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# FORCE MAJEURE IN THE KATZENJAMMER OF COVID-19

***Paras Sharma**

**Abstract**

*One of the most recent events that has left the entire mankind in fear and trepidation is the fallout of the novel coronavirus. COVID- 19 has not only placed a huge billboard of 'Shut Down' on the entire earth but is also proving to be the worst ephialtes for the entire mankind. Apart from the devastating impact of the virus on the humans, its outreach has also extended its dreadful clutches to the neck of the commerce and business round the globe. Due to the outbreak of the COVID- 19 pandemic and the consequent lockdowns throughout the world, the commercial world is in a state of complete havoc. The businesses are not being able to fulfill their contractual obligations. Amidst this situation, a term that has assumed much importance in the commercial realm is Force Majeure. Many counter-parties to a contract these days are trying to escape their liabilities under a contract by relying on the force majeure clauses. The question of relevance thus arises is that whether the COVID-19 is a force majeure event? And if so what factors would be relied upon in answering that question. This work aims to analyze the concept of force majeure under the contracts vis-à-vis the COVID-19 pandemic. This work also attempts to analyze a very recent case decided by the Hon'ble Bombay High Court in relation to the force majeure amidst the coronavirus havoc.*

**Key Words:** Coronavirus, Contracts, COVID-19, Force Majeure, Frustration

## I. Introduction

The up-rise of the global Coronavirus (COVID-19) pandemic is resulting in the unprecedented disruptions in the international economy. With the continuance of these disruptions worldwide, many industries are getting seriously affected. *Inter alia*, one of the most significant issues in the wake of the current pandemic scenario is associated with the contracts, which form the gist of the commercial business market round the globe. Contracts are one of the most essential instruments in the everyday commercial environment. Almost all the commercial transactions are undertaken by the medium of contracts in one way or the other. However, the supply chain disruptions caused by the COVID-19 pandemic makes it likely that the performance under many contracts would be disturbed, delayed, interrupted or may even be cancelled. This may be so, either because Covid-19 has legitimately prevented

the counterparties from performing their contractual obligations, or because they are seeking to use it as an excuse to detach themselves from an unfavorable deal. All the companies worldwide are now forced to assess not only their own, but also their counter-parties' contractual rights, obligations, and remedies in case performance is delayed or performance becomes too difficult or impossible. Parties use the force majeure clauses in the contract to escape liability. A careful examination of rarely-invoked force majeure clauses and related doctrines of impossibility of performance of contracts are critical for the understanding these uncertain times.

## II. Origin of Novel COVID-19

The outbreak of the novel coronavirus (COVID-19) is not hidden from anyone. The deadly virus has resulted in the closure of the entire world. COVID- 19 is a deadly disease which is highly communicable in nature and is caused by a newly discovered coronavirus.[1] As per the world health organization the virus is said to have originated from the seafood market in Wuhan, China, in December 2019 and spread round the globe. Many researches have proposed that Bats are the primary reservoirs for carrying the virus and it is through bats that corona virus began to spread in humans.[2] Even though the immediate cause of origin of virus in human beings is still debatable yet, the rapid human to human transfer of the virus has been confirmed widely. The virus contains a crown-like upper layer thus deriving the term corona virus. Corona viruses are of multiple types. The SARS epidemic of 2005 was also a result of a corona virus. COVID-19 is caused by the most recent type of corona virus i.e. SARS-Cov-2 (Severe Acute Respiratory Syndrome- Coronavirus-2).

Even though many agencies and institutions worldwide have confirmed the natural origin of the COVID-19 yet there are many theories coming up that put up a challenge to the natural origin of the virus. Across the world many institutions have put forward a theory that COVID-19 is a sort of Biological weapon which is the lab product of China itself. Moreover, the sole rise of the China amidst the deadly situations worldwide also points towards the COVID-19 being a weapon used in the 'super-power' race. However, due the absence of any

* University Institute of Laws, Panjab University Regional Centre (PURC), Ludhiana, Punjab

[1] World Health Organization, Overview ,Coronavirus (Apr.19, 2020, 12:05 PM), https://www.who.int/health-topics/coronavirus#tab=tab_1.

