(1960) 02 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Original Civil Suit No. 5 of 2007

Hari Singh and Others APPELLANT

Vs

Dewani Vidyawati RESPONDENT

Date of Decision : 23-02-1960

Acts Referred:
Contract Act, 1872 — Section 56, 65
Transfer of Property Act, 1882 — Section 54

Citation : (1960) 02 J&K CK 0003

Hon'ble Judges : Murtaza Fazl Ali, J

Bench : Single Bench

Advocate : Jaswant Singh, General, for the Appellant; S.K. Chaku and R.L. Anand, for the Respondent

Judgement

Murtaza Fazl Ali, J.—The present suit has been filed by the Plaintiffs Sardar Hari Singh, Sardar Fouja Singh and Sardar Kartar Singh for

recovery of Rs. 36,000/ -, out of which Rs. 34,000/- was advance money given for the Theka in question and Rs. 3,000/- has been claimed as

damages. The Plaintiffs' case is as follows:

The Defendant was the owner of certain lands situate in Kotli Dilbagh, Tehsil Gujranwala (Punjab) and she used to settle these lands with

Thekadars by auction from time to time. The Defendants sanctioned the Theka of the lands in suit in this village from Kharif 1947 to Rabi 1950 in

favour of the Plaintiffs, on their depositing a sum of Rs. 34,000/- being the advance consideration of the Theka for one year. The Plaintiffs

deposited a sum of Rs. 34,000/- between 25th January 1947, to 25th February, 1947.

The Plaintiffs deposited a sum of Rs. 2000/ - on 25-1-1947 by virtue of Ex. P. 2,

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has...

Rs. 21,600/ - on 12-2-1947 by virtue of Ex. P. 3, a sum of Rs.

7,800/- on 20-2-1947 by virtue of Ex. P.4 and Rs. 2,600/- on 25-2-1947 by virtue of Ex. P.5. One of the conditions of the Theka was that a

regular lease and Kabuliat would be executed after the Thekadar was put in possession. The Plaintiffs alleged that the Defendant was unable to

deliver possession of the lands to them in spite of the best efforts of her agents, as a result of which the Plaintiffs filed an application before the

General Manager of the Defendant for extension of the lease.

This application was referred to Dewani Sahiba, the Defendant, for final approval but no final orders could be passed on this application and in the

meantime the Dominions of India and Pakistan came into existence and the lands in suit became a part of the territory of Pakistan. The Plaintiffs

shifted to India and could, therefore, neither cultivate the lands nor derive any usufruct therefrom. The Plaintiffs further contended that they were

entitled to the refund of advance money tendered by them to the Defendant, because they could not be delivered possession due to the negligence

of the Defendant.

The Plaintiffs also pleaded that at any rate by virtue of the fact that the lands formed part of the Pakistan territory after the independence of India,

the very foundation of the contract disappeared and the contract became void by frustration and, therefore, the Plaintiffs were entitled to be

restituted for the benefit received by the Defendant under the contract.

2. The suit was contested by the Defendant and a number of pleas were taken by her. The Defendant pleaded, inter alia, that the Plaintiffs were

Pakistan nationals and the suit was not maintainable without the sanction of the State. They also pleaded that the Plaintiffs were not State subjects

and further that the suit was not triable by the Civil Court as there was a relationship of landlord and tenant between the parties. Certain Other

pleas were also taken regarding the maintainability of the suit and all these pleas have been decided by orders of this Court which will be referred

to later.

On merits the Defendant pleaded that there was no question of giving actual physical possession to the Plaintiffs by the Defendant. The system

prevailing in the estate of the Defendant was that Thekadars were to get the entire produce or rent from the tenants who were already on the lands

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

settled by the Defendant and the Thekadar was further given rights to bring upon such tenants as they pleased, after ejecting the previous tenants in

accordance with law.

The Defendant alleged that the Plaintiffs were fully aware of this position and had taken the lease knowing the conditions prevailing in the estate of

the Defendant. The Defendant further pleaded that it was announced to all the tenants on the spot that the Plaintiffs were their new Thekadars from

Kharif 1947 and henceforward the tenants should pay the produce of their lands to them. This was all that she was required to do.

The Defendant resisted the plea of frustration of contract on the ground that the Plaintiffs had reaped sufficient benefits from the lands in question,

and had taken constructive possession of the lands. The Defendant also pleaded that in spite of the fact that the lands in suit fell within the territory

of Pakistan, the Plaintiffs were not prevented from enjoying the usufruct of those lands.

