustration was also considered by Sir Ashutosh Mukkherjee in Ezekial Abraham v. Ramjus Roy, AIR 1921 Cal 305.

(22) In Kshitish Chandra Mondal Vs. Shiba Rani Debi and Others, , Mookerjee, J., applied the doctrine of frustration to a case of a lease. In that case the subject-matter of the lease was completely destroyed. When the landlord took proceedings for the recovery of the land, the defendant in that case raised an objection that though the structure belonging to the landlord was destroyed by fire, still he was entitled to be in possession of the vacant plot of land and that he had a right to put another structure at his expense. The Court upheld the contention of the landlord and applied the doctrine of frustration, holding that the lease had come to an end by the destruction of the structure by fire. Evidently this case must have been decided under Sec. 108(E) of the Transfer of Property Act, read along with Sec.

56 of the Transfer of Property Act, read along with sec. 56 of the Transfer of Property Act. Therefore, we cannot say whether the principle Act. Therefore, we cannot say whether the principle of this case can be applied to agricultural leases.

(23) In Abdul Hashem and Another Vs. Balahari Mondal and Others, , there was a lease of certain premises for a term of ten years. While the lease was in force a notice of requisition issued under Rule 75-A, Defence of India Act was served on the tenant. The said notice required him to place the land and structure at the disposal of the Land Acquisition Collector. The question arose as to whether the landlord or tenant would be entitled to the compensation payable under Sec. 19 of the Defence court for adjudication of this dispute. Mitter, J., observed,

"In the case before us the occurrence was unforeseen and was not contemplated by the parties when the lease was created, not at a time when the tenant was holding over. The first element is present but we are of opinion that the occurrence was not so fundamental as to be regarded in law to strike at the root and destroy the basis of the relationship of landlord and tenant. The requisition deprives the tenant of part of his possession for a time. He could not in law have personal enjoyment of a part of the demised premises during the period of the requisition but personal enjoyment is not a fundamental characteristic of a tenancy."

Finally it was held that the requisition had not the effect of putting an end to the tenancy.

(24) In Tarabai Jivanlal Parekh Vs. Lala Padamchand, , the plaintiff filed as suit for a declaration that the defendant had no right to obtain possession of a certain flat from the Government and for an order against the defendant to hand over possession of the e flat. In that case the defendant was originally a monthly tenant of a flat in a building in Bombay. The flat was requisitioned by the Government and the Government took possession of it from the defendant. Subsequently, the Government derequisitioned the flat and passed an order giving possession of the flat to the party, that is the defendant, from whom the Government had taken possession on the date of the requisition. It was at that stage the plaintiff filed a suit for a declaration as aforesaid. Coyajee, J., after referring to the English authorities on the point, held that,

"possession of Government of a flat under a requisitioning order under Rule 76(a) of the Defence of India Rules, 1939 does not amount either to eviction by title paramount or as frustration of adventure"

and that

"the doctrine of frustration does not apply where other is a lease whether the term is one for fixed period or one which can be terminated by notice to quit, as the estate vested in the lease by the lessee is not extinguished by the order of requisition which is of temporary nature".

(25) All these cases have been reviewed in Mahadeo Prosad Shaw Vs. Calcutta Dyeing and Cleaning Co., . The facts in that case are : the landlord instituted an ejectment suit against his tenant and ex parte decree was passed and possession was delivered to the landlord. But the tenant immediately started proceedings under O. 9 R. 13 of the C.P.C., for setting aside the ex parte decree and the ex parte decree was set aside. While the proceedings were pending, under the order of the Calcutta Corporation one of the structures in which the defendant was the tenant was demolished. The tenant-defendant applied for restitution u/s 144 of the Code after the ex parte decree was set aside. The objection of the plaintiff-landlord was that as the Corporation demolished one of the structures there has been a frustration of the contract within the meaning of Sec. 56 of the Indian Contract Act, and, therefore, no restitution is possible. The objection was overruled by the lower Courts and when the matter came before the High Court, chatterjee, J., expressed his view thus. When a lease is executed, there is transfer of property. Section 56 of the Contract Act would not apply because there is a valid and subsisting contract between there is a valid and subsisting contract between the parteis. Section 108(e) of the Transfer of Property Act is a specific section which deals with the substance of Sec. 56 of the Indian Contract Act would show that the doctrine of frustration as enacted in Sec. 56 is substantially incorporated in Sec. 108(e) of the Transfer of Property Act. The learned Judge observed at page 74 thus :-

"Reading therefore, Sec. 108(e) together with the proviso I cannot but hold that the entire law of frustration of leases is codified under S. 108(e) of the Transfer of Property Act. The result is that under the Contract Act, the contract stand discharged as this is a part of positive law; whereas under the Transfer of Property Act it depends on the option of the lessee. Therefore, the result of frustration, if a lease is to be treated as a contract would contradict the result as stated in Sec. 108(e) because in one case the contract stands automatically discharged and in the other only discharged at the option of the lessee. As the Transfer of Property Act is a special provision regarding leases the general provision as enacted in Sec. 56 of the Contract Act, would not apply in view of the specific provision relating to leases under Sec. 108(e) of the Transfer of Property Act. In that view I hold Sec. 56 of the Contract Act has no application to leases and instead of that Sec. 108(e) will apply so far as frustration relating to leases is concerned."

(26) In Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, though their Lordships did not specifically say that frustration will not be applicable to a case of lease they observed that.

"the rule of frustration can only put an end to purely contractual obligations, but it cannot destroy an estate in land which has already accrued in favour of a contracting party."

Thus though the law is not settled, the general trend o f opinion both in the House of Lords and in our Courts in India seems to be that the doctrine of frustration or

impossibility of performance will not be applicable to cases of agricultural leases. On the facts in this case, we hold that the defendants are not entitled to claim any remission as the lease is an unconditional lease. The defendants will not be permitted to raise the question of impossibility of performance as they did not specifically plead it in their written statement and even assuming that they had raised the defence, there is no impossibility of performance in this case as the relationship of landlord and tenant continued as the substance of the contract has not disappeared and the basis of the contract has not been demolished. Further as stated already, the theory of frustration cannot be applied to a commercial adventure and being an agricultural lease, there is no question no impossibility of performance or frustration. Therefore the plaintiffs are entitled to collect the rent as per the agreement, EX. A-1 in the case. We accordingly grant a decree for the plaintiff for the disallowed portion of the claim.

(27) Mr. Sundarlingam further contended that the prince of paddy and straw fixed by the learned Subordinate Judge is not correct. We do not however see any reason to interfere with the price fixed by the learned Subordinate Judge. In the result the appeal is allowed with costs.

(28) Appeal allowed.