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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decided on: 12.06.2020*

+ **W.P.(C) 2241/2020**

MEP INFRASTRUCTURE DEVELOPERS LTD. Petitioner
Through: Dr. Abhishek Manu Singhvi, Mr. Mukul
Rohtagi, Mr. Salman Khurshid, Mr. Rajiv Nayyar,
Sr. Advs. with Mr. Rajiv S. Dwivedi, Adv.

Versus

SOUTH DELHI MUNICIPAL CORPORATION
AND ORS. Respondents
Through: Mr. Sanjay Jain, ASG with Ms. Garima
Prashad, Adv for SDMC.

**CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI**

NAJMI WAZIRI, J

CM 11092/2020

CM 11093/2020 (By pet. for modification of order dated 02.03.2020)

CM 11094/2020 (By pet. to place additional facts on record)

**CM 11095/2020 (By pet. for extension of the effective day of
termination)**

**CM 11096/2020 (By pet. for hearing of WPC 2241/2020 & 570/2020
together)**

CM 11397/2020 (by resp. seeking dismissal of the writ petition)

CM 11398/2020 (by pet. to place additional facts on record)

1. The petitioner seeks modification of the order dated 02.03.2020 on account of the events that occurred thereafter, while the respondent's application seeks dismissal of the writ petition itself. The latter on the

ground of breach of the aforesaid order and that the case involves complex and disputed questions of facts, which would not be suitable to be adjudicated in writ proceedings.

2. Reference to orders dated 02.03.2020, 20.04.2020, 27.04.2020 and 21.05.2020 is essential. They are reproduced hereinunder:

Order dated 02.03.2020

- 1. Issue notice. Learned counsel for respondent accepts notice.*
- 2. This Writ Petition is filed seeking to impugn the speaking order passed dated 31.1.2020 and Demand Notice dated 14.2.2020 issued pursuant to a hearing given as directed by this court in its order dated 26.11.2019.*
- 3. Learned senior counsel for the petitioner has raised various submissions to plead as to why the impugned order has been wrongly passed. He further submits that the connected matter being W.P.(C)570/2020 is coming up on 6.3.2020.*
- 4. Learned senior counsel appearing for the respondent has pointed out that there has not been proper compliance of the order of this court dated 26.11.2019 inasmuch as the petitioners have defaulted in making payment of (a) Rs.20 crores per week as stated by this court; (b) have not given fresh Post Dated Cheques as was directed by this court.*
- 5. Counter-Affidavit be filed within one week. Rejoinder thereto, be filed within one week thereafter. In the meantime petitioner will deposit all arrears, as directed by this court in its order dated 26.11.2019, which as per the respondent is Rs. 115.04 crores in three equal monthly instalments without prejudice to their rights and contentions. First instalment will be payable within 15 days from today. He will also continue to pay Rs.20 crore per week as stated in the earlier order dated 26.11.2019. They will also ensure compliance of the order of this court dated 26.11.2019 regarding issue of fresh Post Dated Cheques.*

6. *Subject to compliance of these directions, no coercive steps may be taken against the petitioner, till the next date of hearing.*

Order dated 20.04.2020

CM APPL. 10326/2020

2. *This hearing has been held by way of a video-conference. The main writ petition was listed on 31st March 2020, by which time the lockdown due to COVID-19 had taken effect.*

3. *The present application has been moved inter alia, with the prayer that the national lock-down period ought to be taken into consideration while giving effect to the termination of the Toll Tax Collection Agreement dated 28th September, 2017 {hereinafter, "Agreement"}) and further that the NIT dated 6th April 2020 be quashed.*

4: *Mr. Nayyar, Id. Senior Counsel refers to the letter dated 4 April, 2020 which postpones the effective date of termination of the Agreement and prays that the fresh notice inviting tender should also accordingly be postponed.*

5. *Mr. Sanjay Jain, Id. ASG appearing for the Respondents submits that the order dated 2nd March, 2020 is clear to the effect that the Petitioner had to pay in terms of the earlier order dated 26th November, 2019. Ld. Counsel submits that since the Petitioner is; in, default no relief is liable to be granted in favour of the Petitioner.*

6. *A perusal of the order dated. 2020 makes .it clear that in case of any default, the interim order would stand automatically vacated. On a specific query, Mr. Nayyar concedes that he is not seeking protection under the order dated 26th November, 2019 or the order dated 2nd March, 2020 and admits that there has been a default by his client. Mr. Nayyar, however, submits that a sum of Rs. 64 crores has been credited to the South Delhi Municipal Corporation (hereinafter, "SDMC") after the SDMC encashed the Bank Guarantee. Mr. Jain, however, draws the attention of this*

Court to paragraphs 18 to 20 of the application in which, according to him the Petitioner admits that there has been a default. Mr. Jain submits that the Bank Guarantee amount does not cover all the arrears.

7. This Court has heard the counsel for the parties. The limited question, at this stage, is whether the date of termination needs to be extended or not.

8. A perusal of the letter dated 4th April, 2020 clearly shows that the SDMC had extended the effective date of termination in view of the 21 day national lock down. The relevant portion of the said letter reads as under:

"SUB: Postponement of effective date of termination earlier communicated vide Termination Notice dated 16.03.2020 under Clause 17 of the Toll Tax

Collection Agreement (Agreement) dated 28.09.2017.

Sir, .

In Continuation of earlier termination notice dated 16.03.2020, I am directed to inform you as under:-

1. On account of National Lock Down announced by the Government of India to contain the spread of COVID-19, it has been decided to postpone the effective date of termination of Toll Tax Collection Agreement dated 28.09.2017 from 14.04.2020 (as mentioned in earlier notice dated 16.03.2020) to 05.05.2020 by excluding the period of National Lockdown of 21 days.

2. The postponement date of effective date of termination from 14.04.2020 to 05.05.2020 shall be without prejudice to the earlier demand notices and future demand notices that may be issued by the SDMC. Your contractual liability to pay the arrears of Toll Tax and the contractual amount to SDMC shall remain un-effected by the postponement of the effective date of termination.

3. *The postponement as stated above shall be without prejudice to the rights and contentions of the SDMC in the on-going litigation and shall not confer any right upon you.*

4. *The other contents of the earlier termination notice dated 16.03.2020 shall remain the same."*

A perusal of the above letter shows that despite the defaults of the Petitioner, the effective date of the termination was postponed by the SDMC itself, due to the national lock-down. Since the national lock down has now been extended for a further period, the effective date of termination would, by the rationale of the above letter, be required to be extended for the further period of lockdown. In any event, a perusal of the NIT dated 6th April, 2020 shows that the opening of the tender is to take place on 22nd ^ April, 2020. It will take some time for the NIT to be finalised, owing to the lockdown. It is however made clear that this Court is not inclined to change the date for opening of Tender or any other further steps to be taken for award of the fresh tender.