3. On the pleadings of the parties certain preliminary issues were raised which were decided by orders of my predecessor, Mr. Justice Shahmiri

dated 24th January, 1955, 10th April, 1956 and 14th December, 1956. All these issues were decided against the Defendant and the suit was

directed to be tried on merits. When the suit came up for hearing on merits the following issues were struck, after hearing the parties:

1. Is the suit barred by time?

2. Did the Plaintiffs take over administration of the land about which lease deed was to be executed and registered and did they derive any benefit

from it?

3. Is the suit amount advanced liable to forefeiture because of any breach in the preliminary conditions of agreement to lease dated 25th January,

1947, and

4. To what relief are the Plaintiffs entitled?

N.B. The Plaintiffs' counsel objects that issue No. 2 need not be framed as it was constructively in issue in the preliminary issue No. 3.

4. I might further mention that although the plea of frustration of contract was clearly mentioned in the plaint, yet the Plaintiffs did not raise any issue

on this plea in the first instance. After the parties had closed their evidence an application was made by the Plaintiffs for raising an additional issue

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

relating to this plea. The application was accepted by me by my order dated 16th July, 1959 and an additional issue on this plea was raised which

is as follows:

Has the contract, which is the subject-matter of the suit, been frustrated by virtue of its having become impossible and therefore void and, if so,

whether Defendant is liable to restore the benefit received by her to the Plaintiffs? O.P.P.

5. Issue No. 2. I will first of all take issue No. 2, because that is one of the most important issues in the case and it will enable me to elucidate the

facts of the case. The Plaintiffs' definite case is that the Defendant did not deliver any actual physical possession of the lands in question to them

because the lands were in possession of a large number of tenants who refused to surrender possession to the Plaintiffs.

(His Lordship then discussed the evidence and continued as follows):

6 to 11. On a careful consideration, therefore, of the facts and circumstances of the case, I hold that the Defendant's case that the Plaintiffs were to

be given only constructive and not physical possession is true and further that the Defendant did all is that she was required to do for the purpose

of giving possession to the Plaintiffs.

12. Before, however, closing my finding on this issue, I might refer to an important aspect of the matter, which is argued before me and on which

also evidence has been led by the parties. The Defendant has sought to prove by evidence that the Plaintiffs have derived sufficient benefit from the

lands in question.

(After referring to the evidence of the parties His Lordship concluded as under): Under these circumstances it is reasonable to infer that the

Plaintiffs were unable to derive any benefit from the land in question.

12 to 15. For the reasons given above issue No. 2 is answered accordingly.

16. Issue No. 3. This issue has not been pressed by counsel for the Defendant and is accordingly answered against the Defendant and in favour of

the Plaintiffs.

17. Additional Issue. I will now take up the additional issue which was framed by my order dated 16-7-1959 and which relates to the question as

to whether the contract is frustrated in this case, and, if so, whether the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

Defendant is liable to restore the benefit received by her, under the

contract, to the Plaintiffs. In support of, this issue the Plaintiffs have examined two witnesses, namely Bhagwan Singh, P.W.4 and Hari Singh,

P.W.5. Bhagwan Singh has stated that after the Independence which resulted in the creation of the Dominions of India and Pakistan, there were

serious, disturbances in Kotli Dilbagh where the lands in question, are situate and as a result of these disturbances, the entire population of the

district shifted to India. The witness further stated that in those circumstances it was not at all possible for any Hindu or Sikh, to remain in Kotli

Dilbagh or to look after the lands in question. P.W. 4 also stated that under these circumstances it was extremely hazardous for any Hindu or Sikh

to enter the place where the lands in question were situate.

The witness has given certain instances of the communal disturbances but it is not important for our purposes to consider them. The fact, however,

remains that the Independence was followed by serious communal disturbances in the place where the lands are situate. P.W.5, Hari Singh, is one

of the Plaintiffs. He has also stated in his evidence that if he had known that as a result of the creation of the two Dominions, such disturbances

would occur, he would not have taken the lease at all. D.W.2, Pran Nath Kapur, has also admitted in his evidence that after the partition Ranjit

Singh, Manager of the Defendant shifted to India. It is also admitted that Kotli Dilbagh where the lands in question are situate, now, forms part of

Pakistan. It is also clear that immediately after the partition, it was extremely hazardous for any Hindu or Sikh to go to that part of the Punjab

which now forms part of Pakistan.

