IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

S.C. Appeal No. 08/2017
SC/HCCA/LA No. 322/2016
SP/HCCA/MA/45/2012 (F)
D.C. Matara Case No. 9844/M

1. Pallocci Donatella,
   145, via Leornadi,
   Roma, Italy.
   And presently resident in Unawatuna.

2. Palermi Luca,
   07, via Benucci,
   Roma, Italy.
   And presently resident in Unawatuna.

Plaintiffs

Vs.

Yamuna Kanthi Stein,
No. 158, Kapparatota Road,
Weligama.

Defendant

AND

Yamuna Kanthi Stein,
No. 158, Kapparatota Road,
Weligama.

Defendant-Appellant

Vs.

1. Pallocci Donatella,
   145, via Leornadi,
   Roma, Italy.
   And presently resident in Unawatuna.

2. Palermi Luca,
   07, via Benucci,
   Roma, Italy.
   And presently resident in Unawatuna.

Plaintiff-Respondents

AND NOW BETWEEN

1. Pallocci Donatella,
   145, via Leornadi,
   Roma, Italy.
   And presently resident in Unawatuna.

2. Palermi Luca,
   07, via Benucci,
   Roma, Italy.
   And presently resident in Unawatuna.

Plaintiff-Respondent-Appellants

Vs.

Yamuna Kanthi Stein,
No. 158, Kapparatota Road,
Weligama.

Defendant-Appellant-Respondent

Before: Hon. Yasantha Kodagoda, P.C., J.

Hon. Janak De Silva, J.

Hon. Arjuna Obeyesekere, J.

Counsel:

Geoffrey Alagaratnam, P.C. with Lasantha Garusinghe and Nilakshi Silva for Plaintiff-Respondent- Appellants

Saliya Pieris, P.C., with Pasindu Tilakaratne for Defendant-Appellant-Respondent

Written Submissions:

Appellants on 24.03.2017

Respondents on 06.06.2017

Argued on: 17.03.2025

Decided on: 03.04.2025

Janak De Silva, J.

The Plaintiff-Respondent-Appellants ("Appellants") and the Defendant-Appellant-Respondent ("Respondent") entered into a lease agreement No. 13548 dated 23.08.2004 (P1) ("lease agreement"). In terms of the lease agreement, all that soil plantations and buildings bearing new assessment No. 524 at Pelana more fully described in the schedule to the lease agreement was leased to the Appellants for a period of five (5) years commencing on 15.11.2004. The leased premises included all fixtures, fittings and equipment therein described in a separate inventory signed by the parties. In fact, parties entered into agreement No. 3125 (V1) for the furniture, fittings and other movable

property at the property forming the subject matter of this application. In terms of this agreement, the movables described therein becomes part and parcel of the lease agreement (P1).

Monthly rental for the first year commencing on 15.11.2004 was Euro 1400 per mensem making the annual rental Euro 16800. Out of this, Euro 1500 was paid by the Appellants on the date of execution of the lease agreement i.e. 23.08.2004. The Appellants further credited Euro 5500 as part of the entire rental due for the first year immediately after one week from the signing of the lease agreement. The entire balance of the lease rental for the first year was paid by the Appellants on 15.11.2004 on which day the vacant possession of the property was handed over to the Appellants. The Appellants also paid Euros 2000 being the security deposit. These are admitted facts.

The dispute between the parties revolves on the damage caused to the property by the *tsunami* that occurred on 26.12.2004. According to the Appellants the property was destroyed resulting in the frustration of the contract.

Hence, the Appellants instituted this action to recover a sum of Euro 16840 (Sri Lankan Rupees 21,50,299.60) being the balance from the lease rental paid after deducting the rental due for the period 15.11.2004 to 26.12.2004. The Respondent denied this claim.

The learned District Judge held that although the property was not completely destroyed, it was destroyed to the extent that it could not be used for the intended business and entered judgment as prayed for in the plaint.

The Respondent appealed to the Civil Appellate High Court of the Southern Province holden at Matara ("High Court").

The High Court held that upon a consideration of the entirety of evidence, it appears that the discontinuation of the business was due to financial viability rather than impossibility. It was further held that the learned District Judge has not considered the fact that the

failure was due to cause other than frustration. The judgment of the learned District Judge was set aside.

Aggrieved by the judgment of the High Court, the Plaintiffs appealed.

