AMONG THE modern developments in the law of contract, no other doctrine occupies such a unique place as that of frustration. It has been proclaimed as "a special exception which justice demands" to be made from the rule as to absolute contracts. This doctrine, whatever its basis may be, is designed to relieve parties from their mutual obligations under a contract because of the occurrence of certain events subsequent to their making it and that to hold them to their original contract would be to bind them to almost a new contract which they did not make. This doctrine has been statutorily adapted in our country and as it has been held in the leading case, Satyabrata Ghose v. Mugneeram Bangur and Co., by the Supreme Court to be a "rule of positive law". We are not concerned with the theoretical bases adumbrated for it in English law. However, the tautologous terminology of section 56 of the Contract Act has not rendered the task of the courts in India any less onerous. For the whole, the question in cases arising under the section is that whatever may be the circumstances or event which render a contract impossible of performance, having been a settled proposition that impossibility here includes not merely physical but also commercial impossibility. That is, impossibility in relation to the commercial object or purpose of the contract is sufficient for section 56 to apply. The intrusion of an unexpected event or change of circumstances, so fundamental and strikes at the root of the contract, results in the discharge of the contract by frustration. If we can further compress it, when the object of the contract is frustrated there is a discharge of contract by impossibility of performance.

The present enquiry relates to the question whether this doctrine of frustration is applicable to leases of immovable property in Indian law. Not that it has not been the subject of judicial scrutiny or that a final verdict has not been given by our highest judicial court but the present investigation is undertaken only with a view to assess the existing authorities both on principle as well as in the light of the position obtaining in English law.

Statutory provisions

A lease of immovable property is "a transfer of a right to enjoy such property for a certain time either express or implied or in perpetuity in

2. The Indian Contract Act, 1872 which says that a contract to do an act which after the contract is made becomes impossible becomes void when the act becomes impossible.
4. See the author's article, Effect of War on Contracts in Indian Law Indian year book of International Affairs 231 at 246 (1953) for the real implications of this decision and the true scope of this doctrine in Indian law.
consideration of a price".\(^5\) The transferring of the right to enjoy the property for a consideration usually called rent is therefore the *sine quo non* of a lease. As in the case of other kinds of transfer *inter vivos*, lease usually springs from a contract and as per section 4 of the Transfer of Property Act, 1882, the chapters and sections of that Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. We should therefore naturally expect section 56 of the Contract Act to apply to leases. Also section 108(e) of the Transfer of Property Act provides:

> If by fire, tempest or flood, violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void.

So that even if there was any doubt whether the principle of section 56 would apply to leases or not, this sub-clause (e) of section 108, makes it abundantly clear that where the purpose, for which the property was leased out, could not be achieved, the lease could be avoided by the lessee. This clause, as one leading commentator has put it, "is a departure from the English law on the subject.\(^6\)"

**English law**

It behoves us, therefore, to examine the position in English law. In fact, the earliest case on the point and equally the most famous one is *Paradine v. Jane\(^7\)*, which was by itself a case of lease. In this case the landlord of certain premises sued his tenant for rent, although the tenant had been dispossessed by a German prince who invaded the country and occupied the premises. The court granted the decree in favour of the landlord. It was stated that if the lessee covenanted to repair a house, though it was burnt by lightning or thrown down by enemies, yet he ought to repair it. This was the harsh rule according to which a man who had not taken the care to qualify his obligation under his contract in the event of subsequent impossibility of performance must "do or die", for failing to perform that obligation. As is well-known, this rule as to absolute contracts became qualified in later years starting with *Taylor v. Caldwell\(^8\)* a case of the destruction of subject-matter—a music-hall—essential to the performance of the contract; and through the "coronation cases" of which *Krell v. Henry\(^9\)* is both typical and familiar to students of contract law. Curiously enough *Krell v. Henry* also happens to be a case of lease of premises which the defendant had agreed to occupy for the purpose of viewing the coronation procession and when the procession was cancelled, the defendant, unlike

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5. See the Transfer Property Act, 1882, s. 106.
8. (1863) B and S 826.
9. (1903) 2 K.B. 740.
the defendant of Paradine v. Jane, was held to have been excused from the performance of the contract (of lease).