In my opinion judicial notice should also be taken of that fact that after the partition, entry of any citizen of India into the territory which now forms

part of Pakistan, was regulated by permits and visas and further that any amount of cash or produce could not be brought from one Dominion to

another without insurmountable difficulties. Under these circumstances the question is as to whether the principle laid down in Section 56 of the

Contract Act would apply to the facts and circumstances of the present case. As I have already held, the main purpose and the essential object of

the contract was that the Plaintiffs were to reap the benefit out of the lands by getting produce from the tenants who were in possession of the lands

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

or by ejecting or dealing with them under the provisions of law.

This purpose could not possibly be achieved after the partition of India. D.W.2, has further admitted that the crops could be harvested only in

September and it is also admitted on all hands that the tenants could only be ejected by notice in Assuj. Both these things, therefore, could be done

only after the partition. The circumstances of the case, make it quite clear, that the Plaintiffs could neither have come to the lands in question to

supervise their cultivation nor could they have taken any steps to eject the tenants without involving serious risk to their lives. It is also clear that at

the time when the contract was entered into, namely, in January 1947, none of the parties could have contemplated that partition of India would

take place on 15-8-1947 or that the partition would be followed by disturbances of such a serious nature so as to render the object of the contract

extremely hazardous and impracticable.

It is also clear that the circumstances which frustrated the object of the contract were neither self-induced nor brought about by the negligence of

the Plaintiffs but they came into existence due to reasons beyond the control of the parties. After the partition, there was such a sudden and

unanticipated change of circumstances, that the shape of things assumed an entirely new colour and the atmosphere in the parts which now form

territory of Pakistan, became so tense and feelings ran so high that, it was extremely difficult for any Hindu or Sikh to visit that part of the country,

at that time, without involving risk to his life and property. It is manifest that none of these circumstances could be foreseen or contemplated by the

parties at the time when the contract of lease was entered into by them.

Even if it be assumed that the parties had some idea that Independence was coming yet they could not be expected to foresee that the creation of

the two Dominions would lead to such disturbances of an unprecedented nature resulting in mass movement of refugees on either side. I might

further mention that the Defendant has not adduced any evidence in rebuttal of the evidence given by the Plaintiffs. Now we have to see whether

the principle contained in Section 56 of the Contract Act could be applied to the facts and circumstances of the present case. Section 56, Contract

Act runs as follows:

An agreement to do an act impossible in itself is void. A contract to do an act

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

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.

In order that the section would apply the following conditions must be fulfilled: (1) that the act should have become impossible, (2) that

impossibility should be by reason of some event which the promisor could not prevent and (3) that the impossibility should not be self-induced by

the promisor or due to his negligence. As the principle embodied in Section 56 has been codified and the law on the subject as contained in

Section 56 of the Contract Act is exhaustive, it is not necessary to import the principles of English Law into it. It has now been generally accepted

as correct that the doctrine of frustration of contract would apply to cases, where the very foundation of a contract disappears by virtue of

circumstances coming into existence and which were not within the contemplation of the parties to the contract.

The word 'impossible' should be construed in a liberal sense so as to embrace within its purview acts which become impracticable or extremely

hazardous and cannot be said to have been used, in a physical or literal sense. It is sufficient for the act to be impossible that it becomes

(impracticable or useless from the view of the object and purpose which the parties had in view. In the present case, it is clear that the Plaintiffs

were to derive benefit from the produce of the lands and this object was totally upset by the change of circumstances coming into existence due to

the creation of the two Dominions of India and Pakistan.

The entire law on the subject has been clearly laid down in the case Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, , where their

Lordships have observed as follows:

In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the

Contract Act, taking the word 'impossible' in its practical and not in literal sense. It must be borne in mind, however, that Section 56 lays down a

rule of positive law and does not leave the matter to be determined according to the intention of the parties.

x x x x

In the large majority of cases, however, the doctrine of frustration is applied not

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

on the ground that the parties themselves agreed to an implied

term which operated to release them from the performance of the contract. The relief is given by the Court on the ground of subsequent

impossibility when it finds that the whole purpose or the basis of a contract was frustrated by the intrusion, or occurrence of an unexpected event,

or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there

is no question of finding but an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about

the matter at all nor could possibly have any intention, regarding it.