Leave to appeal has been granted on the following question of law:

(1) Did the learned High Court Judges err in failing to consider the 'frustration of adventure' the Plaintiffs embarked upon by the Lease Agreement marked P1?

Learned President's Counsel for the Appellant contended that the question is whether there was a frustration of the venture. On the contrary, Learned President's Counsel for the Respondent contended that the property forming the subject matter of the lease agreement was not completely destroyed and hence the evidence does not establish frustration.

Although this appeal must be determined by reference to the applicable law, which is the Roman-Dutch law, both the Appellants and Respondent have cited several English authorities in support of their respective cases. Hence, I wish to briefly examine the two legal regimes to ascertain the respective positions on frustration or impossibility of performance in deciding on the relevance of these English authorities.

English Law

The doctrine of frustration in English Law evolved to mitigate the rigour of the common law position which insisted on literal performance of absolute promises.

The evolution began from the initial position that contracts were regarded as absolute and impossibility of performance did not provide a ground for discharge of the contract. This approach is exemplified in ***Paradine v. Jane*** **[(1647) Aleyn 26]** where it was held that where a lessee covenant to repair a house, he ought to repair it even though it be burned by lighting.

A change of approach by the English Courts to this strict doctrine is seen in ***Atkinson v. Ritchi*e [(1809) 10 East 530]** which marked the initial acknowledgment of supervening illegality as a valid basis for excusing contractual non-performance. According to Weeramantry **[*Law of Contracts*, Vol. 2, Stamford Lake Publications, 1967, 749]**, the court's decision to deviate from the strict doctrine of absolute liability stemmed from considerations of public policy, leading to the recognition of the need to accommodate exceptional situations within the realm of contract law.

The recognition of legal impossibility provided a ground for the exception to be expanded to physical impossibility. In ***Taylor v. Caldwell*** **[(1863) 3 B & S 826]** a music hall was hired out for the purpose of holding a concert. The hall got destroyed by a fire. Blackburn J. relied on civil law authority and held that impossibility would discharge a contract. He justified his decision on the ground that if the fulfilment of a contract depends on the continued existence of a certain thing, that contract is subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

The doctrine was extended to cases where although the subject matter continued to be in existence, it is not available for use during the period of the contract or its use in the changed circumstances would be something radically different from that which was in the contemplation of the parties at the time of entry into the contract **[*Jackson v. Union Marine Insurance Co. Ltd.* (1874) LR 10 CP 125]**.

In ***Krell v. Henry*** **[(1903) 2 KB 740]** there was an agreement to hire a flat. Both parties were aware that it was for watching the coronation procession which got cancelled. It was held that because the viewing of the procession had been the common foundation of the contract, its purpose was frustrated and hence it was discharged. The decision was premised on the fact that the foundation of the contract which is said to have collapsed was common to both parties to the contract.

Thus, the doctrine of frustration in English law applies to both physical impossibility as well as legal impossibility. It applies where the performance of the contract subsequently becomes impossible due to change in law **[*Denny, Mott & Dickson v. James B. Fraser & Co. Ltd.* (1944) AC 265]** or a change in circumstances **[*Fibrosa Spolka Akeyjna v. Fairbairn, Lawson Combe Barbour Ltd.* (1943) AC 32]**.

The classic statement of the doctrine of frustration in English law is found in ***Davis Contractors Ltd v. Fareham Urban District Council*** **[(1956] AC 696 at 729]** where Lord Radcliffe held:

> *"[F]rustration occurs whenever the law recognizes that without default of either party a contractural obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."*

The fact that it is impracticable to perform the contract is not generally a ground for discharge in English law. In ***Tennants (Lancashire) Ltd v. CS Wilson & Co Ltd.*** **[(1917) AC 495 at 510]** Lord Loreburn said that "*[t]he argument that a man can be excused from performance of his contract when it becomes "commercially" impossible…seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect".* The dicta in ***Davis Contractors Ltd v. Fareham Urban District Council*** **[supra.]** appears to indicate that there must be at least a hundredfold increase in the cost for discharge to be recognised.

As the matter in issue is whether the lease agreement was frustrated, it is relevant to examine the position in English law on this issue. In ***Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd.*** **[(1945) AC 221, (1945) 1 All ER 252]** the House of Lords held that even if the doctrine of frustration were capable of application to a lease, it did not apply to the specific circumstances of the case.

