

#21 & 22

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 25.09.2020

Judgment Pronounced on: 06.11.2020

+ LPA 165/2020, CM APPL.13389/2020 & CM APPL.13580/2020

SOUTH DELHI MUNICIPAL CORPORATIONAppellant

versus

MEP INFRASTRUCTURE DEVELOPERS LTD ...Respondents

+ LPA 167/2020 & CM APPL.14462/2020

MEP INFRASTRUCTURE DEVELOPERS LTD. Appellant

versus

SOUTH DELHI MUNICIPAL CORPORATION Respondent

Advocates who appeared in this case:

For the SDMC : Mr. Sanjay Jain, ASG, Ms. Garima Prashad, Standing Counsel for SDMC

For the MEP : Mr. Mukul Rohatgi, Senior Advocate and Mr. Abhishek Manu Singhvi, Senior Advocate with Mr. Rajiv S. Dwivedi and Mr. Azeem Samuel, Advocates

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE TALWANT SINGH

J U D G M E N T

TALWANT SINGH, J. (via Video Conferencing)

1. The present matter has been taken up for hearing by way of Video Conferencing on account of COVID-19 pandemic.

2. By this common order, we are adjudicating LPA No. 165/2020 titled as *South Delhi Municipal Corporation v. MEP Infrastructure Developers Ltd.* and LPA No.167/2020 titled as *MEP Infrastructure Developers Ltd. v. South Delhi Municipal Corporation* as both of them have, in sum and substance, challenged the order dated 12.06.2020 passed by learned Single Judge in W.P.C. No.2241/2020 and order passed on 24.06.2020 in review petition No.107/2020. By order dated 12.06.2020, the learned Single Judge had taken up for hearing C.M.No.11093/2020 moved by MEP Infrastructure Developers Ltd. (hereinafter referred to as “MEP”) for modification of order dated 02.03.2020 alongwith other miscellaneous applications to place additional facts on record, amendment of writ petition and for extension of effective date of termination of the contract and for

hearing W.P.C. No. 2241/2020 and W.P.C. No.370/2020 together as well as an application moved by South Delhi Municipal Corporation (hereinafter referred to as “SDMC”) seeking dismissal of the writ petition. However, no order was passed in C.M.No.11397/2020 filed by SDMC for dismissal of the writ petition and the same was adjourned till the next date.

3. The writ petition No.2241/2020 was filed mainly challenging an order dated 31.01.2020 passed by Commissioner of SDMC and a subsequent notice of termination of the contract dated 14.02.2020 served upon MEP. During the pendency of the writ petition, an amendment application was moved and said application was allowed by learned Single Judge. Now the writ petition No.2241/2020 has enlarged reliefs as under:

“a. Issue of a writ of mandamus or any other appropriate writ and appoint an independent Adjudicator to adjudicate the claims of the petitioner.

b. Issue a declaratory writ to the effect that clause 16 of the agreement which provides for adjudication mechanism has been left unworkable on account of actions and inactions of the SDMC Commissioner;

c. Issue a writ of certiorari and quash the order dated 31.01.2020 passed by the Commissioner SDMC;

d. Quash the Impugned Notice dated 14.02.2020 issues consequent to the Impugned Order;

e. During the pendency of the writ petition, stay the Impugned Notice dated 14.02.2020;

f. Issuance a suitable writ, order and direction declaring that in the guise of section 113 (2) (g) of the Delhi Municipal Corporation Act, 1957 the petitioner cannot be compelled to pay to the respondent no. 1 more than the actual collected towards toll tax from commercial vehicles entering the NCT, Delhi;

g. issue a writ in the nature of mandamus directing the respondents to make a fresh assessment as to the circumstances affecting toll collection taking into account the circumstances highlighted by the petitioner and reassess and re-determine the annual weekly amount payable by the petitioner to the SDMC towards toll tax;

h. Issue a writ in the nature of mandamus directing the respondents to take into consideration the change in circumstances make suitable downward revision in the weekly/annual remittance commensurate with the reduction in toll tax paying commercial vehicles and taking into account the tax leakage on account of free lanes;