[2] *Id.*

concrete evidence in this regard, the virus is believed to have been originated naturally. Moreover, many researches have also proved that the COVID-19 is a product of natural evolution and is not lab made.

**III. Socio-Economic Impact of COVID-19: A Brief**

Health is the real prosperity in any country and illness and disease stifles production and growth. The latter is what exactly is happening around the world. The unprecedented outbreak of the novel coronavirus has proved to be devastating to the mankind. It is due to this detrimental character of the virus that the World Health Organization has declared it a global pandemic on March 11, 2020. The pandemic has not only forced the people across different countries to be locked down but have also caused one of the biggest economic slowdown throughout the history. Constant fear of health and life is one of the major psychological situations of almost everybody today. Worldwide the death rates due to the COVID-19 are proving to be the worst possible nightmare of the mankind. As a preventive measure to the spread of the virus, many economies are completely shut down and people are confined to the four walls of their own houses.

In India, the first major step towards the economic closure took place in the shape of 'Janta Curfew' organized on March 22, 2020 followed by a complete nationwide lockdown for twenty-one days from March 24, 2020 to April 14, 2020. On April 14, 2020 the lockdown was further extended for nineteen days till May 3, 2020. Still it is not sure whether or not the situations normalize or not.

Such lockdowns throughout the globe even though proved as a panacea to the environment yet have proved detrimental for the economies worldwide. Many economists throughout the world are coming forward with the concept of coronavirus recession.

Among other things, another area which is facing a lot of issues to the rise of COVID-19 is the commercial sector around the world. Due to the unprecedented and sudden outbreak of the virus, the commercial sector has faced serious problems. *Inter alia,* performance of contracts has also become a significant concern as many parties to the contracts are relying upon the force majeure clauses to escape their obligations under the contracts due to the COVID- 19. It is thus important to understand the scope and applicability of force majeure clauses in the current scenario.

**IV. Force Majeure: Meaning thereof**

Force majeure, simply stating, means "superior force."[3] According to the Cambridge dictionary, it is an unexpected event such as a war crime, or an earthquake which prevents someone from doing something that is written in a legal agreement.[4] It is primarily an event which is beyond the human control. Force Majeure is a civil law concept having it origin from the French Napoleonic Code. The term force majeure has its origin in the Roman law as *vis major* and *casus fortuitous*. It was referred to as an unforeseeable and irresistible event that excused a debtor of performance of his obligations arising out of a contract.[5] The concept was later on adopted by civil law countries and today it has gained way much importance in the commercial realm. In the common law, force majeure doctrine was developed over the years starting off in the nineteenth century as a contractual synonym of the common law doctrine of 'legal impossibility' and with time moving in the direction of 'doctrine of impracticability'.[6] This clause dissolves the parties from contractual liabilities on the happening of a force majeure event. It must be noted however that a force majeure clause does not excuse the parties' non-performance entirely but only suspends it to the duration of the event which lead to the non-performance. Most commercial agreements nowadays include a force majeure clause. However there may be a certain situations where no express provision or clause is provided in an agreement.

Where a force majeure clause is not specifically mentioned in the agreement, certain other provisions relating to the frustration of the contracts can be resorted to. In Indian context, the law relating to aforesaid scenario is contained in sections 32 and 56 of The Indian Contract Act, 1872. Section 56 of the Indian Contract Act provides for the provisions relating to the agreements to do impossible acts. Typically any agreement would not be made to do something impossible rather these agreements are formulated for something which is deemed to be practically possible. It only becomes impossible on the happening of certain unprecedented event. Section 56, *inter alia,* provides that: "An agreement to do an act impossible in itself is void…A contract to do an act which, after the contract is made,

[3] *Force Majeure,* Black's Law Dictionary (9th ed. 2009).
[4] *Force Majeure,* Cambridge Dictionary (4th ed. 2013).
[5] W.E. Cooper, The South African Law of Landlord and Tenant 181 (2nd edition, 1973).
[6] P.J.M. Declerq, *Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability,* 15 J L & C 213, 214(1995).

becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful..."[7]. Thus relief from non-performance in case of force majeure event is not restricted only to an express inclusion of a force majeure clause in an agreement but it can be claimed under the letter and spirit of section 56 as well. Further, section 32 provides, *inter alia, "*...Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void…*"*[8]

## V. Force Majeure- A Judicial Outlook

Prior to the judgment of ***Taylor v. Caldwell***[9]***,*** the English law of force majeure was extremely rigid. Simply put, a contract had to be performed after its execution in all costs, nonetheless the fact that the contract becomes impossible to be performed owing to some unforeseen event which is beyond human agency. This rigidity of the common law was loosened to much extent when a liberal decision was taken in ***Taylor's case.*** In this case, an event organizer entered into a contract with a person to rent a music hall and gardens for an event for some days. The event organizer agreed to pay the owner, a sum of money each day. However, an accidental fire destroyed the music hall, before the first event could take place. The contract did not include any provision for governing such unexpected events. It was thus held by the court that the purpose of the contract was to allow the event organizer to use the hall for the events. But without the hall, the purpose of the contract stands frustrated. It was observed that if the performance of a contract becomes impossible due some unforeseeable event, in the sense that the fundamental basis of the contract ceases to exist, such contract need not be further performed. It would be unjust to insisting upon such performance. While the case did not inversed the existing principle of *pacta sunt servanda* in common law, it did introduce the notion that there can exist mitigating factors to discharge an otherwise absolute contract.

[7] Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872 (India) § 56.
[8] Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872 (India) § 32.
[9] Taylor v. Caldwell **(1861-73) All ER Rep 24.**

Many years later the Supreme Court of the United States also assented to the same rule in *The Tornado Case.* [10] *In this case,* a ship named the *Tornado* was required to deliver freight to some place as contemplated by a contract. The ship however, accidentally caught fire before it commenced its voyage and was deemed unseaworthy. The parties had failed to include a clause in their contract governing this situation akin to *Taylor's case*. The Supreme Court expressly adopted the rule laid down in *Taylor* that, where the agreement of two contracting parties contemplate a specific set of circumstances that can no longer be performed, both parties are excused from performance.

In the Indian context, the law has been laid down in the celebrated judgment of *Satyabrata Ghose v. Mugneeram Bangur & Co.*[11] A broad principle relating to the force majeure events evolved which, simply put, is the narrow construction of such clauses in Indian context. The apex court held that the word "Impossible" used in section 56 of the Indian Contract Act, 1872 is not used in the sense of physical or literal impossibility, *viz.* strikes, commercial hardships etc., but ultimately an impossibility that would render the performance of a contract impossible. In order to determine whether a force majeure event has occurred or not, it is not necessary that the performance of obligation under the contract should literally become impossible. Rather it will also cover a mere impracticality of performance. Where a troublesome event or an unforeseen change of conditions upsets the very fundamentals or the very basis upon which the parties entered into the agreement, the same may be considered as the 'impossibility' to do as agreed. Further a very crucial point was laid down in this judgment vis-à-vis the time as the essence of the contract. Quoting from the judgment itself:

> If there was a definite time limit agreed to by the parties within which the construction work was to be finished, it could be said with perfect propriety that delay for an indefinite period would make the performance of the contract impossible within the specified time and this would seriously affect the object and purpose of the venture. But when there is no time limit whatsoever in the contract, nor even an understanding between the parties on that point and when during the war the parties could naturally anticipate restrictions of various kinds which would make the carrying on of these operations more tardy and difficult than in times of peace, we do not think that the order of requisition affected the fundamental basis upon which the agreement rested or struck at the roots of the adventure.[12]

[10] The Tornado, 108 U.S. 342 (1883).
[11] Satyabrata Ghose v. Mugneeram Bangur & Co. AIR 1954 SC 44.
[12] *Id.*

In ***Naihati Jute Mills Ltd. v. Hyaliram Jagannath,***[13] the Hon'ble Supreme Court held that a contract is not frustrated merely because the circumstances in which it was made are altered. In general, the courts have no power to excuse a party from the performance of its part of the contract merely because its performance has become erroneous on account of an unforeseen turn of events.