When such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as

a whole, it is the Court which can pronounce the contract to be frustrated and at an end. The Court undoubtedly has to examine the contract and

the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the Court

has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object.

In the case before their Lordships of the Supreme Court the principle laid down in Section 56. Contract Act, was not applied, because their

Lordship held that the requisition order was a circumstance which was within the contemplation of the parties and that the transaction by its very

nature involved certain risks and difficulties which also were under the contemplation of the parties. In the present case, however, as I have already

pointed out the supervening circumstances were not at all contemplated by the parties and their effect was to render the very object of the contract

completely useless and impracticable.

In the case of Shree Kishen v. Gambhirmal (S) AIR 1955 Hyd 233, the principle of frustration of contract as laid down in Section 56 of the

Contract Act, was applied to a case where the Defendant made a contract with the Plaintiff to supply him with certain goods at a place outside the

State, at a time when there was no prohibition against sending the goods outside the State but prohibition was imposed subsequently. Their

Lordships of the Hyderabad High Court in that case observed as follows:

The essential idea upon which the doctrine of frustration is based is that of

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

impossibility or performance of the contract, in fact impossibility and

frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the

parties are absolved from the further performance of it, as they did not promise to perform an impossibility.

x x x x

In the case under consideration the contract was made on 29-12-1942. At that time there was no prohibition of sending the goods outside the

State. By Exs. A, B, 6 and 7, which have been fully proved by the evidence of D.Ws.1 and 2 it is proved that from the beginning of 1943 the

railway booking was closed and remained so for a year and a half. So this event made the contract impossible of performance due to the event

which came into existence after the contract was made and this comes under para. (2) of Section 56, Indian Contract Act.

In the present case also it is clear that the time when the contract was entered into between the Plaintiffs and the Defendant, there was no

restriction on the entry of any person into the parts which now form part of Pakistan, nor was there any restriction on the movement of goods.

After partition, however, these restrictions now exist. Apart from this, it was extremely hazardous for any Indian citizen to have gone and carried

on agricultural operations in Kotli Dilbagh which now forms part of Pakistan. The facts of the present case seem to be on all fours with the

Hyderabad case cited above. To the same effect is another decision of the Division Bench of Travancore-Cochin High Court in the case

Kochuvareed v. Mariappa Gounder AIR 1954 TC 10. Similarly in Hurnandrai Fulchand v. Pragdas Budhsen AIR 1920 Bom 187, the principle of

frustration of contract was applied to a case where the contract was based on supply of goods which were to be given to the Defendants by a

certain mill and eventually the mill refused to supply the goods.

In the case Mugneeram Bangore and Co. Vs. Satyabrata Ghosh and Another, , a Division Bench of the Calcutta High Court applied this principle

where a contract for construction of roads was interrupted by requisition of the premises by the Government for an indefinite period. Their

Lordships held that as the contract could not be performed the act of requisition frustrated the contract. In this connection their Lordships made the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

following observations:

If the substance of the contract as contemplated by the parties cannot be performed because of the supervening event, the Court will imply a term

that in such an event, the contract will be void; and it is only where the foundation of the contract as contemplated has disappeared because of the

supervening event, that the Court can find that the con tract cannot be performed because of that event.

x x x x

x x x x

As the parties contemplated that roads and drains would be constructed, and the conveyance completed within a few years the foundation of

contract was that the lands would remain available for the construction of such roads and drains, without any appreciable break, for this period of

time. With the requisition of the lands, for an indefinite period of time, this foundation of the contract has gone and so the contract has gone.

In the case Parmeshwari Das Mehra and Sons v. firm Ram Chand Om Prakash AIR 1952 Punj 34 a Full Bench of the Punjab High Court

observed as follows:

It is clear that if there is an entirely unanticipated change of circumstances the question will have to be considered whether this change of

circumstances has affected the performance of the contract to such an extent as to make it virtually impossible or even extremely difficult and

hazardous. If that be the case, the change of circumstances not having been brought about by the fault of either party, the Court will not enforce the

contract.