i. Issue a writ in the nature of certiorari quashing the demand of .1% per that that is 36.5% per annum in the demand letter dated 18.11.2019 as being in terrorem and inequitable;

iA. Be pleased to quash the letter of termination dated 16.03.2020 issued by the respondent to the petitioner;

iB. Be pleased to quash the NIT dated 28.04.2020 issue by the respondent consequent to the notice of termination 16.03.2020;

iC. During the pendency of this writ petition, pass an interim order directing the respondent to keep in abeyance the Termination Notice dated 16.03.2020 as well as NIT dated 28.04.2020 for fresh bidding for collection of tax, till the final disposal of the instant writ petition;

j. To issue a Writ order or direction in the nature of CERTIORARI and quash the Termination Notice dated 16.03.2020 and subsequent extension of termination dated issued by the respondent as being illegal;

k. To issue a writ order or direction in the nature of CERTIORARI and quash the NIT dated 27.04.2020 issued by the Respondent consequent to the notice of termination dated 16.03.2020;

l. During the pendency of this writ petition, pass ad interim order direction the respondent to keep in abeyance the Termination Notice dated 16.03.2020 and subsequent extension of termination date as well as NIT dated 27.04.2020 for fresh bidding for collection of tax, till the final disposal of the instant writ petition;

m. Direct that the money appropriated by the Respondent by way of encashment of bank guarantee for Rs.64 crore, will be held by the respondent as a security deposit after adjusting therefrom the amount payable by the petitioner towards ECC;

n. Pass such other order/orders as this hon'ble court may deem fit and proper in the facts and circumstances of this case."

4. If we go little back in history, the SDMC had issued an NIT and had called for tenders for collection of the entry tax/toll tax in Delhi in the year 2017 and the contract was awarded to MEP and since then MEP is managing about 124 Toll Plazas, which have been established

on all the roads through which one can enter the National Capital Territory of Delhi. It is pertinent to mention here that apart from collection of the toll, MEP is also authorized to collect ECC i.e. Environment Compensation Cess, which is imposed upon certain type of vehicles entering Delhi as per direction of Hon'ble Supreme Court. The amount of ECC is not part of the contract and it is to be collected and handed over by MEP to Government over and above the contract amount. The terms on which the contract was awarded to MEP by SDMC vide agreement dated 28.09.2017 was that MEP had agreed to pay cumulative and lump sum weekly remittance of Rs.23.13 crores, totaling to Rs.1,206 crores per annum for two years with effect from 01.10.2017 and thereafter to enhance the weekly amount to Rs.24.29 crores, i.e., Rs.1,266 crores per annum with effect from 01.10.2019 after giving effect to 5% enhancement. The safeguards for due performance of the contract, by way of submission of bank guarantees etc., were also taken. As per SDMC, when certain violations were committed by the MEP, it sent a demand notice dated 18.11.2019 by which MEP was required to pay a sum of Rs.450.69 crores as dues besides penalty @ 0.1 % per day. This demand notice was challenged

by MEP by filing a writ petition bearing No.12483/2019, in which an order was passed on 26.11.2019 by learned Single Judge reducing the weekly commitments of MEP for the time being to Rs.20.00 crores per week and SDMC was directed to pass a fresh order giving reasons. The order dated 26.11.2019 in W.P.C.No.12483/2019 is reproduced as under:

