

# COVID 19- BUSINESS AND LEGAL ISSUES

## *Builders Association of India-Southern Centre*

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# BACKGROUND

- COVID 19 pandemic.
- Lockdown ,Shutdown and Restrictions
- Unprecedented Challenge
- Disruption
- Business and Profession
- Employment
- Compliance and Regulations
- Tax Payments
- Courts
- Contracts

# BUSINESS

- Lock down
- Mandated closure of shops and offices
- Factories
- Warehouses
- Malls and Theatres
- Hospitality
- Travel
- Tourism
- Media
- Entertainment
- Real Estate

# IMPACT ON REAL ESTATE

- Everyone is affected
- Global Impact
- Investment Decisions will be deferred
- Assets in play for next few years
  - Gold and Gold Funds
  - Deposits
  - Select Mutual Funds
  - Select Equities
  - Real Estate

# IMPACT ON REAL ESTATE

- Developers- Residential
  - Delay in completion of projects
  - Customers may not see value or priority
  - Customers may not pay on time
  - Mega new projects unlikely
  - Focus on liquidating inventory
- Developers – Commercial
  - Wait and Watch game
  - Work from Home impact
  - Vacating Tenants and possible surplus in market

# IMPACT ON REAL ESTATE

- Contractors
  - Cash Crunch
  - Labour may or may not return
  - Delay in Payments
  - Pause in fresh projects
  - Pending Payments
  - Contractual Disputes

# PROFESSION

- Accounting, Audit, Secretarial Services
- Legal Services
- IT Services
- IT Support Services
- IT Enabled Services

# WORK FROM HOME – The New Norm

- Design Work
- Planning and Co-ordination
- Accounting
- Documentation
- Data Privacy
- Home Gadgets
- Emails
- Video conferencing
- Trade Secrets
- Work From Home Guidelines



# KEY QUESTIONS

- Since I have not opened my office during lockdown can I avoid payment of rent?
- What action is possible for recovering monies due?
- Can I delay payments to my vendors and sub- contractors?
- Am I legally bound to pay wages during lockdown period?
- What is Force Majeure?
- What is the meaning of Impossibility in contract law?
- What are the benefits for Contractors that the Government has announced?
- What are my Income tax and GST obligations during COVID 19?

# DOCTRINE OF IMPOSSIBILITY/ FRUSTRATION

- '*Lex non cogit ad impossibilia*'
- It means the law does not compel a man to do that which he cannot possibly perform.
- ***Taylor v. Caldwell [1863] 3 B&S 826*** - it was held that when an opera house, which was rented for holding concerts, was destroyed by fire, the contract was frustrated.
- Criticised and overturned by House of Lords in ***National Carriers Ltd v Panalpina (Northern) Ltd*** ( [1981] 1 All ER 161), Interruption of 20 months in a 10 year lease not significant to destroy the entire contract.

# APPLICATION OF MAXIM

- *Arise India Ltd. Vs. Commissioner of Trade and Taxes (TS – 314 – HC – 2017 (Del) – VAT),*
- There was need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not punish bona fide purchasing dealers.
- The latter cannot be expected to do the impossible.
- It is trite that a law that is not capable of honest compliance will fail in achieving its objective.
- If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution.

# DOCTRINE OF FRUSTRATION

## ■ *Krell vs. Henry* [1903] 2 KB 740 –

- In 1903, an Englishman named Krell leased his apartment in London to C.S Henry to be used for viewing a royal procession, which subsequently got cancelled
- Henry refused to pay Krell the balance of the rent. Krell sued, but the English court held against him on the ground that the purpose of the contract between them was "frustrated".
- The court thought if Krell and Henry had foreseen the cancellation of the King's procession, they would not have entered into the agreement. It found that the procession was the foundation of the contract.
- "loss of object" or the "loss of foundation" of the contract by the supervening events
- the performance is dependent on the continued availability of a specific state of things
- This foundation theory is currently the most widely accepted theory on the event of impossibility of performance of contractual obligations by parties.

# INDIAN CONTRACT ACT

- Section 56 of the Indian Contract Act
  - Agreement to do impossible act.—An agreement to do an act impossible in itself is void.
  - A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
  - Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

# TEST OF FRUSTRATION

- *Industrial Finance Corporation of India Ltd Vs. The Cannanore Spinning and Weaving Mills Ltd AIR 2002 SC 1841 [43] –*

There exist three basic conditions that must be met to satisfy the doctrine under section 56:

- (1) there must be a subsisting contract,
- (2) some part of the contract is still to be performed and
- (3) the performance has become impossible after the contract is entered into.

# WHAT IS IMPOSSIBLE?

- *Satyabrata Ghose v Mugneeram Bangur and Co. AIR 1954 SC 44*
- The word “impossible” has 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.
- Therefore, 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.