9. *While it is made clear that the SDMC would be permitted to go ahead with its NIT and finalize the tender, it is clarified that the effective date of termination shall stand postponed for a further period of 19 days. If the lock down is lifted with effect from 04th May, 2020, all the amounts which are collected upon lifting of the lockdown by the petitioner, by operating under the Toll Tax agreement shall be deposited with the SDMC. The effective date of termination is extended by period of 19 days from 5th May, 2020 i.e. till 24th May, 2020. The SDMC shall, however, ensure that any new arrangement and award of tender in favour of any third party would not be effective till 24th May, 2020. The SDMC would be at liberty to award any fresh tender w.e.f 25th May 2020. This extension of the effective date shall not create any equities in favour of the Petitioner and shall be without prejudice to the rights and contentions of the SDMC.*

10. *With these observations, the application is disposed of.*

Order dated 27.04.2020

C.M. APPL. 10358/2020 (for modification of order dated 20th April, 2020)

2. This hearing was held through video-conferencing.

3. An application has been filed seeking modification of order dated 20th April 2020, as according to the Petitioner, certain statements have been incorrectly recorded and/or attributed to the counsels for the Petitioner. The Court has heard Id. Senior Counsels for the parties on the application.

4. After hearing, it is clear to this court that the admission as to default by the Petitioner, as mentioned in paragraph 6 was inappropriately recorded and certain submissions that were made were inadvertently not recorded, in the order dated 20th April, 2020.

5. Paragraphs 6 and 7 of the order are accordingly modified as under:

"6. A perusal of the order dated 2nd March, 2020 makes it clear that in case of any default, the interim order would stand automatically vacated. On a specific query, Mr. Nayyar submits that at this stage, his client is not seeking protection under the order dated 26th November, 2019 or the order dated 2nd March, 2020. He submits that though the payments have not been made fully as per the said orders because of force majeure, a sum of Rs.64 crores has been credited to the South Delhi Municipal Corporation (hereinafter, "SDMC") after the SDMC encashed the Bank Guarantee. Mr. Jain however submits that the Petitioner has defaulted on payments even prior to the lockdown coming into effect and is clearly not entitled to seek any benefit or protection due to force majeure. Mr Jain, further draws the attention of this Court to paragraphs 18 to 20 of the application in which, according to him, the Petitioner admits that there has been a default. He further submits that the Bank Guarantee amount does not cover all the arrears.

7. *This Court has heard the counsel for the parties. The Court is currently only considering the arrangement that should continue during the lockdown period. The limited question, at this stage, is whether the date of termination needs to be extended or not. "*

6. *In paragraph 8, after the extraction, the word 'non-payment' shall replace the word 'default', to read as under:*

"A perusal of the above letter shows that despite the non-payment of the Petitioner, the effective date of the termination was postponed by the SDMC itself, due to the national lock-down. ..."

7. *Mr. Nayyar, Id. Senior Counsel, further submits that it may further be clarified that in the Notice Inviting Tender (hereinafter, "NIT"), the SDMC has itself made the NIT subject to the outcome of the writ petitions and that the said condition has not been modified by this Court vide order dated 20th April, 2020. He submits that the order dated 20th April, 2020 should not be construed as overriding the said NIT. Reliance is placed on the following extract of the NIT;*

"This NIT issued subject to outcome of WP(C) No. 12483/2019 and WP(C) No. 2241 of 2020 pending before Hon 'ble High Court of Delhi".

8. *Mr. Jain, Id. Senior Counsel, opposes any clarification being issued in this regard as the same is beyond the scope of review.*

9. *Insofar as the NIT is concerned, vide order dated 20th April, 2020, except specifying the date from when the new tender is to take effect, nothing else has been modified by this Court. Thus, no clarification is required.*

10. *Let the order dated 20th April, 2020 be uploaded with the correction as set out hereinabove, as a corrigendum to the order dated 20th April, 2020.*

11. *With these observations, the application is disposed of..."*

Order dated 21.05.2020

CM APPL. 11093/2020

1. *This application is filed by the petitioner seeking an order to recall/modify the order dated 02.03.2020 to the extent that para 8 of the said order be recalled/modified that mere non-payment by the petitioner cannot be treated as a default/automatic vacation of the interim order.*

2. *At the outset, I may state that pursuant to the order dated 02.03.2020, it was put to the learned ASG as to whether the respondents would be willing to go to arbitration to be conducted by a retired judge of this court but to be nominated by the respondents. Learned ASG however states that the respondents do not wish to go for arbitration.*

3. *Learned senior counsel for the petitioner has urged that subsequent to the order of this court dated 02.03.2020, the respondents have in violation of the said order issued a termination order of the contract on 16.03.2020. Further, it is urged that the respondents have made three attempts to invite fresh tenders for the contract in question and are seeking to finalize the tender in question.*

4. *Dr. A.M.Singhvi, learned senior counsel for the petitioner urges that the order dated 02.03.2020 is liable to be clarified/modified/vacated on the following salient grounds:-*

(i) Reliance is placed on a circular dated 19.02.2020 issued by Union of India whereby Government of India has issued an office memorandum relating to force majeure clause regarding Manual for Procurement of Goods 2017.

(ii) It has also been pleaded that the respondents have sought to apply this clause in the fresh tender as is apparent from the clarifications which have been given in the fresh tender.

(iii) It has also been urged that a new communication has been issued by Union of India on 18.05.2020 whereby there has been a waiver of the charges payable by contractors regarding the highways. It is urged that in view of this new clause issued by Union of India, the petitioner is entitled to waiver of these charges.

(iv) It has been urged that the respondent has encashed a bank guarantee for Rs.65 crores given by the petitioner on 25.03.2020 and that after deduction of ECC amount, a balance of Rs. 42 crores is available with the respondent which would be in compliance of the payments which were to be made by the petitioner in terms of the order dated 02.03.2020.

(v) It is further stated that the new bid which has now been received by the respondent pursuant to the fresh tender, which the respondent is trying to accept, is lower than the bid of the petitioner by a sum of Rs.500 crores. It has been urged that the petitioner would be willing to up the bid from the lowest bidder.

5. It is obvious that the grounds being raised are on account of subsequent developments which have taken place after the order of this court was passed on 02.03.2020. These are points which could not have been urged on the day when this court passed the order dated 02.03.2020.

6. What the petitioner wants is not a modification of the order dated 02.03.2020 on grounds of any error but on grounds of subsequent developments.