W.P.(C) 12483/2019 and CM APPL. No.50933/2019

1. This writ petition is filed seeking the following reliefs:

“a. Issuance a suitable writ, order and direction declaring that in the guise of section 113 (2) (g) of the Delhi Municipal Corporation Act, 1957 the petitioner cannot be compelled to pay to the respondent no. 1 more than the actual amount collected towards toll tax from commercial vehicles entering the NCT, Delhi;

b. Issue a writ in the nature of declaration, declaring that the Toll Tax & ECC Agreement is ultra vires Section 113 (2) (g) of the Delhi Municipal Corporation Act, 1957 to the extent it contemplates payment of amount by the petitioner to the respondent no. 1 in excess of the toll tax actually collected by the petitioner;

c. Issue a writ in the nature of mandamus directing the respondents to make a fresh assessment as to the circumstances affecting toll collection taking into account the circumstances highlighted by the petitioner and reassess and re-determine the annual/

weekly amount payable by the petitioner to the SDMC towards toll tax;

d. Issue a writ in the nature of mandamus directing the respondents to take into consideration the change in circumstances make suitable downward revision in the weekly/ annual remittance commensurate with the reduction in toll tax paying commercial vehicles and taking into account the tax leakages on account of free lanes;

e. Issue a writ in the nature of certiorari quashing the demand notice dated 18.11.2019 issued by the respondent to the petitioner for payment of Rs.450.6973 crores.

f. Issue a writ in the nature of certiorari quashing the demand of .1 % per day that is 36.5% per annum in the demand letter dated 18/11/2019 as being in terrorem and inequitable.

g. Issue a writ in the nature of Mandamus directing the SDMC to provide a suitable mechanism for resolution of disputes/grievances of the petitioner as the mechanism provided by the contract has become unworkable.”

2. The case of the petitioner is that for the purpose of collecting Toll Tax, SDMC floated a tender on 21.07.2017 inviting bids from interested parties to collect Toll Tax and ECC from specified commercial vehicles at 124 toll plaza/post/barriers location bordering Delhi.

3. The petitioners made a bid and were declared successful. An agreement was signed between the petitioner and respondent No. 2 on 28.09.2017. As per the agreed terms, the petitioner agreed to pay to the respondent a sum of Rs. 23.12 crores per week being a total of Rs. 1206 crores per annum for the period of five years subject to enhancement of 5% in the awarded amount after completion of every two

years. Presently, it is stated that as per the agreement, the petitioner are obliged to pay Rs.24.28 crores per week.

4. The grievance of the petitioner is that the Eastern Peripheral Expressway was opened for general public traffic on 27.05.2018. On 16.01.2019, a meeting of a High Level Committee of the respondent took place. In the said meeting, they deliberated that the traffic entering Delhi has reduced due to opening of the Eastern peripheral Expressway. It was estimated in the meeting that was held on 31.08.2018 amongst SDMC, NHAI and the petitioner that on opening of the Eastern Peripheral Expressway there is a reduction of 30% in the commercial traffic approximately and it would be higher on the completion of the Western Peripheral Expressway. The grievance of the petitioner is that at present weekly expected revenue from 124 entry points is only Rs.19.25 crores taking into consideration all other aspects. On the annual basis collection of amounts calculated on the basis of survey report is approximately Rs.1000 crores which is far below the awarded contract of Rs.1206 crores per annum.

5. It is the case of the petitioner that they have been regularly sending representations to the respondent with regard to decline in toll revenue due to diversion of traffic from 01.06.2018. On the representation of the petitioner, a High-Level Committee was constituted to look into all the aforesaid claims as raised by the petitioner. The committee on 17.10.2019 is said to have made a recommendation and approved that a sum of Rs. 18,98,54,798/- be reduced from the outstanding claim made by the respondent of Rs.446,46,55,359/-.

6. On 18.11.2019, the respondent has issued a demand notice to the petitioner asking them to deposit a sum of Rs. 450.69 crores and the penalty amount of .1% per day i.e. 36.5% per annum within a period of seven days failing which action shall be taken for revocation of the bank guarantee and post-dated cheques.

7. Learned senior counsel for the petitioner has vehemently urged as follows:

(i) He has urged that as is apparent from the minutes of the meeting noted above, there has been a reduction of at least 30% in the traffic on the opening of the Eastern peripheral Expressway. This has further reduced on the opening of the Western Peripheral Expressway. Hence, he submits that the petitioner cannot be made to pay toll tax which they have not been collecting and will not be able to collect given the volume of traffic that is passing through various toll booths.