But the rule in English law is generally understood to be that frustration does not apply to leases. This rule seems to have been fairly well-settled and its raison d'être is said to be the subsistence of the so-called "chattel interest", other wise also called "a term of years" created by a lease. In a leading case, Criklewood Property and Investment Trust v. Leighton Investment, which dealt with a case of a building lease for 99 years, there was a cleavage of opinion among the learned Lords. Lords Simon and Wright took the view that lease could be frustrated while Lords Russell and Goddard adopted the opposite view. Lord Parker left the question open. Lord Goddard compared this chattal interest to an "interest in the demised property" which becomes vested in the tenant as finally and irrevocably as if he had purchased the fee simple thereof. Yahuda contests the validity of this comparison. He pertinently points out that:

If that is really so, the usual covenants in leases such as absolute or qualified covenants as to assignments and sub-letting should disappear, for the transfer with such limitations, apart from involving a contradiction in terms would impose on the tenant risks and liabilities which on the happening of certain events, would deprive him of his right to quite enjoyment without relieving him from any of his obligations under the lease.

The view of Lord Goddard is also not in harmony with the history of leaseholds. Yahuda finds on a careful analysis that the "chattel interest" is only an appendant to and not the foundation of a lease. Leading text-writers are also of opinion, inspite of the position at the present day in English law being that the frustration does not apply to leases, that this works out to be an "arbitrary formula." At any rate much depends on the time for which the event causing frustration is present. In the law of Scotland, the opposite view, namely that leases can be the subject of frustration prevails.

12. (1945) A.C. 221.
14. Id. at 638.
16. For example see, Treitel supra note 10 at 764; Cheshire and Fifoot, supra note 10 at 476.
17. Cheshire and Fifoot, supra note 10 at 476.
18. Tay Salmon Fisheries v, Speedle, (1929) A.C. 593.
Indian case law

Till the pronouncement of two recent decisions by the Supreme Court,\textsuperscript{19} two views seem to have been held on the question of applying the doctrine to leases. Calcutta,\textsuperscript{20} Bombay\textsuperscript{21} and Madras\textsuperscript{22} High Courts have taken the view that there can be frustration of a lease. The Lahore\textsuperscript{23} and more recently the Punjab\textsuperscript{24} High Courts have taken a contrary view that a lease cannot be frustrated. In some of the cases which took the former view, no reference is made to section 108(e) of the Transfer of Property Act. As the Supreme Court has dealt the whole question in the cases mentioned above, it would not be necessary for us to examine the merits of the views expressed by the several High Courts. We may rather concentrate on the cases decided by the Supreme Court.

In the first of the cases, namely in Dhruv Dev Chand \textit{v.} Harmohinder Singh,\textsuperscript{25} the appellant before the Supreme Court was the lessee of certain lands within undivided Punjab who took them on lease for the \textit{kharif} season in 1947 and \textit{rabi} season for 1948 from the Court of Wards for a certain estate. He sued for a refund of the sum paid by him following the allotment of the leased lands in Pakistan on the partition of India in 1947. The respondents who were the owners of the estate resisted the claim. The claim for refund of the rent was made by the appellant on the ground that the covenants of the lease had become impossible of performance as a result of communal riots in the area and the inability of non-Muslims to continue to reside in that area. As the Supreme Court itself said, "he (the lessee) was unable to continue in effective possession on account of circumstances beyond his control."\textsuperscript{26} The trial court decreed the suit. But the Punjab High Court reversed the decree holding that the doctrine of frustration did not apply to leases of immovable property.\textsuperscript{27} Hence the appeal by the lessee to the Supreme Court. The Supreme Court agreeing with the Punjab High Court, held that the appellant was not entitled to get refund of the rent and dismissed the suit. The main ground on which the judgment of the Supreme Court is based is that the doctrine of frustration in the law of contract embodied in section 56 of the Indian Contract Act, 1872 does not apply to leases as it is a "completed conveyance," different from an "executory contract"; and "events which discharge a contract do not invalidate


\textsuperscript{20} Abdul Hashem \textit{v.} Behari Mondal, A.I.R. 1952 Cal. 380.

\textsuperscript{21} Tarabari Jivanlal \textit{v.} Padamchand, A.I.R. 1950 Bom. 89.


\textsuperscript{23} Inter Pershad Singh \textit{v.} Campbell, I.L.R. (1881) 7 Cal. 474; See also A.I.R. 1956 Trav. Coch. 59.


\textsuperscript{25} A.I.R. 1968 S.C. 1024 (Shah, Ramaswami, Mitter JJ. Judgement of the court was delivered by Shah J.).

\textsuperscript{26} Id. at 1025.