7. It is appropriate that the roster bench may hear the matter and pass appropriate orders in the present application.

8. List before the Roster Bench on 27.05.2020.

9. The interim order/arrangement that was directed by this court on 20.04.2020 shall continue to operate till the next date of hearing....”

3. The petitioner has sought modification of the said order on the ground that the contract had become temporarily non-operational/unfeasible in view of the COVID-19 pandemic, resulting in the multiweek nationwide lockdown. The application seeks three reliefs, that: (i) it be granted protection against the notice of termination of the contract dated 16.03.2020 issued by the respondent, (ii) coercive steps not be taken against it and (iii) the time accorded for payment of the second and third instalment of the

arrears be extended.

4. The petitioner contends that prior to the passing of order dated 02.03.2020, an order/Circular issued by the Ministry of Road Transport and Highways (MORTH) had notified that the COVID-19 pandemic was in the nature of *force majeure* and the said clause would be applicable apropos all contracts of development in the road sector. The said generic order was to be implemented forthwith. It is argued that insofar as the Government of India has itself recognized and declared COVID-19 as a *force majeure* occurrence, it did not require any further intimation to the respondent or express invocation by the petitioner, for the corollary effect under Clause 15 of the toll collection contract, between the petitioner and the respondent.

5. It is argued that in terms of the order dated 2.3.2020, the weekly payments of Rs.20 crores each became due on 9th and 16th March. Additionally, the first instalment of 1/3rd of the Rs. 115 crores i.e., Rs.38.33 crores, was payable on 16th. These three amounts add-up to Rs.78 crores. Between 2nd and 16th March the petitioner had paid Rs.14.5 crores to the respondent. Specifically, by 9th it had paid Rs.12 crores, therefore the balance was only Rs.8 crores on that day. The respondent had in its possession a cash surety, by way of a Bank Guarantee of Rs.64 crores. It was a ready fund to be dipped into and appropriated by the respondent, in case of default in payments. The Bank Guarantee (BG) was subsequently encashed. The invocation of the BG has a concomitant penalty on the petitioner, as envisaged the contract. It is argued that in effect, on 16.03.2020 the respondent had within its account at least Rs.14.5 crores plus Rs.64 crores, (notionally, in the form of Bank Guarantee). The total amount with the respondent was Rs.78.5 crores i.e. in excess of the required Rs.78

crores. Therefore, according to the petitioner there was no breach of the court's directions as of 02.03.2020.

6. It is argued that the post-dated cheques would in any case be encashable only later in time and their non-supply in the said period would not be of such serious consequence so as to be deemed to be a breach of the order; that in any case, no specific time was prescribed in the order of 2nd March in which the post-dated cheques were to be made available to the respondent. The petitioner contends that the respondent's impugned order dated 16.03.2020 is imbued with legal malice and is pre-meditated, with the sole objective to oust the petitioner from the contract; that the respondent could not have passed the impugned order at least till the midnight of 16th March. It could, at best, have issued it the next day. It is argued that the legal malice is manifest in the issuance by the respondents on 23.03.2020, of Notice Inviting Tender (NIT) for handing over the toll collection. This was done right in the middle of the nationwide pandemic lockdown. Albeit, the said NIT and a second one floated thereafter were subsequently withdrawn. The third one was floated on 28.04.2020, in which two bids were received. The first one was half the reserve price hence it was disregarded. The second bid was for Rs. 736 crores. This sole bid was accepted. It is argued that this bid is almost Rs.500 crores less than what the petitioner is paying to the respondent. It is contended that this hurried acceptance of such a large reduction in revenues is not in the public interest and smacks of malice against the petitioner to oust it from the toll collection contract, as well as to debar it from participation in future tender bids. The petitioner contends that it is paying roughly Rs.23.12 crores per week, whereas as per the new tender Rs.15 crores per week would be received by the respondent from the

sole bidder. It is submitted that in the last 28 months the petitioner has paid Rs.21,64,74,06,589/- i.e. an average of Rs.17 crores per week. Presently, the petitioner is paying approximately Rs.19.27 crores per week.

7. The petitioner contends that by order dated 25.03.2020 a Full Bench of this Court has extended the interim protection available to any party, who had such protection as of 16th March 2020. Therefore, the petitioner is protected not only in terms of the specific order in this petition and in the LPA, but also under the aforesaid generic order of the Full Bench.

8. The petitioner also contends that they have been suffering a loss of approximately Rs.2.16 crores per week because of the leakage in the toll collection. It states that toll collection lanes have been reduced to six. The remaining lanes have been made toll free; that this restriction of lanes for toll collection is much to their detriment. Furthermore, a large volume of the anticipated traffic now necessarily skirts Delhi via the East West Expressway Corridor and in compliance of the specific orders of the Supreme Court. This has further reduced the municipal toll collection, which was envisaged in the agreement/contract. Therefore, this leakage and drying up of anticipated revenues ought to be adjudicated/adjusted/duly addressed. It is argued that because of material alteration of the ground realities, as understood in the contract, the petitioner is suffering immense prejudice.

9. The petitioner seeks to bring on record certain documents in this regard. It also seeks to refer to the two reports submitted to the respondent Corporation at its instance, in April, 2019 and on 27.08.2019. Only private cars are permissible to pass through the free lanes without toll. However, according to the petitioner the latter report shows that taxis, trucks and minibuses, on which municipal toll is leviable, pass through toll-free lanes,

but the petitioner -- toll collector cannot do anything to stop them, chase them or penalize them, to collect the dues. It is stated that the loss of revenue collection on this unrestrained movement by toll-due vehicles, is about Rs.36.8 lacs per day. The petitioner contends that despite its repeated requests, no policy or remedial measures have been put in place by the Corporation. The petitioner suggests that these questions and related issues would best have been looked into: i) by way of a report that could be sought by this Court or ii) as noted in the previous orders, by appointment of an arbitrator. However, the Corporation has chosen to disregard the court's repeated observations and suggestions.

10. It is further argued that the restrictions imposed by this Court on 04.06.2018, in another writ petition filed by some third party against the Corporation, apropos the free lanes, was never intimated to the petitioner. They came of the restraint order only once they started the toll collection operations. According to the petitioner, the Corporation's contention in this regard has been that this was a court order which was in public realm and the petitioner ought to have known about it. The petitioner contends that the bid documents should have specified all adverse circumstances apropos the toll collection. According to the petitioner 15% is deductible towards operational and maintenance cost as per the MCD's own statement given on 22.10.2019. The petitioner submits that it had made the Bank Guarantee ready on 15 May 2020, however, it did not participate in the third bid since its right could well be prejudiced, i.e. it could have been construed as acceptance of the impugned order.