# WHAT IS IMPOSSIBLE?

- In *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH, 1961 (2) WLR 633*, where the Suez Canal was closed and it was customary route of shipping goods, it was held that a contract for sale of groundnuts was not frustrated and an alternative, more expensive mode of shipping was to be performed by the parties. Here it was held that, even though the contract had become more onerous to perform, it was not fundamentally altered.
- When it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an Act of God, the circumstances will be taken as a valid excuse ( *State of M.P v. Narmada Bachao Andolan (2011) 7 SCC 639* ).
- In *Alopi Parshad & Sons Ltd. v. Union of India (1960 (2) SCR 793)*, it was held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.



# FORCE MAJEURE

- ***Matsouki Vs Priestman(1915) 1 KB 681***
  - Contract for delivery of steamer
  - Force Majeure Clause
  - Coal Strike, machinery breakdown, Workers attended a football match and also attended a Managers funeral
- General FM clauses which are not specific and clear
- ***Lebaupin Vs Crispin(1920) 2KB 714***
  - Close attention must be paid to the words which precede or follow it and with due regard to the nature and general terms of the contract

# Energy Watchdog v. CERC (2017) 14 SCC 80)

- While referring to *Satyabrata Ghose Vs. Mugneeram Bangur & Co*, observed that, If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do.
- It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself.
- If, however, frustration is to take place de hors the contract, it will be governed by Section 56.

# SARS

- A contract will not be frustrated if the change is only temporary or transient –
- ***Li Ching Wing Vs. Xuan Yi Xiong [2004] 1 HKLRD 754***
  - A tenant the subject of a 10-day isolation order due to SARS, who was 13 months into a 24-month lease, sought to invoke frustration to discharge a lease to which he was a party.
  - The court rejected the tenant's argument on the basis that the isolation order was only of a short duration in the context of the entire lease.
  - It further held that although SARS may arguably be an unforeseeable event, it did not "*significantly change the nature of the outstanding contractual rights or obligations*" of the parties in this case.

# COVID 19

- ***Standard Retail (Bom HC)***
  - Petition under Section 9 of the Arbitration and Conciliation Act
  - Prayer to restrain the bank from negotiating/ encashing Letters of Credit
  - Scope of Force Majeure clause in contract
  - Steel identified as essential and ports also declared as essential
  - Petitioner cannot avoid payment obligations on account of difficulties in selling after import on account of lockdown.
  - Interim Reliefs not granted

# COVID-19

- ***Halliburton Offshore Services Vs Vedanta(Del HC)***
  - Petition under Section 9 of the Arbitration and Conciliation Act
  - Prayer seeking injunction against encashment of bank guarantee
  - Project due for completion by 31.03.2020
  - Industrial activities shut down due to national lockdown on account of COVID
  - Lockdown in the nature of Force majeure
  - Court considered that special equities exist and Interim reliefs granted

# CONTRACTS – Some Answers

- Lease Contracts
  - If Force Majeure clause exists
  - If Force Majeure clause does not exist
  - Impossible Vs Difficult
  - Negotiation
- Contracts for Work
- Supply Contract
- Arbitration

# BUSINESS- Some Answers

- Working Capital Management
- Cash flow Planning
- Borrow if critical
- Examine all channels of credit announced by Government
- Liquidate Inventory
  - There will be takers if price comes down
  - There will be buyers looking to buy cheap
  - Reduce Profit Expectations or cover just costs
  - Discuss and negotiate with clients and vendors

# RERA

- Ministry of Housing and Urban Affairs has vide Office Memorandum dated 13.05.2020 advised the States/UTs and their Real Estate Regulatory Authorities to –
  - Treat COVID-19 as an event of 'Force Majeure' under RERA.
  - Extend the registration and completion date suo-moto by 6 months for all registered projects expiring on or after 25.03.2020 without individual applications.
  - Regulatory Authorities may extend this for another period of upto 3 months, if needed.
  - Issue fresh 'Project Registration Certificates' automatically with revised timelines.
  - Extend timelines for various statutory compliances under RERA concurrently.
- Real Estate Regulatory Authorities of Maharashtra, Gujarat, Uttar Pradesh and Tamil Nadu have already issued orders for extension of completion dates by 3 to 5 months.



# IBC

- **Measures already in place -**
  - Minimum amount of default to initiate insolvency proceeding has already been raised to Rs.1 Crore from Rs.1 Lakh.
- **Measures announced -**
  - Special insolvency resolution framework for MSMEs.
  - Suspension of fresh initiation of insolvency proceedings up to one year depending upon the pandemic situation.
  - COVID 19 related debt to be excluded from the definition of “default” under the Code for the purpose of triggering insolvency proceedings.
- **Impact –**
  - The MSMEs will be insulated from insolvency proceedings being initiated against them.
  - Any future default of COVID 19 related debt will not result in insolvency proceeding being against a borrower. This measure will provide a long rope and the much-needed confidence to the business to borrow and sustain themselves.
  - On the contrary a complete suspension of fresh insolvency proceedings might hamper the recovery of past debts.