Mr. Chaku appearing for the Defendant placed reliance on this case and submitted that even in this case the principle of frustration of contract was

not applied because one of the arbitrators happened to be at Karachi. It is true that; the principle of frustration of contract was not applied in that

case, but the facts of that case are clearly distinguishable from the facts of the present case, because in that case their Lordships found as a fact that

it was not necessary for the parties to go to Karachi at all. On the other hand, their Lordships clearly indicated that if it was necessary for the

parties to go to Karachi, this circumstance would have been such as to render the contract void. This would appear from the following

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

observations made by their Lordships in that case:

In the present case it must be conceded that the parties, when they entered into this contract, did not contemplate that there would be a partition of

the country and Karachi would become part of foreign territory, but the question for our decision is whether this change of circumstances has

materially affected the performance of the contract. If it was necessary for the parties to go to Karachi and to take witnesses there, the contract

could not be performed, for it is clear that non-Muslims could not during 1947, go to Karachi without running very great risks.

This case, therefore, far from supporting the contention advanced by counsel for the Defendant, supports the case of the Plaintiffs.

18. Similarly in the case A.F. Ferguson and Co. and Others Vs. Lalit Mohan Ghosh, , a Division Bench of the Patna High Court observed as

follows:

Paragraph 2 of Section 56 of the Indian Contract Act provides that 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.

It has been argued on behalf of the Plaintiff that due to the outbreak of war the performance of the contract by the Plaintiff by making payments of

the premiums became impossible, and, therefore, the contract became frustrated and void.... Section 56 of the Contract Act is perfectly clear on

the point, and, if the performance of the contract after the outbreak of war became impossible or unlawful, the contract of insurance became void.

x x x xxx x Therefore, in my opinion, the moment the war broke out any further performance of the contract became unlawful and the result was

that the contract stood dissolved on the very date the declaration of war was made."" To the same effect is a Division Bench decision of the Simla

High Court reported in Rama Nand Vijay Parkash v. Gokulchand AIR 1951 Simla 189.

19. Having regard, therefore, to the principle laid down in the aforesaid authorities it seems to me that the provisions of Section 56, Contract Act,

would apply to the facts and circumstances of the present case.

20. The learned Counsel for the Defendant, however, submitted that in spite of the creation of the Dominions of India and Pakistan, it could still be

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

open to the Plaintiffs to have cultivated the lands and derived the produce therefrom. The Defendant has not led any evidence on this point whereas

it is clear from the evidence of the Plaintiffs that it was extremely hazardous for the Plaintiffs to do so.

21. It was then contended by Mr. Chaku that the principle contained in Section 56 of the Contract Act would not apply to the present case

because it was not a case of a contract but that of a lease. It is common case of the parties that a registered lease or Kabuliat as contemplated by

Ex. D. 2 did not come into existence. The evidence of Ranjit Singh shows that he did not insist on the execution of the Kabuliat although the

conditions of the Theka form required him to do so. It seems to me, however, that as negotiations for extension of the lease were still proceeding,

therefore, the Defendant did not insist on the registration of the lease. The transaction was in the shape of a completed contract. Moreover (sic)

perusal of Ex. D. 2, Theka form, would itself show that it was nothing but a contract of lease and a registered lease deed was to be executed

which in fact did not come into existence. Moreover in paragraph 2 of the written statement the Defendant has referred to the transaction as which

means a contract. The relevant portion of that written statement is as follows:

This clearly shows that both the parties treated the transaction to be a contract and nothing more than that It has been clearly held by the Supreme

Court in Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, that the principle embodied in Section 56 of the Contract Act applies

also to a contract for sale of immovable property. In this connection their Lordships have observed as follows:

According to the Indian Law, which is embodied in Section 54 of the Transfer of Property Act, a contract for sale of land does not of itself create

any interest in the property which is the subject-matter of the contract. The obligations of the parties to a contract for sale of land are, therefore,

the same as in other ordinary contracts and consequently there is conceivable reason why the doctrine of frustration should not be applicable to

contract for sale of land in India. This contention of the Attorney-General must, therefore, fail.

If Section 56, Contract Act, applies to contract for sale of immovable property, it would certainly apply to a contract for lease of immovable

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

property because such contracts do not create a present demise or interest in the property. The argument of Mr. Chaku on this score must,

therefore, be overruled.

22. The next point that arises is whether the Plaintiffs are entitled to be restituted for the benefit received by the Defendant under the contract. It is

admitted that the Defendant received a sum of Rs. 34,000/ - as advance money for the contract which eventually became void due to frustration. It

is well settled that where a contract becomes void the principle embodied in Section 65 of the Contract Act at once comes into play and a party

who has reaped benefit under the contract is bound to restore it to the other party. Section 65, Contract Act, runs as follows:

When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such

agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

The Defendant is, therefore, bound to make good the advantage which she received under this contract to the Plaintiffs from whom she received it.