11. Be that as it may, these are issue which may be dealt with at a later stage. They are not germane to the issue at hand. What is to be seen in these

applications is whether there is a breach of this Court's 2nd March order.

12. The respondent Corporation has contended that there is a clear breach of the said order on account of the following instances:

Date	Event
18.11.2019	Demand Notice served by SDMC requiring MEP to pay Rs. 450,69,73,096 besides penalty amount equivalent to 0.1% per day as on 11 th November, 2019.
26.11.2019	In W.P. (C) no. 12843/2019, Ld. Single Judge passed an order requiring MEP to pay Rs. 20 Crore per week; deposit fresh PDCs and requiring SDMC to pass an uninfluenced reasoned order.
26.11.2019 to 30.01.2020	MEP did not comply with the order dated 26.11.2019; paid only Rs. 120 Crores out of 180 Crores so ordered, did not deposit Rs. 20 crores every week successively, as required in the court order; did not deposit fresh PDCs, SDMC, on the other hand, granted personal hearing to MEP despite their blatant tactics to delay the hearing and proceeded to pass an uninfluenced reasoned order.
30.01.2020	Reasoned order passed by Commissioner, SDMC vide which claims no. 5 and 7 of MEP were partially allowed to the extent of approx. 19 Crores.
31.01.2020 to 13.02.2020	Non-compliance of order dated 26.11.2019 continued. During this period, a sum of Rs. 24.80 Crores was only deposited instead of 40 Crores. This is apart from previous outstanding arrears.
14.02.2020	After adjusting approx. 19 Crores the amount allowed by Commissioner, SDMC to MEP and a few payments received in the meantime (though, not in accordance with Court order) a demand notice was issued to MEP for Rs. 592,67,01,673 (592 Crores approx.) with penalty @ 0.1% per day amounting to Rs. 163,89,79,075 (approx.164 Crores) totalling to Rs. 756,56,80,748 (approx. 756 Crores.)
02.03.2020	The present writ petition was taken up for hearing. Ld. Single Judge passed a pre-emptive conditional order requiring petitioner to clear the outstanding arrears in three instalments, first within 15 days from the date of order (by 16.03.2020); to pay Rs. 20 Crores every week; deposit fresh PDCs and thus ensure full compliance of the order dated 26.11.2019 failing any of which the interim protection as against coercive steps would automatically stand vacated: <i>Please see para 5 and 8 of the order.</i>
09.03.2020	Second weekly payment became due and remain unpaid even after seven days of the order. One of the three conditions, namely, making payment of Rs. 20 Crores per week stood defaulted. Interim protection as against coercive steps stood vacated on this date, for the pre-emptive order dated 02.03.2020 had prescribed any of the three conditions to be violated for vacation of the same.
16.03.2020	Termination Notice under clause 17 of the contract was served upon MEP calling upon MEP to handover the toll-booths as per clause 17 (by 14.04.2020).
19.03.2020	MEP writes a letter to SDMC claiming for the first time force majeure without any specific reference to the Department of Expenditures OM dated 19.02.2020. (<i>Note: Clause 15 of the agreement deals with Force Majeure. "clause 15.4 – "Performance excused An event of force majeure may be relied upon by a party only to the extent that it continues to directly affect the performance or observance of the agreement by that party and the party shall resume performance and observance of the agreement immediately after abatement of the event of force majeure."</i>) MEP skipped the procedure prescribed in clause 15.3 for invoking force majeure on occurrence of an event of force majeure.
20.03.2020	An order was passed in LPA 140/2020 against 02.03.2020 order to the effect that MEP will comply with the order 02.03.2020 by 24.03.2020.
24.03.2020	MEP writes another letter to SDMC claiming force majeure on the basis of

	Department of Expenditure's OM dated 19.02.2020 (Page 61 of CM 11092/2020). “...An FM clause does not excuse a parties non-performance entirely, but only suspends it for
25.03.2020	Delhi High Court passes an order extending all interim orders in operation as on 16.03.2020 (in this case the interim order stood vacated on 09.03.2020 till further orders).
31.03.2020	40 Crores BG encashed.
03.04.2020	9.25 Crores BG encashed.
04.04.2020	Keeping in view that the physical possession of toll-booths could not be taken because of lockdown and curfew, the handing over of toll-booths was extended to 05.05.2020, without in any manner diluting the termination notice.
07.04.2020	14.75 Crores BG encashed making it total of Rs. 64 Crores.
20.04.2020	Ld. Single Judge passed an order on CM 10326/2020, extending the hand over of toll-booths from 05.05.2020 to 24.05.2020 subject to the condition that the toll collected by MEP from 05.05.2020 to 24.05.2020 shall be deposited with SDMC.
05.05.2020	Fresh NIT for the work in question issued.
14.05.2020	MEP withdrew its LPAs against orders dated 26.11.2019 and 02.03.2020.
21.05.2020	Ld. Single Judge noticing that all applications pertain to events subsequent to passing of order 02.03.2020 and referred the same to the roster bench.
27.05.2020	Online Tender was issued vide NIT No. ADC/TT/HQ/2020/D-1454 dated 28.04.2020. Letter of Intent was issued vide letter No.ADC/TT/HQ/2020/D-1496 dated 27.05.2020 to successful bidder M/s Sahakar Global Limited – JV
28.05.2020	After order dated 26.11.2019, total dues comes at Rs. 520.00 crores @ of Rs.20 crores per week as per Hon'ble High Court of Delhi order. After adjusting BG of Rs.64.00 crores and M/s MEPIDL deposited Rs. 177.05 Crores between 26.11.2019 to 23.03.2020. Amount received directly through RFID from only 13 entry points out of 124 entry points is Rs. 9.64 crores w.e.f 23.03.2020 to 28.05.2020. Thus the outstanding is Rs.269.31 crores.