(ii) It is further pleaded that on 04.06.2018, a direction was issued by the respondent not to collect toll tax and ECC from other than the allotted six lanes. It is stated that this itself is causing a loss of Rs.36.81 lakhs per day.

(iii) It is further pleaded that Clause 16 of the agreement between the parties stipulates a dispute resolution clause. Under the said clause, in case any disputes are stated, decision has to be given by a competent officer in connection with or arising out of the agreement. If the competent officer fails to give his instructions or decision in writing or if the contractor is dissatisfied with the instructions of the competent officer, an appeal to the Commissioner, SDMC shall lie who shall give an opportunity to the contractor to be heard, if the later so desires. The Commissioner, SDMC shall give his decision in writing within 30 days on receipt of the contractor's appeal. It further pleaded that the respondent before raising a demand of Rs. 450 crores ought to have followed the principles of natural justice.

8. Learned senior counsel for the respondent has pleaded as follows:

(i) He submits that the floor price of the bid was Rs.636 crores but the petitioner themselves made a bid of Rs. 1206 crores per annum. The second highest bid was of the bidder whose bid was at Rs. 811 crores. Meaning thereby, the

petitioner themselves had made a much higher bid in an effort to grab the contract in question.

(ii) He further submits that in case toll tax is collected is higher than the petitioner's bid offer, the balance would be retained by the petitioner with themselves and would not be handed over to the respondent. Hence, he states that it was for the petitioner to have properly judged the possible revenue collection and made a bid accordingly.

(iii) He further states that presently, a total amount of Rs.450 crores is outstanding whereas the respondent have only a bank guarantee of Rs. 64 crores and some post-dated cheques as a security.

9. Given the nature of submissions made, this writ petition can be disposed of at this stage.

10. I may note that the dispute resolution clause in the agreement between the parties reads as follows:

"16. Dispute Resolution Clause:

16.1 Except where otherwise provided in the agreement, all questions and disputes in any way arising out of or relating to the agreement shall be dealt with as mentioned below.

16. 2 In the event the Contractor consider any work demanded of it as being outside the requirement of the Agreement, or disputes any record or decision given in writing by the Competent officer in any matter in connection with or arising out of the Agreement, to be unacceptable, it shall promptly within (15) days request the Competent Officer in writing to give his instructions or decision in respect of the same. Thereupon, the competent Officer shall give his written instruction or decision within a period of (30) days for the receipt of the Contractor's Letter.

16.3 If the Competent Officer fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the instructions or decision of the Competent Officer, the Contractor may, within (15) days of receipt of Competent Officer's instruction or decision, appeal to the Commissioner, SDMC who shall afford an opportunity to the Contractor to be heard, if the later so desires, and to offer evidence in support of its appeal. The Commissioner, SDMC shall give his decision in writing within (30) days of receipt of Contractor's appeal which shall be acceptable to the Contractor.”

11. It is manifest from the above that a procedure has been incorporated in the Agreement whereby in case any contractor, namely, the petitioner has any dispute or any grievance, he can approach a competent officer/the Commissioner, SDMC who has to after giving a hearing pass a reasoned order.

12. In my opinion, it would be in the interest of justice that before the W.P. (C) 12483/2019 Page 7 of 10 respondent enforces their demand as now claimed by demand dated 18.11.2019, first they should give a hearing to the petitioner and thereafter taking into account the submissions of the petitioner pass an appropriate reasoned order.

13. Reference may be had to the judgment of the Supreme Court in the case of Swadeshi Cotton Mills vs. Union of India, (1981) 1 SCC 664 where the court held as follows:

“32. The maxim audi alteram partem has many facets. Two of them are: (a) notice of the case to be met; and (b) opportunity to explain. This rule is universally respected and duty to afford a fair hearing in Lord Lore-burn's oft quoted language, is “a duty lying upon everyone who decides something”, in the exercise of legal power. The

rule cannot be sacrificed at the altar of administrative convenience or celerity; for, “convenience and justice” — as Lord Atkin felicitously put it — “are often not on speaking terms [General Medical Council v. Spackman, 1943 AC 627, 638]”.