# CONTRACTORS

- **Government Relief Package**
- Extension of up to 6 months (without costs to contractor) by all Central Agencies (like Railways, Ministry of Road Transport & Highways, Central Public Works Dept, etc) on -
  - Construction/ works and goods and services contracts.
  - Obligations like completion of work, intermediate milestones etc. and extension of Concession period in PPP contracts.
- **Partial release of bank guarantees** by government agencies to the extent contracts are partially completed.

# MSME

- **Introduction of new definition of MSME**
  - Distinction between Manufacturing and service sector eliminated.
  - Investment criteria revised upwards.
  - Introduction of new turnover criteria.

# MSME

## Existing MSME Classification

### Criteria : Investment in Plant & Machinery or Equipment

Classification	Micro	Small	Medium
Mfg. Enterprises	Investment < Rs. 25 lac	Investment < Rs. 5 cr.	Investment < Rs. 10 cr.
Services Enterprise	Investment < Rs. 10 lac	Investment < Rs. 2 cr.	Investment < Rs. 5 cr.

## Revised MSME Classification

### Composite Criteria : Investment And Annual Turnover

Classification	Micro	Small	Medium
Manufacturing & Services	Investment < Rs. 1 cr. and Turnover < Rs.5 cr.	Investment < Rs. 10 cr. and Turnover < Rs.50 cr.	Investment < Rs. 20 cr. and Turnover < Rs.100 cr.

# MSME

## ■ Relief through infusion of funds –

- Rs.3 lakh crores Collateral free Automatic Loans for Business, including MSMEs – up to 20% of outstanding credit as on 29.02.2020 - 100% guaranteed by the Central Government
- Rs.20,000 crore Subordinate Debt for MSMEs – partially guaranteed by the Credit Guarantee Fund Trust For Micro And Small Enterprises.
- Rs.50,000 crores equity infusion through MSME Fund of Funds.

## ■ Relief through easing competition –

- Global tenders disallowed in government procurements up to Rs.200 Crores.
- The Ministry of Finance has amended the General Financial Rules to this effect on 15.05.2020.

## ■ Other measures –

- e-market linkage for MSMEs to be promoted to act as a replacement for trade fairs and exhibitions.
- Fintech will be used to enhance transaction-based lending using the data generated by the e-marketplace.
- MSME receivables from Government and CPSEs to be released in 45 days.

# INCOME TAX

- Last date for filing IT Returns for FY 2018-19 as well as Aadhaar-PAN linking, extended from 31 March 2020 to 30 June 2020
- Due dates for issue of notice, intimation, filing of appeal, furnishing of return, statements, etc.. and time limit for completion of proceedings by the authorities and any compliance where time limit expires between 20 March 2020 to 29 June 2020 extended to 30 June 2020.
- Reduction of TDS rates by 25% from the prescribed rate for the period 14.05.2020 to 31.03.2021
- Interest at 9% instead of 12% / 18% per annum for delayed payments of advance tax, self-assessment tax, regular tax, withholding tax, tax collected at source made between 20 March 2020 and 30 June 2020

# GST

- Rate of interest applicable for delayed filing of GSTR-3B for February, March & April 2020
  - Nil interest liability for first 15 days from the due date and 9% interest thereafter for Taxpayers having aggregate turnover of more than 5 crore rupees, if GSTR 3B for February, March & April are furnished on or before 24.06.2020
  - Nil interest liability for Taxpayers having aggregate turnover of 1.5 crore rupees and upto Rs.5 crores.
    - If GSTR 3B for February & March 2020 is filed on or before 29.6.2020; If GSTR 3B for April 2020 is filed on or before 30.06.2020
  - Nil Interest liability for taxpayers having aggregate turnover of upto 1.5 crore rupees
    - If GSTR 3B for February 2020 is filed on or before 30.06.2020; If GSTR 3B for March 2020 is filed on or before 03.07.2020; If GSTR 3B for April 2020 is filed on or before 06.07.2020
- Interest relief is applicable only if the GSTR 3B returns are filed as per the specified dates

# WAY FORWARD

- Tough Times wont last but it is important to survive
- All old concepts will be revisited
- Technology and Automation
- New ideas which can save costs
- Quality and delivery
- Build Goodwill
- Revisit your Beliefs and embrace change
- Look out for New sectors and opportunities



# THANK YOU

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