Payments made by MEP as per Court Order dated 26.11.2019 in WP 12483 of 2019 for the period from 25.11.2019 to 16.02.2020 (12 weeks)

Sl No	Period	Due Date	Due amount as per Contract Agreement	Due amount as per Hon'ble Court orders	Amount Received upto/on due date	Short payment as per Hon'ble Court orders for the week
1.	25.11.2019 to 01.12.2019	02.12.2019	Rs.24.28Cr.	Rs.20 Cr.	Rs.9.50 Cr.	Rs.10.50Cr.
2.	02.12.2019 to 08.12.2019	09.12.2019	Rs.24.28Cr.	Rs.20 Cr.	Rs.20 Cr.	-
3.	09.12.2019 to 15.12.2019	16.12.2019	Rs.24.28Cr.	Rs.20 Cr.	Rs.20 Cr.	-
4.	16.12.2019 to 22.12.2019	23.12.2019	Rs.24.28Cr.	Rs.20 Cr.	No amount received	Rs.20.00 Cr.
5.	23.12.2019 to 29.12.2019	30.12.2019	Rs.24.28Cr.	Rs.20 Cr.	Rs.20 Cr.	-

6.	30.12.2019 to 05.01.2020	06.01.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs.10.50 Cr.	Rs.9.50 Cr.
7.	06.01.2020 to 12.01.2020	13.01.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs.20 Cr.	-
8.	13.01.2020 to 19.01.2020	20.01.2020	Rs.24.28Cr.	Rs.20 Cr.	No amount received	Rs.20.00 Cr.
9.	20.01.2020 to 26.01.2020	27.01.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs.20 Cr.	-
10	27.01.2020 to 02.02.2020	03.02.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs.10.50 Cr.	Rs.9.50 Cr.
11	03.02.2020 to 09.02.2020	10.02.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs.14.30 Cr.	Rs.5.70 Cr.
12	10.02.2020 to 16.02.2020	17.02.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs. 8.00 Cr.	Rs.15.00 Cr.
	As on 19.2.2020		Rs. 291.36 Cr.	Rs. 240 Cr.	Rs. 152.80 Cr.	Rs. 87.20 Cr.

Payments made by MEP as Court Order dated 02.03.2020 in WP No. 2241/2020 till termination on 16.3.2020

Sl. No	Period	Due Date	Due amount as per Contract agreement.	Due amount as per Hon'ble Court orders.	Amount Received upto / on due date	Short payment as per Hon'ble Court orders for the week
1	02.03.2020 to 08.03.2020	09.03.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs.13.50 Cr.	Rs. 6.50 Cr.
2	09.03.2020 to 15.03.2020	16.03.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs.3.00 Cr.	Rs.17.00 Cr.
		Total	Rs.48.56 Cr.	Rs.40.00 Cr.	Rs.16.50 Cr.	Rs.23.50 Cr.

Payments made by MEP from 17.02.2020 till 23.03.2020 as per HighCourt order dt 26.11.2019 and 02.03.2020

<i>Sl No</i>	<i>Period</i>	<i>Due Date</i>	<i>Due amount as per Contract agreement</i>	<i>Due amount as per Hon'ble Court orders</i>	<i>Amount Received upto / on due date</i>	<i>Short payment as per Hon'ble Court orders for the week</i>
01.	17.02.2020 to 23.02.2020	24.02.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs. 6.00 Cr.	Rs. 14.00 Cr.
02.	24.02.2020 to 01.03.2020	02.03.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs. 5.50 Cr.	Rs. 14.50 Cr.
03.	02.03.2020 to 08.03.2020	09.03.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs. 12 Cr.	Rs. 8 Cr.
04.	09.03.2020 to 15.03.2020	16.03.2020	Rs.24.28Cr.	Rs.20 Cr.	Rs. 2.75 Cr.	Rs. 17.25 Cr.
05.	16.03.2020 to 22.03.2020	23.03.2020	Rs.24.28Cr.	Rs.20 Cr.	Nil	Rs.20 Cr.
	AS ON 23.03.2020	Total	Rs. 121.40 Cr.	Rs. 100 Cr.	Rs. 26.25 Cr.	Rs. 73.75 Cr.

**After 23.3.2020, SDMC did not receive any payment from MEP directly.*

** Lockdown was in force from 25.3.2020 but MEP continued to operate the 124 toll posts without any break and collected toll amount, which is evidenced by MEP's admission in para 8 at pg 26 of IA No. 11094/2020 being application for permission to place Additional Facts and Documents filed by MEP itself on 18.5.2020 wherein MEP admitted that collection from counter for the period from 19.02.20 to 31.03.20 was Rs. 53.70 crores.*

** The fact that MEP continued to operate the toll booths during lockdown period is also confirmed from the fact that SDMC got **Rs. 9.64 crores (for the period from 23.3.2020 to 28.5.2020)** through RIFD system put in place in 13 major toll points. However, this amount shown in RIFD system does not include the amount received by MEP from sale of monthly passes or toll paid in cash by vehicles and it does not include the remaining 111 toll points wherein RIFD system is not in place.*

Details of Post Dated Cheques to be revalidated by MEP as per High Court order dated 26.11.2019 in WP No. 12483 of 2019

<i>Sl No</i>	<i>Ref. Letter No. dated</i>	<i>Cheque No. and dated</i>	<i>Amount</i>	<i>Expiry Date</i>
1.	MEPIDL/2019-20 dated-24.09.2019	000870 to 000875 dated- 02.09.2019	Rs.23,12,87,671/-	01.12.2019
2.		000876 to 000881 dated- 09.09.2019	Rs.23,12,87,671/-	09.12.2019
3.		000882 to 000887 dated- 16.09.2019	Rs.23,12,87,671/-	16.12.2019
4.		000888 to 000893 dated- 23.09.2019	Rs.23,12,87,671/-	23.12.2019
5.		000894 to 000899 dated- 30.09.2019	Rs.23,12,87,671/-	30.12.2019
6.	MEPIDL No. 849 dated-01.10.2019	000950 to 000955 dated- 07.10.2019	Rs.24,12,00,000/-	06.01.2020
7.		000956 to 000961 dated- 14.10.2019	Rs.24,28,52,055/-	12.01.2020
8.		000962 to 000967 dated- 21.10.2019	Rs.24,28,52,055/-	19.01.2020
9.		000968 to 000973 dated- 28.10.2019	Rs.24,28,52,055/-	26.01.2020
10.	MEPIDL No. 968 dated-01.11.2019	000982 to 000987 dated- 04.11.2019	Rs.24,28,52,055/-	02.02.2020
11.		000988 to 000990, 000629 to 000630 and 000900 dated- 11.11.2019	Rs.24,28,52,055/-	09.02.2020
12.		001216 to 001221 dated- 18.11.2019	Rs.24,28,52,055/-	19.02.2020
13.		001222 to 001227 dated- 25.11.2019	Rs.24,28,52,055/-	26.02.2020
		Total	Rs.309,76,02,740/-	

**MEP agreed to re-validate the PDCS worth Rs. 310 crores (approximately) when order dt 26.11.2019 was passed but failed to do so and after the validity of all the PDCs have expired, they filed the present Writ Petition being WPC No. 2241 of 2020 on 26.02.2020.*

13. The petitioner, however, states that it has made payments as under:

<i>Amount payable as per SDMC between 26.11.2019 to 17.02.2020 as per order dated</i>	240 Cr
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26.11.2019	
(12 weeks x 20 Cr/week)	
Amount paid between 26.11.2019 to 17.02.20	161.55 Cr
(see item 1 to 12 at page 7-8 of this note)	
Balance Amount	79 Cr
Amount of BG Encashed by SDMC	64 Crs.
Balance payable	15 Crs.