The issue was put beyond doubt in ***National Carriers Ltd. v Panalpina (Northern) Ltd.*** **[(1981) 1 AC 675]** where the House of Lords held (Lord Russell dubitante) that the doctrine of frustration was capable of applying to an executed lease of land so as to bring the lease to an end if a frustrating event (i.e. an event such that no substantial use, permitted by the lease and in the contemplation of the parties, remained possible to the lessee) occurred during the currency of the term. The decisive argument was the essential unity of the law of contract and the belief that no type of contract should as a matter of law be excluded from the doctrine.

Lord Simon held [at page 700] that:

> "*frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance*."

Several theories underpin the doctrine of frustration in English law. In ***National Carriers Ltd v Panalpina (Northern) Ltd.*** **[Ibid. 687-8]** Lord Hailsham LC highlighted five theories for frustration: the implied term theory, a total failure of consideration theory, the just outcome theory, the frustration of the "adventure" or "foundation" of the contract theory and the construction theory.

The implied term theory was the first of the theories to be used to justify the application of the doctrine of frustration [See ***Taylor v Caldwell*** **(supra.)** where Blackburn J. discusses the exceptions at pages 836-837]. This theory requires the court to ascertain what the parties would have intended to happen following the supervening event, had they turned

their minds to it at the time they made their contract. By implying a term, it has been said that "the law is only doing what the parties really (though subconsciously) meant to do themselves" **[*Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 504** per Lord Sumner**]**.

Total failure of consideration theory has been used to describe cases where the supervening event renders the performance of one party's obligations impossible. However, the total failure of consideration theory is difficult to apply in cases where a contract has been partly performed. In ***National Carriers Ltd v Panalpina (Northern) Ltd.,* [supra. 702]** Lord Simon said that, of all the theories, the total failure of consideration is incompatible with the application of the doctrine of frustration to a lease precisely because the lease will be partly executed at the time of the supervening event.

In just outcome theory, the contract is discharged in order to avoid the perceived injustice that would otherwise result from compelling the parties to undertake something totally different from what they originally promised to do. It is in fact a theory founded upon a principle captured in all the other theories.

The frustration of the adventure or foundation of the contract forms the next theoretical basis for the doctrine of frustration. This theory brings an objective focus on the event and its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure. The knowledge or intention of the parties are immaterial.

A theory that has found increasing favour in recent times as the correct basis for the doctrine of frustration is the construction theory. In ***Davis Contractors Ltd v. Fareham Urban District Council* [supra.]**, Lord Reid held that frustration depends on the construction of the terms of the contract which should be read in light of the nature of the contract and the relevant surrounding circumstances when the contract was made. He said [at page 721] : *"The question is whether the contract … is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."*

English law has used the doctrine of frustration in a restrictive sense. It is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains and must be kept within very narrow limits and ought not be extended **[Pioneer Shipping Ltd. and Others v. B.T.P. Tioxide Ltd. ("*The Nema*") (1982) AC 724 at 752; *J. Lauritzen A.S. v. Wijsmuller B.V. ("The Super Servant Two")* (1990) 1 Lloyd's Rep. 1 at 8]**.

To recapitulate, the position in English law, according to McKendrick [*Contract Law, Text, Cases and Materials*, 2nd ed., 2005, Oxford, 868] is that the doctrine of frustration operates to discharge a contract where, after the formation of the contract, something occurs which renders performance of the contract impossible, illegal, or something radically different from that which was in the contemplation of the parties at the time of entry into the contract.

Learned President's Counsel for the Respondent drew our attention to the decision in ***Bank of New York Mellon (International) Ltd v Cine-UK Ltd*; *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and others*** **[2022] EWCA Civ 1021**. However, the facts of that case differ from the facts of the present appeal. In that case, the tenants sought to resist their respective landlords' claims for rent for periods when the COVID-19 pandemic meant the demised premises could not be used as a cinema. The tenant *inter alia* contended that it was relieved from the obligation to pay upon a true construction of the *rent cesser* provision in the lease. A *rent cesser* provision is a clause in a lease that provides for the suspension of a tenant's obligation to pay rent under certain circumstances (e.g. where the whole or part of a premises is damaged or destroyed. The Court of Appeal held that the *rent cesser* provision operated only where there was physical damage or destruction to the property by an Insured Risk (as defined within the lease).