\textsuperscript{27} A.I.R. 1961 Punj. 143.
Apart from the foregoing general observations it is not easy to find out the exact reason upon which the Supreme Court proceeded to make the above distinction for concluding that frustration does not apply to leases. The following observations may be extracted as showing the considerations which perhaps impelled the mind of the court to such a conclusion:

We are unable to agree with the counsel for the appellant in the present case that the relation between the appellant and the respondent vested in a contract. It is true that the Court of Wards had accepted the tender of the appellant and had granted him a lease on agreed terms, of lands of Dada Siba Estate. But the rights of the parties did not, after the lease was granted, rest in contract. The second paragraph of section 56 (of the Contract Act) which is the only paragraph material to cases of this nature has a limited application to covenants under a lease. A covenant under a lease to do an act which after the contract is made becomes impossible becomes void when the act becomes impossible or unlawful. But on that account the transfer of property resulting from the lease granted by the lessor to the lessee is not declared void.

Referring to section 108 (e) of the Transfer of Property Act the court observed that it applies to leases only where the property is destroyed or rendered substantially and permanently unfit for the purpose for which it was let. The lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him.

Before proceeding further, we can relate the facts and decision of the Supreme Court in the second case also, in order to understand better the validity or otherwise of the afore-mentioned distinction between a contract and a completed conveyance like a lease for purposes of frustration made by the Supreme Court as above mentioned. In *Sushila Devi v. Hari Singh,* the appellants before the Supreme Court were the legal representatives of one Vidyavati, owner of village in Teshil Gujranwalla, now in Pakistan. Respondents took it on lease for three years in response to a public notice of the owner, inviting tenders to take the land on lease from January 1947. Respondents paid Rs. 1000 as earnest money and later another sum of Rs. 34000 as security for payment of rent. No lease deed was executed or registered, although as per the terms of the tender a lease deed ought to have come into existence within fifteen days of the making of the contract.

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30. *Id.* at 1027.
31. (1971) 1 S.C.W.R. 697 (*Hegde, Grover, JJ.* judgment of the court was delivered by Hegde J)
Teshil Gujranwalla became part of Pakistan as a result of partition of India in 1947. As a consequence of the communal riots, respondents could not cultivate the lands or otherwise collect their yield. In fact both parties had to migrate to India. The appellant thereupon filed the suit for recovering the above sum of Rs. 34000 plus Rs. 2000 as damages, on the ground that the lease had become frustrated. The trial court allowed the lessee’s claim and the High Court of Jamu and Kashmir confirmed the trial court’s order. In the appeal by special leave by the owner-lessee to the Supreme Court, the only question before the court was, as the Supreme Court itself formulated it, “whether the contract referred to in the plaint has become void in view of the circumstances established.”

The decision of the Supreme Court was that as the case, before it was one of an agreement to lease and not a lease, (because no lease deed required under the law had been executed or registered, and not because the lessee had not taken possession of the land or enjoyed it for that was the responsibility wholly of the lessee himself, as per the facts appearing from the record of the case) and it became impossible of performance owing to supervening circumstances beyond the control of the parties: there was frustration. It therefore, agreed with the lower courts and dismissed the appeal of the lessor. That is the lessee succeeded in getting refund of the amount paid on the frustration of the lease, rather the agreement to lease.

But the Supreme Court made it absolutely clear that its decision in the earlier case noted above, namely *Dhruv Dev Chand v. Harmohinder Singh*, has laid down what the law ought to be, viz, the rule as to frustration embodied in section 56 of the Contract Act applied only to a contract. It was observed by the Supreme Court that:

Once a valid lease comes into existence the agreement to lease disappears and its place is taken by the lease. It becomes a completed conveyance under which the lessee gets an interest in the property. There is a clear distinction between a completed conveyance and an executory contract. Events which discharge a contract do not invalidate a concluded transfer. See *Raja Dhruv Dev Chand v. Harmohinder Singh...*. In view of that decision the view taken by some of the High courts that section 56 of the Contract Act applies to leases cannot be accepted as correct.

If any further reiteration of the non-applicability of frustration to leases is needed, we may advert to a very recent decision of the Allahabad High Court, in *Rahim Bux v. Mohammad Shafi*. In this case the plaintiff was the tenant of the defendants shop which was itself part of a big building belonging to the defendants, in the city of Lucknow. The entire building

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32. Id. at 701.
33. Ibid.
34. A.I.R. 1971 All. 16,
was demolished in compliance with a notice by the municipal authority, presumptively in the interests of public safety. The plaintiff consequently sued for injunction and in the alternative for possession against the defendants. The trial court dismissed the suit; the first appellate court decreed it; the defendants appealed to the Allahabad High Court. At the trial court, the defendants sought and were granted permission to re-build but, as it was said, at his own risk and responsibility.