14. According to the respondent, the amount of Rs.115 crores had to be paid in three equal instalments. Rs.20 crores were payable every week and the PDCs had to be supplied accordingly. In case of two consecutive defaults, the right of hearing and reasoned order would stand superseded. The *force majeure* clause was invoked by the petitioner on 19.03.2020 but the first two defaults of Rs. 20 crores had already occurred on 02.03.2020 and 09.03.2020. The third consecutive default occurred on 16.03.2020. It is argued that, therefore, the interim orders stood vacated and the Corporation has not erred in terminating the contract as on 16.03.2020.

15. The respondent relies upon the dicta of the Supreme Court in ***Energy Watchdog v. Central Electricity Regulatory Commission & Ors. (2017) 14 SCC 80*** and decision of this Court dated 29.05.2020 passed in OMP(D)(COMM) 88/2020 titled: ***M/s Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.***

16. The respondent argues that *force majeure* clause was not invoked until 19.03.2020. It was in any case effective five days of the notice i.e., on 24.03.2020. Therefore, the petitioner could not claim benefit of any circumstance prior thereto i.e., benefit of any alteration in ground realities or benefit of *force majeure* clause prior thereto.

17. Apropos the respondent's declining to appoint an arbitrator, reliance is placed upon the dicta of the Supreme Court in ***Kvaerner Cementation India Ltd. V. Bajranglal Agarwal & Anr. (2012) 5 SCC 214*** which has held, *inter alia*, that where there is no arbitration clause, arbitration cannot necessarily be imposed upon the parties unless such reference is made by consent. The respondent contends that the writ petition involves disputed questions of facts for which invocation of the writ jurisdiction of this court is not the appropriate remedy.

18. As regards the petitioner's request for seeking appointment of a retired High Court Judge to prepare a report after hearing both sides, the Corporation contends that the same is impermissible in view of the decision of the Supreme Court in ***State of Kerala & Ors. V. M.K. Jose (2015) 9 SCC 433*** which has held, *inter alia*, as under:

".... 16. Having referred to the aforesaid decisions, it is obligatory on our part to refer to two other authorities of this Court where it has been opined that under what circumstances a disputed question of fact can be gone into. In Gunwant Kaur v. Municipal Committee, Bhatinda[8], it has been held thus:-

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial

principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.”

[Emphasis added]

20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had

arisen in ABL International (supra) was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract.

21. The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to exercise of powers under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a Public Interest Litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination subserves any public interest...”

19. The Court agrees with the contention of the respondent in this regard, therefore, such an appointment cannot be considered. The argument for

seeking such appointment is untenable and is accordingly rejected.

ANALYSIS

20. From the aforesaid arguments, reference to two clauses of the agreement/contract is imperative. First is the *force majeure* clause and the second is the Bank Guarantee clause, which reads as under:

“... 15. FORCE MAJEURE

15.1 Force Majeure

“Force Majeure” shall mean (with respect to either Party) any event or circumstances or combination of events or circumstances:

- (a) beyond the reasonable control of the Party claiming relief under Clause 15;*
- (b) which materially and adversely affects, prevents, delays any Party in the performance of its obligations under this Agreement;*
- (c) which could not have been foreseen, prevented, overcome or remedied by the affected Party by exercising a standard of care and diligence consistent with Good Industry Practices.*

15.2 Force Majeure Events

Force Majeure events shall include, without limitation, the following:

- (a) riots (other than those on account of Contractor’s employees);*
- (b) war (whether declared or not), invasion, act of foreign enemies, hostilities, civil war, rebellion, revolution, insurrection, military or usurped power,*
- (c) damages from aircraft; and*
- (d) acts of God, such as earthquake, lightning and unprecedented floods.*

Provided that the court orders and judicial interventions result in any kind of stoppage of/ obstruction in the working of the contractor would not constitute Force Majeure Event.

15.3 Procedure on occurrence of an event of Force Majeure

Immediately upon any occurrence of an event of Force Majeure or, in any event, no later than 5 (five) days following such occurrence, the Party affected by such event of Force Majeure event shall:

(a) notify the other Party and provide documentary proof (if any) of the existence of an event of Force Majeure, and such notice and proof to include (i) the particulars of the event giving rise to such Force Majeure claim, in as much details as is then reasonably available, (ii) its current estimate of the extent to which, and the period during which, the performance of such Party will be affected by such event of Force Majeure, and (iii) the particulars of the programme to be implemented to ensure prompt and full resumption of such Party's normal performance under this Agreement;

(b) thereafter provide interim reports of the status of the event of Force Majeure, reasons for continued existence of the event of Force Majeure and an estimate of the anticipated duration of the event of Force Majeure; and

(c) upon request in writing by the other Party, give or procure access insofar as is reasonably practicable to do so for a reasonable number of representatives of that Party at that other Party's sole risk and cost, to examine the scene of the relevant event or circumstances of Force Majeure”

CLAUSE 12(b)

'In case of delay in remittance of weekly installment due under the contract to SDMC beyond the fixed day shall result In levy of penalty @ 0.1% per day for first week and in case of a default, the default balance amount shall be recovered through encashment of Bank Guarantee. On account of repeated defaults In this regard, the Corporation shall have the right to

terminate the contract forthwith, without assigning any reason whatsoever. The penalty so levied shall be recovered from the Performance Guarantee which shall be replenished by the Contractor within 10 days from the date of such recovery falling which the contract is liable to be terminated. Any such termination shall be without prejudice to any other right that the SDMC may have under this Agreement or any other law being in force".

21. The Government of India notification dated 19.02.2020 reads as under:

".....A Force Majeure (FM) means extraordinary events or circumstance beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strike, riots, crimes (but not including negligence or wrong-doing, predictable/seasonal rain and any other events specifically excluded in the clause). An FM clause in the contract frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract. An FM clause does not excuse a party's non-performance entirely, but only suspends it for the duration of the FM. The firm has to give notice of FM as soon as it occurs and it cannot be claimed ex-post facto. There may be a FM situation affecting the purchase organisation only. In such a situation, the purchase organisation is to communicate with the supplier along similar lines as above for further necessary action. If the performance in whole or in part or any obligation under this contract is prevented or delayed by any reason of FM for a period exceeding 90 (Ninety) days, either party may at its option terminate the contract without any financial repercussion on either side.... "

22. The MORTH, Government of India notification dated 18.05.2020 reads as under:

*“... Subject: Atmanirbhar Bharat: Relief for contractors/
Developers of Road Sector*

As an integral part of Atmanirbhar Bharat, the following measures are hereby notified for providing relief to Contractors/ Developers. Concessionaires of Road Sector from the impact of COVID, subsequent lockdown and other measures taken to prevent spread of COVID

2. Ministry of Road Transport & Highways, NHA & NHIDCL will implement the following measures forthwith;

A. For all national Highway works being executed under HAM and EPC models by different agencies.

(i) Schedule – H condition in Contracts to be relaxed to enable payments at monthly interval for the work completed as per specifications.