Roman-Dutch Law

The doctrine of impossibility of performance forms part of the Roman Law and the Roman-Dutch Law.

The theoretical origin of the doctrine of impossibility in Roman-Dutch Law is the principle of *clausula rebus sic stantibus*, which means "things thus standing". It recognises that contracts are based on the hypothesis that the conditions at the time of contracting will remain unchanged. Where unforeseen events occur that make the performance of the contract impossible or radically different, it provides the theoretical justification for the doctrine on impossibility of performance to be applied so that the contract can be discharged. The doctrine is grounded on fairness and equity. It prevents parties from being bound by contracts when it would be unreasonable or unjust to enforce them.

Buckland [*A Manual of Roman Private Law*, 1953, Cambridge, 342] states that an *obligatio* may cease to exist due to supervening impossibility and gives the example of destruction of subject matter.

Grotius in *The Introduction to Dutch Jurisprudence* [Translated by Charles Herbert (London: John Van Voorst and another, 1844) page 326] states:

> *"The extinction of the thing extinguishes the obligation when something specific was the object of the obligation, and the extinction took place without neglect of the debtor, and before the time of making default in payment, or before the time when the thing ceases to be an article of commerce."*

Lee in *An Introduction to Roman-Dutch Law* [5th ed., 276] states that if a contract, possible when made, subsequently becomes impossible of performance, the parties are sometimes discharged from future liability. Whether this will be so or not depends upon the nature of the contract and the circumstances of each particular case.

Weeramantry in *The Law of Contracts* [supra. 747] states that the doctrine that a contract was discharged by supervening impossibility was well recognised by Roman and Roman-Dutch law. Where performance becomes impossible either physically or legally, the debtor is discharged from liability if the impossibility of performance is due *vis major* or *causus fortuitus*.

The terms *vis major* and *casus fortuitus* are concepts derived from the Roman Dutch Law. *Vis major* or superior force is some force, power or agency which cannot be resisted or controlled by the ordinary individual **[*Benoni Produce and Coal Co. Ltd. v. Minister of Railways and Harbours* (1914) WLD 31 at 35]**. This term is now used as including not only the acts of nature or *vis divina* (act of God) but the act of man as well **[*Peters, Flamman & Co. v. Kokstad Municipality* (1919) AD 427 at 435]**. *Casus fortuitus* (inevitable accident) is a species of *vis major* and includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against **[*New Heriot Gold Mining Co. Ltd. v. Union Government* [(1916) AD 415 at 433]**.

Whether the supervening event of *vis major* or *casus fortuitus* results in impossibility of performance will depend on a number of factors.

The test for determining impossibility under the Roman-Dutch law is explained in ***Hersman v. Shapiro & Co.* [1926 TPD 367 at 372-8]** where Stratford J. held that one must:

> *"look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant to see whether the contract should be discharged."*

The present position in Roman-Dutch law is succinctly stated in ***Transnet Ltd t/a National Ports Authority v. owner of MV Snow Crystal*** **[2008(4) SA 111 (SCA) para 28 (authorities omitted)]** as follows:

> *"As a general rule impossibility of performance brought about by a vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to "look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied. The rule will not avail a defendant if the impossibility is self-created, nor will it avail the defendant if the impossibility is due to his or her fault."*

Having set out the respective position in English law and Roman-Dutch law on frustration and impossibility of performance respectively, it is apparent that there are strong similarities between the two doctrines **[*Nuclear Fuels Corporation of SA (Pty) Ltd. v. Orda AG* 1996 (4) SA 1190 (A) at 1214C]**.

Learned President's Counsel for the Respondent drew our attention to Weeramantry [supra. page 746] where he states that although there is fundamental difference in approach between Roman-Dutch law and English law to the question of impossibility of performance or frustration, through a long process of development English law has been brought very close to Civil law in its practical application.

However, there is a fundamental difference between the two legal systems in the starting point of the application of the two doctrines.

In English law, the rule is that court starts with the contract and remains with the contract throughout, looking exclusively at it to ascertain what the effect of any supervening conditions should be in law.

On the contrary, in Roman-Dutch law, Court begins by implying a term into the contract exempting a party from liability when through no fault of his own the contract becomes impossible of performance. Thereafter, the Court looks to the contract, to see how that implied term should be applied in regard to the specific facts of the particular contract involved. In other words, in Roman-Dutch law, the rule is that impossibility of performance does in general excuse the performance of a contract unless the particular circumstances of the case, the nature of the contract and the nature of the impossibility invoked by the defendant displaces the general rule.