The appellants (defendants) contended firstly that after the shop had been demolished, the lease became void under section 108(e) of the Transfer of Property Act. The Allahabad High Court did not accept this argument. The court said that the demolition of the building, even though in pursuance of a notice by the municipal authority, cannot be said to be a destruction of the premises by an irresistible force within the meaning of section 108(e). Further, according to the court, the option to avoid the lease under this clause, namely clause (e) of section 108, rests with the tenant and not with the landlord.

The appellants contended secondly that after the demolition of the building the contract of tenancy was frustrated and it became impossible of performance under section 56 of the Contract Act. This argument also did not succeed before the Allahabad High Court. As observed by the court:

The doctrine of frustration applies to purely contractual obligations and not to a contract creating an interest in land which had already accrued in favour of a party. Moreover in this case even if this doctrine had been applicable, the facts do not show that the contract of lease had become impossible of performance. The landlord who demolished the premises in compliance with the Municipal Board... could rebuild the premises in the same form in which they existed before, and the rights of lessor and lessee would then be available in respect of the new premises.35

The court further observed that it would be for the execution court to decide as to which portion of the premises consisted of the shop which was in the tenancy of the plaintiff and to restore possession to him only in respect of that portion. Hence the appeal by the landlord was dismissed and the tenant succeeded in getting possession of the premises, such as might be determined, as the court said, by the execution court.

With this formidable authority in favour of excluding the operation of the doctrine from leases of immovable property it would almost be blasphemous to canvass a contrary position which, however, seems, to the present writer, to be more in consonance with sound principles and justice. What is the reason for saying that frustration does not apply to leases? With great respect to the learned judges, there does not appear to be any valid reason for this. From the very contrary conclusions arrived at by the

35. *Id.* at 17.
Supreme Court itself in the two cases cited above and on a set of facts almost identical in both, the arbitrariness of the formula is evident; although the ratio of both of them is allegedly the same. No doubt the distinction was sought to be made on the fact that in the later case (Sushila Devi's case) the lease had not fructified beyond the stage of an agreement. This was nothing short of, if one may be excused for the expression, piling unreasonableness upon technicality. In the first case the tenant could not be in possession but as it was a case of lease, the doctrine of frustration did not apply and he could not get refund of the amount paid; in the second case, the tenant could not be in possession for the same set of reasons and causes as in the first, but he could get a refund of the rent paid because it was not a lease but only an agreement. Is this not a proof of the statement that the forms of action may have passed away but the form of legal thought still rulets us from their graves? It is grim irony for us to find that on almost the same set of facts, no less inferior a court that a Full Bench of the Punjab High Court has recently held, no doubt, by a majority of two against one, that the tenant was entitled to get refund of the rent paid because the doctrine of frustration applies equally to leases as well as to other contracts. Here also it related to a lease of some agricultural property which subsequently became part of Pakistan. The lessee did not and could not take possession owing to the communal riots. Harbans Singh J. who dissented and took the view that frustration cannot apply to a lease observed:

A lessee goes into possession of the land demised and the lessor has nothing more to do on his part under the contract, there accrues in favour of the lessee a right in the land though the same is less than the ownership rights. This estate which has come into being in his favour cannot be affected by the application of the doctrine of frustration as embodied in section 56 of the Indian Contract Act.

His Lordship however was of the view that the provisions of section 108(e) of the Transfer of Property Act, did not, in cases where it applied, mean the same thing as a contract becoming void by application of the doctrine of frustration, as in that case, according to the learned judge, it depends on the volition of one party, namely the lessee, to terminate it, whereas if frustration operates at all, it operates automatically so as to render the contract void from the date of the supervening impossibility. This way of distinguishing frustration from section 108(e) implies that under this sub-clause the tenant will have a right, in the case of the property taken on lease is destroyed, for example, by fire, to choose to treat or not to treat the lease as at an end of what use will it be to any one except that the tenant may "choose" to pay the rent without having the property to enjoy? The volition given to the lessee to avoid is only for securing his rights against the landlord.