Further, in the recent case of ***Energy Watchdog v. CERC*****,**[14] **it was held that the** *force majeure* clauses are to be construed narrowly. On the construction of the *force majeure* clause in the Power Purchase Agreements, 'Hindrance' could mean an event wholly or partly preventing performance of the contract. But mere rise in prices is not a hindrance, whole or part.

**The** Courts look forward for several elements while evaluating the applicability of a force majeure clause. These elements can be attributed as:

(1) Whether or not the event qualifies as force majeure event under the contract;

(2) Whether or not the risk of non-performance was predictable and able to be mitigated; and

(3) Whether or not performance is truly impossible.

For an event to qualify as force majeure it must be outlined in the clause at issue as it is the general principle that force majeure clauses are usually interpreted narrowly.[15] Depending upon the pertinent language of the contract and the clause in specific along with the governing law, a party usually would be required to establish that the performance is truly impossible and not merely impracticable.[16] In most of the force majeure cases, the non-performance would not be excused if it is merely economically or financially more difficult to satisfy contractual obligations. As a result, companies are required to closely analyze both the language of the force majeure clauses incorporated in the contracts and the applicable law while considering their liabilities and potential non-performance risks.

[13] **Naihati Jute Mills Ltd. v. Hyaliram Jagannath 1968 (1) SCR 821.**
[14] **Energy Watchdog v. CERC (2017) 14 SCC 80.**
[15] *Kel Kim Corp. v. Cent. Mkts., Inc.,* 70 N.Y.2d 900, 902 (1987).
[16] *Re Cablevision Consumer Litig.,* 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012).

## VI. Interpretation of the Force Majeure Clauses

There are certain general principles which are formulated by the common law courts in regard to the interpretation of the force majeure clauses. These principles play a pivotal role while discussing the ambit of force majeure clauses.

Firstly, the courts rely upon the general principles of contractual interpretation to interpret the force majeure clauses contained in the contracts. In such interpretation, the intent of the parties is paramount that can be estimated from the language of the clause. Usually, the courts read and interpret force majeure clauses narrowly and require that the clause must unambiguously cover the triggering event for performance to be excused. [17]

Secondly, the party claiming force majeure must show that the claimed event actually leads to the impossibility of performance of the obligations under the contract.[18] An event that merely makes the performance expensive or difficult but not impossible may not qualify under the ambit of the force majeure.

Thirdly, most contracts enlist events or categories of events that may constitute force majeure and may excuse a party from its obligation in such event. Events like Wars; Natural calamities *viz.* Hurricanes, floods, droughts, earthquakes etc.; Labor strikes; Supply shortages etc. are often enlisted in the contracts. The courts while interpreting the force majeure clauses analyses the language of the clauses very carefully to determine whether a particular event fall under the force majeure. Two types of force majeure clauses have been identified by the common law courts: The Exclusive clauses that refer to a specific list of triggering events and exclude all other events which are not mentioned in the list, and the inclusive clauses that include some sort of general 'catch-all' expressions, *viz.* 'including but not limited to', 'any other event not under the reasonable control of the parties' that expands the scope and ambit of the clause beyond the listed events. More recently, force majeure clauses are likely to include epidemics, pandemics etc. due to the outbreak of SARS, Ebola, MERS in the recent years. For sure the future contracts would include lockdowns, shutdowns etc. resulting from any government orders. In the case in inclusive clauses, the courts generally apply the principle of *ejusdem generis* (of the same kind) to include in the catch-up expressions only such events which are of same kind or of same *genus* as listed before such expression.

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[17] Kyocera Corp. v. Hemlock Semiconductor, LLC, 886 N.W.2d 445 (Mich. Ct. App. 2015).
[18] Frigillana v. Frigillana, 266 Ark. 296 (1979).

Many a times the expression 'Act of God' is often included as a force majeure clause. The Courts usually interpret 'Acts of God' to mean and include natural calamities which are outside the control human agency *viz.,* storms, perils of the sea, earthquakes, volcanoes, sudden death, or illness and so on.[19] However, taking into account the current scenario, there is a little literature addressing whether a pandemic is an act of God or not. Although the wide outbreak of a virus may itself be viewed as a natural event yet its spread and the resulting response and emergency declarations may be interpreted as being within human control and thus not forming a force majeure event.[20]

Where an event is reasonably foreseeable and the parties could have prevented such event by the exercise of general prudence, diligence, and care, the courts generally do not apply force majeure clauses.[21] This requires that parties must use advance planning to minimize adverse impacts by taking reasonable steps and precautions to avoid foreseeable force majeure events.