Therefore, this distinction must be borne in mind in using any English authority.

Application of the Doctrine to the Factual Circumstances

Before applying the legal principles, it is important to describe the property in issue. It consisted of four two storied buildings, each containing two rooms, one on the ground floor and the other on the first floor. There were eight rooms in total. These rooms were situated around 50 meters away from the sea. There was another building which was to be used as a restaurant with a seating capacity for forty persons. It was situated about 100 meters away from the sea.

The Respondent had begun construction of the premises in 2004. She had met the Appellants during the time it was under construction. She came to know that the Appellants were looking for a property to be used as a tourist resort. Acting on their request, the Respondent expedited the construction by using additional labour and handed it over to the Appellants on 15.11.2004. It was admittedly furnished to be used as a tourist resort and was described by the Respondent as luxury accommodation.

The parties were not at variance on whether *tsunami* was a *vis major* or *casus fortuitus*. Indeed, it is beyond debate that a *tsunami* is a *vis major* or *casus fortuitus*. As held in ***Alibhoy v. The Ceylon Wharfage Co. Ltd.*** **[56 NLR 470 at 476]** under modern conditions,

the term *vis major* is not necessarily restricted to "an act of God" or to the consequences of piracy, ship-wreck, thunder, lightning, or hostile action by the Queen's enemies.

The issue on which the parties are at variance is the extent of damage caused by the *tsunami* to the property. It is this very intricate issue that we are required to determine as one of the fundamental issues in this case.

As Lord Wright observed in ***Denny, Mott and Dickson Ltd. v. James Fraser & Co. Ltd.*** **[(1944) AC 265 at 274-5]**:

> *"Where, as generally happens, and actually happened in the present case, one party claims that there had been frustration and the other party contests it, the court decides the issue and decides it ex post facto on the actual circumstances of the case. The data for decision are, on the one hand the terms and conditions of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decided what is the true position between the parties."*

According to the Appellants, the property was heavily damaged. The restaurant and the surrounding wall had collapsed. All the equipment in the restaurant had got washed away. The four buildings also suffered heavy damage. Two foreigners who were staying at the tourist resort died.

The Respondent denied that the property was fully damaged. Although she admitted that the restaurant was fully destroyed, it was contended that the upstairs rooms could have been rented. However, when pressed in cross-examination she conceded that the toilet facilities for the said rooms could not have been provided as they were destroyed. It was her contention that property could have been renovated and the business of the Appellants carried on.

In this context, the evidence of Viraj Jeewantha, former Grama Niladhari of the area is vital to obtain an independent and objective description of the damage caused to the property. He testified that the first floors of the four buildings did not suffer much damage. However, the ground floors were fully damaged. The doors and windows were washed away. The kitchen was also fully damaged. The furniture had been swept away. The restaurant was a total destruction. His evidence on these matters were not challenged in cross-examination which was directed more towards eliciting the fact that the buildings and kitchen could have been renovated.

Moreover, the evidence of the Respondent is contradicted by the statement she made to the Police within a few days of the *tsunami* on 05.01.2005. It is stated therein that the restaurant was completely damaged. Furthermore, she states that the cost of the damage to the restaurant and the buildings is around Rs. 6 million. This provides a good assessment of the damage caused to the property due to the *tsunami*.

In the context of the above evidence, it is clear that although the property was not completely destroyed, it had suffered heavy damage. The restaurant was completely destroyed. The furniture, doors and windows had been washed away. The property was in no condition to be used as a tourist resort.

Here, it is important to note that Weeramantry is of the view that [supra. page 751]:

> *"it is not necessary that there should be a total or complete destruction of the subject matter of the contract. It is sufficient if the subject matter is affected in such a way that the main purpose of the contract is defeated or cannot be performed. Thus even where there is an impairment or destruction not of the entirety but of some attribute or quality which is essential to the particular contract, the contract is discharged in the same way for the reason that performance is impossible."*

I must now examine the provisions of the lease agreement to ascertain whether parties had allocated the risks arising from this event between them. In other words, did they contemplate of the consequences of a *tsunami* and the damage caused thereby.