(ii) To allow extension of time to contractors under Force Majeure Clause due to COVID pandemic as per instructions in Ref. No. F.18/4/2020-PPD of Department of Expenditure and in accordance with the contract.

(iii) Direct payments to approved subcontractors by the Departmental authority towards works done by them wherever competent authority is satisfied that it is required for early completion of work in accordance with contract.

(iv) Expeditious approval of change of scope whenever required and payment to the extent of work executed as per specification.

(v) Waiver of penalty for delay in submission of Performance Security/ Bank guarantee for new contractors entered into during March 2020 to September 2020.

(vi) Performance Security provided by contractor/ supplier to be returned by the Contractee (Government Department/Agency) as is proportional to the supplies made/ contract work completed as per amendment to GFR 171 issued vide F.18/4/2020-PPD by Department of Expenditure.

B. For all National Highway works being executed under BoT by different Agencies.

(i) To allow extension of concession period in accordance with the Concession agreement and DOE instructions in this regard on F. 18/4/2020

(ii) provision of revenue shortfall loan at an interest rate not more than bank rate +2% to eligible concessionaire for the amount not covered relief granted by RBI.

(iii) Expeditious approval of change of scope whenever required and payment to the extent of work executed.

C. For all National Highway tolling contract being operated by NHAI.

MORTH vide letter no. H-25016/01/2018-Toll dated 25th March 2020 conveyed that the lockdown period and the subsequent prevailing condition of low traffic due to unprecedented COVID-19 epidemic outbreak, may be treated as Force Majeure of the Concession/ Contract Agreement as per Ministry of Finance letter no. F-18/4/2020-PPD dated 19th Feb. 2020. In view of the Ministry of Finance letter no. F.18/4/2020-PPD dated 19th Feb, 2020 and subsequent instructions of MOF with regard to Force Majeure Condition, NHAI is directed to provide the undermentioned Force Majeure relief to the User Fee Collection Contractors/ Agencies by dividing the entire Force Majeure period in two phases, first phase during the period use fee collection was suspended and second phase due to low traffic count post resumption of the user fee collection due to COVID-19 pandemic.

I. Force Majeure period during suspension of tolling during complete lockdown from 26.03.2020 to 19.04.2020:

(i) Waiver of the agreed remittance of the contractor for the period of suspension of user fee collection for the above period.

(ii) Reimbursement of 75 % of the Administrative & Toll Collection Expenses to be calculated based on fixed annual administrative charges on lane basis as per NHAI procedure, on account of ensuring functioning of ETC systems, security and safety of fee plaza infrastructure during the suspension period.

II. 2nd " *Force Majeure period post resumption of tolling with effect from 20.04.2020 (00:00 hrs) till traffic resumes 90% of the traffic in pre-lockdown period weekly average traffic count. During this period the following has to be provided:*

(i) *Waiver of the difference between agreed remittance as per contract agreement and the estimated remittance based on the traffic data during the above period.*

(ii) *Waiver of penal interest for delayed/short remittances for the above period as per Contract provisions.*

(iii) *Reimbursement up to 50 % of the Administrative & Toll Collection Expenses to be calculated based on fixed annual administrative charges on lane basis as per NHAI procedure.*

3. *A Committee under the Chairmanship of DGRD&SS is being separately constituted which will examine the Issues as per specified Terms of Reference (ToR) and recommend to MoRTH further steps required to be taken to provide relief to contractors, concessionaires and developers in road sector..."*

23. Both the notifications refer to suspension of continuous obligation between the parties w.e.f. 19.02.2020. The petitioner had, in the first instance, invoked the said *force majeure* clause on 19.03.2020, therefore, at least till the said date it was not effected apropos the operation of the toll collections. The nation-wide lockdown was announced on 24.03.2020 to be effective from the next day. The *force majeure* period has not abated as per any government notification; free movement of traffic is being regulated even now at borders between the States. Evidently, the full operability of the contract is hindered by orders of the National and the State governments i.e. by circumstances beyond the control of the petitioner.

24. In *Halliburton Offshores* (*supra*) the essence of the dicta of the Supreme Court in *Energy Watchdog* (*supra*) regarding *force majeure* has

been summarized as under:

“..... 56. It is under this factual backdrop that the ground of Force Majeure taken in March, 2020 would have to be adjudged. The grounds taken to invoke the Force Majeure clause are that due to outbreak of COVID-19 experts from France who may be required cannot travel to India. Since the Force Majeure clause in the contract covers epidemics and pandemics, the Contractor claims that its non-performance is justified and the invocation of Bank Guarantees is liable to be stayed. There is no doubt that COVID-19 is a Force Majeure event. But was this event the cause of the non-performance?

57. The law relating to Force Majeure has been recently settled by the Supreme Court in the case of **Energy Watchdog v. Central Electricity Regulatory Commission, (2017) 14 SCC 80**. The principles laid down by the Supreme Court in paragraphs 34-42 are as under:

a) Force Majeure would operate as part of a contract as a contingency under section 32 of the Indian Contract Act 1872 (‘ICA’).

b) Independent of the contract sometimes, the doctrine of frustration could be invoked by a party as per Section 56, ICA.

c) The impossibility of performance under Section 56, ICA would include impracticability or uselessness keeping in mind the object of the contract.

d) If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement it can be said that the promisor finds it impossible to do the act which he had promised to do.

e) *Express terms of a contract cannot be ignored on a vague plea of equity.*

f) *Risks associated with a contract would have to be borne by the parties.*

g) *Performance is not discharged simply if it becomes onerous between the parties.*

h) *Alteration of circumstances does not lead to frustration of a contract.*

i) *Courts cannot generally absolve performance of a contract either because it has become onerous or due to an unforeseen turn of events. Doctrine of frustration has to be applied narrowly.*

j) *A mere rise in cost or expense does not lead to frustration.*

k) *If there is an alternative mode of performance, the Force Majeure clause will not apply.*

l) *The terms of the contract, its matrix or context, the knowledge, expectation, assumptions and the nature of the supervening events have to be considered.*

m) *If the Contract inherently has risk associated with it, the doctrine of frustration is not to be likely invoked.*

n) *Unless there was a break in identity between the contract as envisioned originally and its performance in the altered circumstances, doctrine of frustration would not apply.*

58. *The principles as laid down in **Energy Watchdog (supra)** by the Supreme Court have to be applied to the facts of the present case in order to assess as to whether the performance*

of the Contractor was prevented by the Force Majeure condition. Did COVID-19 prevent the Contractor from bringing the work on the three fields to completion and conclusion? If so, is the encashment of Bank Guarantees liable to be injuncted? ...