Even where a force majeure event exists, the parties must make good-faith efforts to perform their obligations.[22] Even where performance is impossible, the non-performing party must mitigate the damages from not performing.[23] A party is only entitled to suspend performance when a force majeure event has occurred and the party is unable to perform despite its reasonable mitigation efforts.

## VII. COVID-19 as Force Majeure

The devastating coronavirus has not only proved to be detrimental to the humans worldwide but on the other hand it is also proving to be egregious for the world commercial realm. The outbreak of COVID-19 has forced the major world economies to shut-down for a significant amount of time which lead to the significant fall in the growth of these economies. Upon discussing a wide framework of the force majeure in the contractual realm, it now becomes significant to analyze whether the current pandemic qualifies under the ambit of force majeure. Unfortunately akin to many other legal issues, there is no clear cut answer to this question. It totally depends on the contractual interpretation and on the fact-based

[19] Felder v. Oldham, 199 Ga. 820, 824-25 (1945).
[20] SNB Farms, Inc. v. Swift & Co., 2003 U.S. Dist. LEXIS 2063.
[21] Great Lakes Gas Transmission Limited Partnership v. Essar Steel Minn., LLC, 871 F. Supp. 2d 843 (D. Minn. 2012).
[22] Paper Makers Importing Co. v. Milwaukee, 165 F. Supp. 491 (Wisc. E. D. 1958).
[23] *Id.* at 505.

determination in each case. The courts typically do not apply the force majeure clause to a situation where the parties could have expected the event at issue to occur at the time of contracting. Ideally, epidemics and pandemics should be included under the ambit of force majeure. However, the foreseeability of the COVID-19 pandemic is also debatable. Some consider a pandemic to be 'inevitable', but 'quite unpredictable', such that it would classify as a classic force majeure event. However, others argue that after the SARS outbreak in 2005, epidemics and diseases that could affect the impacted contract or industry are now foreseeable and should be contemplated in the contracts, such that parties waive the right to use it as a defense if they don't mention it in the contract.[24]

Notwithstanding the severity and the impact of the COVID-19 outbreak, it is not an inevitable conclusion that, a contractual *force majeure* provision will apply to the contracts. In a case where an express *force majeure* clause in a contract refers to pandemics and epidemics, then it would without a doubt almost certainly be applicable to that contract as the World Health Organization on 11 March 2020 declared COVID-19 as a worldwide pandemic. However, the position becomes more confusing and uncertain where the express clause contains general expressions *viz.* an 'act of God' without any additional definition or explanation as it is still debatable whether COVID-19 is an 'act of God' or some man-made conspiracy.

Even if epidemics or pandemics are explicitly mentioned in the contract itself, it would still require a fact-based scrutiny in order to review the relevant contract and the impact of COVID-19 on the impacted party's ability to perform under that contract. It may be possible for instance that some obligations in a contract may not be impeded by the outbreak and some obligations may be simply postponed. The affected party would be required to show that COVID-19 qualifies as a force majeure event. It must also show that the pandemic has caused an inability of performance under the contract. It is not enough to show that it is too cumbersome to perform under the contract.

Akin to the above mentioned general law, in India, force majeure cannot be implied rather it needs to be expressly contained in the contract. In the case of absence of such express clause

[24] David J. Ball et. al, *Contractual Performance In The Age Of Coronavirus: Force Majeure, Impossibility And Other Considerations* (Apr. 18, 2020) https://bracewell.com/insights/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other#1.

in a contract, relief under section 56 and 32 of the Indian Contract Act, 1872 can be resorted to as mentioned earlier. The courts would generally apply the rules of interpretation in order to evaluate whether a particular force majeure clause includes pandemics or epidemics or not. Where a force majeure clause specifically and expressly includes epidemics or pandemics, the force majeure clause shall be made applicable in the current scenario. In the remaining cases the courts shall scrutinize the nature of the clauses in the contract by applying the general rules of contractual interpretation. It must however be noted that whether a party can be excused of performing its obligation by considering COVID-19 as a force majeure event would be a fact-based determination which would ultimately depend upon the nature of obligations arising from the contract.