36. See supra note 24.
37. Id. at 53.
The creation of an interest in land by means of a transfer of property like a lease may mean that the transferee will get more than merely contractual rights which are, as is well-known only rights in *persona*. There is no reason why frustration should not apply to leases. Such rights are necessarily based on and only appurtenant to, not independent of the right to be in possession of and enjoyment of the property. This is the fundamental or main purpose of the whole transaction called a lease. If that purpose fails, there is no interest in fact enduring in favour of the tenant. The case may be different where the full ownership is transferred.\(^{38}\)

In fact the statutory provision, section 108(e), seems squarely designed to meet the very contingencies which falls to be considered in the aforesaid cases. Though the specific cases of fire, tempest, flood, violence of an army are mentioned, the courts in the above cases which had to decide the side-effects in the law of leases caused by the travails of partition perhaps omitted to notice that the specific mention of those cases is followed in the section by “the violence of a mob or other irresistible force” and also by the mention of “any substantial and permanent” unfitness of the property for which it was let. If owing to communal riots, the parties far from being able to take possession of the property leased had to flee their abode and migrate to another country, namely India; one fails to understand how this will not be an event rendering the property taken on lease substantially unfit for the purpose for which it was taken, as the Supreme Court thought it was not in *Dhruv Dev Chand’s* case?\(^{39}\)

The property no doubt may in fact exist and be fit in a physical sense; but in relation to the parties does it continue to be fit for the purpose contemplated by them? As has been observed by the Supreme Court in *Satyabrata Ghose’s* case, cited above that the rule of section 56 of the Contract Act applies not merely to cases of impossibility in a physical sense but also in a commercial sense. To exclude this wholesome doctrine which has been developed for promoting the cause of justice and fairplay, from applying to a transaction we are used to call a lease, would land us in empty technical formulae and needless classifications. No doubt there is an option given to the lessee alone under section 108(e) but that is because so far as the lessor is concerned the contingency of avoiding a lease would not arise when the property let undergoes any of the events mentioned in that section. If for example the property is destroyed or rendered unfit, the lessor’s right to receive the rent upto the date of destruction or unfitness is secure under the general law, and for rent due after such event it remains the burden of the lessee to claim that section 108(e) operates to avoid it. It is an entirely a misreading of the purport of section 108(e) to say that lessor has no option, as was done by the Allahabad High Court in *Rahim Bux v. Mohammed Shafi*. In the circumstances which happen to affect the right of the lessee to enjoy the property, it will be necessary only for the lessee, not for the

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lessor, to avoid, it as per the section. Even in the Allahabad case on the demolition of the building there was nothing to which the lease could attach but to say that in the building rebuilt by the landlord the tenant could claim his rights as a lessee implies that the tenant could exercise or fail to exercise such option depending on the willingness and action of the landlord. That is to say the tenant's right or option of avoiding the lease depends, according to the decision, on the landlord's consent and will to rebuild the premises. This is equal to saying that the lessee's option depends on the landlord's option. Can anyone imagine that the landlord would have taken the trouble of putting up a fresh construction, had he only known that as a result of his choosing to rebuild, he would be giving his own original lessee (whom he, for aught we know, did not want to continue as his lessee) an option not to avoid the lease terminated by the demolition under orders of the municipal authority?

The Supreme Court in Sushila Devi's case said in the passage already quoted that "once a valid lease comes into existence the agreement to lease disappears and its place is taken by the lease." Doubtless a lease, though it springs from a contract, may transcend it in the sense that it gives rise to a right in rem to the lessee. That right is constituted to be what Yahuda calls the 'fundamental element' in a lease, namely, the covenant for quiet enjoyment. Inability or impossibility of securing the observance of this covenant without the fault of either party, must necessarily involve a termination of the lease. Of course, the determining factor will be the degree of interference and the duration of the event which has caused such inability or impossibility. Dr. Glanville Williams thinks the right in rem supposed to be conferred on the lessee is artificial. In fact the opening paragraph of section 108 itself speaks of the absence of a "contract to the contrary," which implies that there is no disappearance of the contract, automatic or otherwise, on the making or completion of a lease as observed by the Supreme Court.

Conclusion

We believe that the points made above make it sufficiently clear that there is no reason, either on principle or in the name of justice, to exclude the operation of the doctrine of frustration from leases. Although the doctrine has been developed in relation to obligations arising under a contract, the principle can well be extended to other kinds of relationships without getting into any danger of causing unjust loss. At any rate the distinction between a contract and lease is not such as call for any different treatment of the latter under circumstances which, if it were a contract, would have brought in that principle into operation.

That principle is already implicit in section 108(e) of the Transfer of

40. Supra note 13.

41. Coronation Cases 4 Mod L. Rev. 248 at 257 (1941).
Property Act but it would be better to introduce a general provision comparable to section 56 of the Contract Act deleting at the same time the words giving the option to avoid the lease to the lassee alone. It would also be necessary for the Supreme Court to review, if the occasion arises, its decisions in Dhruv Dev Chand's case and Sushila Devi's case, in order to make this branch of the law conform to sound principle and accepted notions of justice.

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