In doing so, the starting position in the Roman-Dutch law is that Court implies a term into the contract exempting a party from liability when through no fault of his own the contract becomes impossible of performance. Thereafter, the Court looks to the contract, to see how that rule should be applied in regard to the specific facts of the particular contract involved.

The Respondent contends that the lease agreement has made provision for such an eventuality. In particular our attention was drawn to Clauses 8 and 12 therein.

Clause 8 of the lease agreement states that the lessor shall, upon being informed by the lessees, make all repairs necessary major structural repairs to the premises with any other minor repairs due in terms of Clause 7.

The structural repairs contemplated in this clause does not in my view cover structural repairs arising from a *tsunami*. The damage from a *tsunami* was never in contemplation by the parties. This becomes clear upon an examination of Clause 12 which refers only to civil commotion, riots, floods and fire.

In any event, it covers only structural damages. No provision is made for damage to the for the furniture, fittings and other movable property referred to in agreement V1. It is clear that these furniture, fittings and other movable property was an integral part of the premises leased for a tourist resort.

I am of the view that Clause 12 of the lease agreement does not displace the implied rule in Roman-Dutch law. Firstly, it exempts the lessee from being liable to pay for any damages incurred due to civil commotion, riots, floods and fire. Secondly, the lessee is made liable for damages caused to the demised premises as a result of any act or wilful default of the

lessee or their employees, workers, servants or any other person acting under their authority.

It is important to note that both parties were aware that the property was being leased to be used as a tourist resort. In fact, admittedly the property was constructed and furnished with that objective in mind. The lease agreement covered both soil plantations and buildings standing thereon together with all fixtures, fittings and equipment described in agreement No. 3125 (V1) entered into between parties.

In my view, these facts plainly establish that the state of things both parties clearly intended was that the property will continue to remain in a fit condition for it to be used as a tourist resort. However, the damage caused by the *tsunami* to the property changed this position. The property was damaged to such an extent that it was not possible for it to be maintained as a tourist resort unless restored to its former condition at a cost of around Rs. 6 million. This is nearly the total of three years lease rental.

There is no term in the lease agreement which requires any party to spend such a large sum of money to renovate the property due to damage caused by a *tsunami*.

Moreover, in invoking the doctrine of impossibility to perform, the Appellants are not seeking to avoid a bad bargain made by them as contended by the Respondent. Rather, they seek to be excused from the performance of their bargain due to an event beyond the control of either party which resulted in a change of the fundamental status of things envisaged by both parties at the time the lease agreement was made.

Besides, that event and its consequences were never in the contemplation of the parties. Hence the parties never made provision for the event and its consequences in the lease agreement (P1) or the agreement (V1).

In Roman-Dutch Law, the doctrine of supervening impossibility involves implying a term into the contract exempting a party from liability when through no fault of his own the contract becomes impossible of performance. According to Weeramantry [supra. 747], such an implication arises when the subject matter of the contract is destroyed or when the condition or ***state of things contemplated by the parties as the foundation of their contract has ceased to exist or not been realised*** or if performance becomes legally impossible (emphasis added).

It will be unreasonable and unjust to hold the Appellants and the Respondent to the lease agreement and require performance when the state of things contemplated by the parties as the foundation of their contract has ceased to exist.

For all the foregoing reasons, I hold that the Appellants have established that there has been a frustration of the adventure that they embarked upon due to the *tsunami*. I answer the question of law in the affirmative.

The Appellants are claiming the balance of the lease rental after deducting rental for the limited period of use by them. In ***Punchisingho v. De Silva*** **[38 NLR 416]** it was held that a tenant is entitled to a full or partial refund of rent in cases where a *vis major* or *casus fortuitus* has prevented him from using the property for the purposes for which it was leased, either completely or to a significant extent. The decision was based on the common law principle that a tenant is entitled to remission of rent either wholly or in part where he has been prevented either entirely or to a considerable extent from making use of the property for the purposes for which it was let, by some *vis major* or *casus fortuitus*, provided always that the loss of enjoyment of the property is the direct and immediate result of the vis major or casus fortuitus, and is not merely indirectly or remotely connected therewith.

The Appellants are thus entitled to the relief claimed.

I set aside the judgment of the High Court dated 25th May 2016 and affirm the judgment of the District Court dated 27th July 2012. The learned District Judge of Matara is directed to enter decree accordingly.

Appeal allowed. Parties shall bear their costs.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere, J.

I agree.

JUDGE OF THE SUPREME COURT