In order to settle the doubt of whether COVID-19 qualifies as a force majeure event, the government of India issued the office memorandum dated February 19, 2020 which declared that the disruption of supply chains due the spread of the coronavirus in china or any other country will be covered in the force majeure clause (FMC). The memorandum provided that the outbreak must be treated as a natural calamity and force majeure clause may be invoked where ever considered appropriate. [25]

Ultimately, the answer to the question of whether an affected party can avail itself of the remedies available during a force majeure event, according to the terms of the contract or under applicable law, is fact-based.

**VIII. Case analysis —** *Standard Retail Pvt. Ltd. v. M/s G. S. Global Corp*

Amidst the current lockdown scenario a very interesting case is decided by the Hon'ble High Court of Bombay on April 8, 2020. This case is of very much importance from the purview of the ongoing arguments relating to the force majeure clauses. In this case entitled *Standard Retail Pvt. Ltd. v. M/s G.S. Global Corp*[26], the Bombay High Court rejected the claim of the petitioner for an ad-interim relief in the wake of a force majeure event i.e. the outbreak of the COVID-19 and the lockdown imposed by the government of India in light thereof. The Petition was filed under section 9 of the Arbitration and Conciliation Act, 1996 in order to seek directions restrain the Respondent Bank from negotiating/encashing the Letters of

[25] Office Memorandum, Ministry of Finance, Government of India (Feb. 19, 2020), https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf.

[26] Standard Retail Pvt. Ltd. v. M/s G.S. Global Corp 2020(04)SMLBOM4.

Credit. The petitioner purchased certain steel products from the seller (M/s G.S. Corporation). The shipment has been dispatched from South Korea to reach the petitioner at Mumbai. However, later due to the outbreak of COVID-19 the Government of India imposed a 21-day nationwide lockdown. Pertaining to this lockdown the petitioner terminated the contract with the seller taking it as unenforceable on account of frustration by relying under the ambit of section 56 of the Indian Contracts Act, 1872. The petitioner was of the view that in the wake of COVID-19 and the Lockdown imposed by the Government of India, his contract with the seller stands frustrated as it is impossible to perform the contract in the prevailing situations. In other words, the petitioner tried to take shelter of the force majeure clause of the contract. Article 11 of the contract provided for the force majeure clause as under:

> Article 11- Force Majeure: In the event of an Act of God (including but not limited to floods, earthquake, typhoons, epidemics and other natural calamities), war or armed conflict or serious threat of the same, government order or regulation, labor dispute or any other similar cause beyond the control of "Seller" or any of its suppliers or sub-contractors which seriously affects the ability of "Seller" or any of its suppliers or sub-contractors to manufacture and deliver the "Goods", "Seller" may, at its sole discretion and upon written notice to "Buyer" either terminate the Contract or any portion affected thereof by such event(s), or delay performance of the Contract, in whole or in part, for a reasonable period of time. Any such delay of performance by "Seller" shall not preclude "Seller's" later right to terminate the Contract or any portion affected thereof by such event(s). In no event shall "Seller" be liable to "Buyer" or to any third party for any costs or damages arising indirectly or consequentially from such non-fulfillment of or delay in the performance of all or part of the Contract.

It can be clearly observed that this clause in the contract clearly gave only and only the 'seller' the right to invoke force majeure and not to the petitioners. Therefore, the court observed that this clause is not for the aid of the petitioner. Further, the court also observed that the letters of credit are independent transactions with the bank and the Bank was not concerned with underlying disputes between the Petitioners and the sellers.

In the instant case, the seller had complied with his obligation that is by shipping the goods from South Korea and the petitioner was left with his part of the contract that is payment. However, anticipating the some future damages or losses, the petitioner tried to avoid the contract by relying on section 56 of the Indian Contract Act, 1872. The court also pointed out that 'distribution of steel' as in the instant case, is notified as an essential service and there were no restrictions on its movement in the current lockdown scenario. Further, all ports and

port related activities including the movement of vehicles and manpower, warehouses and offices of Custom Houses Agents and operations of Container Freight Station had also been declared as essential services, thereby having no restrictions under the lockdown.