....

62. The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition. The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.

*63. It is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in **Energy Watchdog (supra)** it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a 'real reason' and a 'real justification' which the Court would consider in order to invoke a Force Majeure clause..."*

25. What is clear from the aforesaid is that in terms of the 2nd March order i) Rs.20 crores were payable per week, ii) the arrears of Rs.115.04 crores were payable in three equal monthly instalments, the first instalment was to be paid in a fortnight i.e. on 17.03.2020 and iii) the petitioner was to issue fresh post-dated cheques in terms of the said order dated 26.11.2019. As a

corollary to the said order, the first amount payable by the petitioner was Rs.20 crores as on 09.05.2020. Till 09.03.2020 the petitioner had paid Rs.12 crores into the account of the respondent. There was a balance amount of Rs. 8 crores due on the said date. *Ex facie*, it could be construed as a breach of the said order. However, the order has to be read in the context of the contract between the parties. There was a Bank Guarantee of an amount of Rs.64 crores with the respondent. This was a surety which the respondent could have easily utilised whenever there was a shortfall in the promised payment by the petitioner. The dipping into the said cash fund by the Corporation is permissible and is the prerogative of the Corporation. It is clearly envisaged between the parties, particularly in Clause 12(b) of the agreement/contract.

26. Apparently, the objective of the said Bank Guarantee was to remedy the petitioner's defaults in payments, if any. The second amount of Rs.20 crores was due on 16.03.2019. In effect the total amount payable to the respondent was Rs.78 crores, of which, the respondent had already received Rs.14.5 crores directly into its bank account from toll collection and Rs. 64 crores in the form of Bank Guarantee, which it encashed later on. The encashment is only a ministerial act because the money was otherwise secured to it.

27. Evidently, the existence of the Bank Guarantee or its likely encashment in case of default in payment, was not argued when the 2nd March order was passed because there is no reference in the order to the said facility of ready cash/monetary security to the Corporation. Had it been argued, the order would obviously have interpreted and noted the scheme of payment as has been envisaged between the parties. Clause 12(b) is an

integral part of the said agreement. Therefore, insofar as monies were secured to the respondent in the form of Bank Guarantee, from which the respondent could have easily taken out the money on 09.03.2020 as well as on 16.03.2020, there cannot be a deemed default. In any case, the Corporation encashed the BG and appropriated to itself the monies due as of 16th March. There was a default of Rs.20 crores by the petitioner the subsequent week on 24.03.2020. However, prior thereto a few instances occurred as noted hereinabove:

(i) The respondent Corporation itself referred to Circular dated 19.02.2020 issued by the Ministry of Road Transport Highways (MORTH) which notified that the COVID-19 pandemic was a *force majeure* occurrence. In effect, the *force majeure* clause under the agreement immediately becomes applicable and the notice for the same would not be necessary. That being the position, a strict timeline under the agreement would be put in abeyance as the ground realities had substantially altered and performance of the contract would not be feasible till restoration of the pre *force majeure* conditions.

(ii) A Full Bench of this Court by order dated 25.03.2020 has ordered that interim orders obtaining as on 16.03.2020 would continue till 15.05.2020, which has subsequently been extended. In the interim, on 16.03.2020 the respondent cancelled the agreement with the petitioner, on grounds of what it perceived as a clear breach of the orders of this Court dated 02.03.2020.

28. *De hors* the merits of the Corporation's contentions or justification, its impugned order dated 16.3.2020 was pre-mature at least by one day. It could not have been passed till midnight of 16th March. Furthermore, the due amounts of Rs.78 crores as of the said date stood paid and/or secured in

terms of the contract. The impugned order is therefore non-est.

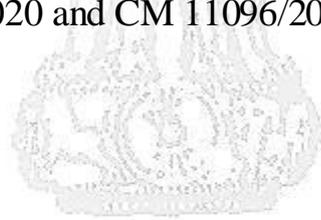
29. Once the *force majeure* clause is acknowledged by the respondent as on 23.03.2020 in view of the public declaration of COVID-19 pandemic, the *force majeure* comes into effect w.e.f. 19.02.2020 itself. This vital change in ground reality was not brought to the notice of the Court when the order dated 02.03.2020 was passed. Had it been known to the court that the pandemic had been declared as *force majeure* by the Government of India the relevant clause 15(1) of the contract between the parties immediately gets operational, which in effect means that the amount payable by the petitioner to the respondent would have to be put into abeyance i.e. the strict timelines would not be applicable.

30. The interim order of 2nd March subsumed the previous directions and claims or arrears. The arrears were quantified at Rs. 115.04 crores. This was payable prior to the ground reality having being altered because of the global pandemic/nationwide lockdown or reduction of volume of traffic, as a consequence thereof. Therefore, the said amounts ought to be paid as directed. The first instalment was payable on 17.03.2020 which was duly encashed through the Bank Guarantee and the second amount was payable on 02.04.2020 and the third was on 02.05.2020. However, because of the interim orders the said amounts have not been paid to the Corporation. The balance amount of Rs.77.04 crores shall be made available to the respondent within ten working days from the date of this order failing which the interim order shall stand vacated.

31. As regards the weekly payment of Rs.20 crores, the same would stand suspended in view of the *force majeure* clause. Nevertheless, the amounts collected by the petitioner shall be deposited into the account of the

respondent Corporation after deduction of 15% towards operation and maintenance charges, subject to final adjustments. The requisite post-dated cheques shall be issued within two weeks.

32. In view of the above, CM No. 11093/2020 filed by petitioner for modification of the interim order dated 02.03.2020 is allowed and the order stands modified. Keeping in view the reliefs already sought in the writ petition, the petitioner's application being CM Nos. 11094/2020 & 11398/2020, seeking permission to place additional facts on record and amendment applications are allowed. Amended petition be filed within two weeks from today, to which reply and rejoinder be filed in four successive weeks each. CM No. 11092/2020 is not on record. The Registry is directed now to show the same in the cause list. The respondent's application being CM No. 11397/2020 for dismissal of the writ petition is held over with till the next date. CM 11095/2020 and CM 11096/2020 stand disposed-off.



NAJMI WAZIRI, J

JUNE 12, 2020/_{kk}

सत्यमेव जयते