I am fortified in my view by a decision of the Madras High Court in the case Manasseh Film Co. v. Gemini Picture Circuit AIR 1944 Mad 239,

where his Lordship made the following observations:

I am of the opinion that the Plaintiffs cannot be regarded as alien enemies disentitled to sue for the return of the money that they had paid in respect

of a contract that has become void and for which the consideration to move from the other party has entirely failed for reasons beyond the control

of both the parties to the contract. Reference may be made in this connection to Sections 56 and 65, Contract Act. A contract to do an act which,

after the contract was made, has become impossible becomes void when the act becomes impossible. When a contract becomes void, any person

who has received any advantage under such contract is bound to restore it or to make compensation for it to the person from whom he received it.

To the same effect is the decision reported in Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour Ltd. 1942 2 All ER 122, as also the

decision of the Calcutta High Court in the case Ram Nagina Singh Vs. Governor-General in Council, where his Lordship Justice Sinha observed as

follows:

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

Section 65, therefore, applies only to case where benefit or advantage is derived under an agreement before it is discovered to be void. If the

benefit is received after the agreement is discovered to be void, then it is clear that the advantage cannot be said to have been received under the

agreement. The section therefore only applies to a case where an agreement is entered into between the parties under which benefit is received by

one party and after the benefit is so received the agreement is discovered to be void. It is then that the party who has received the advantage is

compelled to restore the advantage so received. Section 65 embodies and is an expression of the principle of restitution and of prevention of unjust

enrichment.

The Calcutta decision was relied upon by a Division Bench of the Assam High Court in a case reported in Purkayastha v. Union of India AIR

1955 Gau 33. A Division Bench of the Allahabad High Court in the case Kr. Rajendra Bahadur Singh Vs. Kr. Roshan Singh and Another, ,

applied the principle contained in Section 65 of the Contract Act to a case where the contract became void u/s 56 and in another case of the

Orissa High Court reported in Babulal Agarwala Vs. Vijaya Stores, Firm, , a Division Bench of the Orissa High Court observed as follows:

It would appear to follow therefore, that if the transaction between the parties is honest and is not designed to circumvent or defeat any provision

of law, the principle of restitution embodied in Section 65, Contract Act, can be applied to give relief to a party who has acted under the contract

before it became void.

It is clear, therefore that the Defendant having received the money before the contract became void, i.e...long before the partition of India, must be

compelled to return the said money to the Plaintiffs.

23. For the reasons given above the additional issue is, therefore, decided in favour of the Plaintiffs and against the Defendant.

24. Issue No. 1. It is manifest from the finding which I have given already that the suit has been brought within three years from the date when the

contract was frustrated, i.e., 15-8-1947. Mr. Chaku has conceded that so far as frustration is concerned the suit is not time barred. His contention

was that if issue No. 2 had been decided in favour of the Plaintiffs, then as possession was delivered in April 1947 the suit was clearly barred by

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…

time. This question does not arise in view of my findings given above. Issue No. 1 is answered accordingly.

25. Issue No. 4. In view of the findings given by me it is clear that the Plaintiffs are entitled to a decree for Rs. 34,000/ -, being the advance paid

by them to the Defendant. As, however, the contract has become void due to frustration, as a result of circumstances beyond the control of the

parties, the Plaintiffs are not entitled to any damages but are entitled to be reimbursed only for so much of the benefit which the Defendant had

received from them.

26. For the reasons given above the Plaintiffs' suit is decreed and a decree for a sum of Rs. 34,000/ - is hereby passed against the Defendant. The

Plaintiffs will also be entitled to interest at the rate of six per cent per annum from the date of the decree to the date of realisation. In the peculiar

circumstances of the case I would make no order as to costs, particularly because the Plaintiffs have succeeded on the plea of frustration, a plea on

the basis of which an issue was raised at the instance of the Plaintiffs after close of the evidence by both the parties. The Plaintiffs should have

raised this issue in the first instance but as they were negligent in raising this issue previously, the Defendant was undoubtedly prejudiced to some

extent. Moreover, as the contract has failed not due to fault of either party to the suit but because of circumstances, destroying the very foundation

of the contract, none of the parties should be saddled with costs. I would, therefore, leave the parties to bear their own costs.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/hari-singh-and-others-appellant-has…