The court interpreted this case as a private dispute of letter of credit of the bank and the petitioner and not with the seller who has already performed his part of the contract. The court further observed that in any event, the lockdown would only be for a limited period and the lockdown cannot come to the rescue of the Petitioners so as to escape from its contractual obligations vis-à-vis the sellers of making payments.[27] Therefore the petitioners claim for ad-interim reliefs stood rejected by the hon'ble Bombay High Court.

The Bombay high court interprets the instant case as a dispute arising from a private contract relating to the letter of credit between the bank and the petitioner. The seller and the petitioner are one set of parties to the contract and the Bank and the petitioner are the other set. The instant case deals with the latter. Further, the judgment of *Satyabrata ghose*[28] and *Energy watchdog*[29] cases as discussed above are fact centric and thus they do not apply *in toto* to the instant case.

In the humble opinion of the author the petitioner anyhow tried to avoid his obligation under the contract by trying to take shelter under the force majeure clause. The petitioner is the wholesaler in India. Amidst the current lockdown, it is practically impossible for him to distribute the steel imported by him from the seller in South Korea by sending it to the factories for manufacturing or to the retailers also there is no labor to process the steel as well and so on. Since the whole country is under a lockdown no industry is functioning thereby breaking the whole supply chain in the country. Ultimately the final revenue would not come to the wholesaler and he would have to face huge losses. The contract between the petitioner and the seller is concluded on hand but the contract between the bank and the petitioner relating to the letter of credit is in question.

Ultimately the letter of credit has been encashed by the bank for the purchase of steel from the seller and the bank would require its money back from the petitioner. If the petitioner won't be able to put the imported steel into the supply chain in India to generate revenue, he

[27] *Id.* at para 4(e).
[28] Supra note 11.
[29] Supra note 14.

would have to repay the credit on his own to the bank and would be going in the direction of insolvency for itself. Thus the petitioner tried to avoid the contract.

The High Court seems to be of the view that if such an order would be allowed, a precedent would be set which could lead to the unjust enrichment of one party over the other as in the instant case. However, it is possible that the petitioner was trying to get an ad-interim relief for the time being only i.e. not to terminate the contract forever but merely to postpone the performance of the contract till the current situation would clear and the economy begins to function smoothly.

Thus in the opinion of the author, no doubt that the current need of the hour is sufficiently fulfilled in this case by refraining from giving an ad-interim relief to the petitioner by giving a green signal to the import of steel but the decision in the instant case may have some cryptic characters by most probably misinterpreting the petitioners intentions. The ultimate answer to this confusion would come from the higher bench in case of an appeal of course.

**IX. Conclusion**

The COVID-19 has without a doubt proved to be the horror the world could ever imagine. The coronavirus has took thousands of lives till date and the only the almighty knows what is yet to come in the near future but one thing is very clear, the pandemic has proved that not only missiles and nukes but even a microbe can be disastrous for the mankind. No doubt the entire mankind is despicably affected by this virus but the commercial world is also not left unaffected by it. The havoc of the coronavirus can clearly be felt in the commercial world as well. One such key issue amidst other things is the applicability of Force Majeure clauses to the instant situation. This work analyzed various dimensions of the concept of force majeure in relation to the COVID-19 scenario. In a nutshell, it can be concluded that whether COVID-19 is a force majeure event or not is a fact-oriented question and the answer may vary depending upon the facts and provisions of each individual contract. A contract may contain an express force majeure clause in which case the courts should narrowly interpret the same. On the other hand, a contract may not contain a force majeure clause in which case parties may take relief by taking shelter under the provisions relation to the impossibility of performance as discussed. Parties these days are trying to invoke the force majeure clauses in order to avoid any losses arising out of a contract but it is upon the court to decide each case

on its own facts and on the established principles of law. Further, in the opinion of the author, such pandemics, epidemics and the lockdowns must be included as express force majeure clauses in the future contracts to avoid any unwanted tribulations.