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94. The further question to be considered is: What is the effect of the non-observance of this fundamental principle of fair play? Does the non-observance of the audi alteram partem rule, which in the quest of justice under the rule of law, has been considered universally and most spontaneously acceptable principle, render an administrative decision having civil consequences, void or voidable? In England, the outfall from the watershed decision, Ridge v. Baldwin [1964 AC 40: (1963) 2 All ER 66 (HL)] brought with it a rash of conflicting opinion on this point. The majority of the House of Lords in Ridge v. Baldwin [(1978) 1 SCC 248] held that the nonobservance of this principle, had rendered the dismissal of the Chief Constable void. The rationale of the majority view is that where there is a duty to act fairly, just like the duty to act reasonably, it has to be enforced as an implied statutory requirement, so that failure to observe it means that the administrative act or decision was outside the statutory power, unjustified by law, and therefore ultra vires and void (see Wade's Administrative Law, ibid., p. 448). In India, this Court has consistently taken the view that a quasi-judicial or administrative decision rendered in violation of the audi alteram partem rule, wherever it can be read as an implied requirement of the law, is null and void (e.g. Maneka Gandhi case [1964 AC 40 : (1963) 2 All

ER 66 (HL)] and S.L. Kapoor v. Jagmohan [(1970) 2 WLR 1009: (1970) 2 All ER 528 (CA)]. In the facts and circumstances of the instant case, there has been a noncompliance with such implied requirement of the audi alteram partem rule of natural justice at the pre-decisional stage. The impugned order therefore, could be struck down as invalid on that score alone. But we refrain from doing so, because the learned Solicitor-General in all fairness, has both orally and in his written submissions dated August 28, 1979, committed himself to the position that under Section 18-F, the Central Government in exercise of its curial functions, is bound to give the affected owner of the undertaking taken-over, a “full and effective hearing on all aspects touching the validity and/or correctness of the order and/or action/of takeover”, within a reasonable time after the takeover. The learned Solicitor-General has assured the court that such a hearing will be afforded to the appellant Company if it approaches the Central Government for cancellation of the impugned order. It is pointed out that this was the conceded position in the High Court that the aggrieved owner of the undertaking had a right to such a hearing.”

14. Given the terms of the contract as noted above i.e. Clause 16 and the legal position regarding compliance of the principles of natural justice, it is appropriate that the respondent give a proper hearing to the petitioner and thereafter pass a reasoned order. In the interest of justice, I pass the following directions:

(i) Present writ petition would be treated as a representation of the petitioner to the Commissioner, SDMC.

(ii) He may give a hearing to the petitioner within four weeks from today. If the Commissioner so desires, he may nominate a retired judge of this court for the necessary hearing and passing of a reasoned order.

(iii) The Commissioner/Nominee of the Commissioner would thereafter pass a reasoned order. This exercise may be done within two months from today.

(iv) The Commissioner/nominee of the Commissioner is requested to pass a reasoned order uninfluenced by any observations that have been made by this court while passing this order. Once the order is passed, the respondent is free to take steps as per law. Needless to add, in case the petitioner are not satisfied with the said order, they are at liberty to take steps to challenge the same as per law.

(v) In the meantime, the petitioner shall continue to pay a sum of Rs.20crores per week starting from the current week. In case there are two consecutive defaults in making payment, the right of the petitioner to a hearing and reasoned order shall stand superseded.

(vi) Demand notice dated 18.11.2019 is kept in abeyance subject to speaking order passed by the Commissioner/Nominee of the Commissioner.

15. It has been pointed out that certain post-dated cheques that were given by the petitioner are expiring in the next two months. The petitioner will ensure that fresh post-dated cheques are given to the respondent with the same validity as was given earlier.

16. This order has been passed without prejudice to the rights and contentions of the parties.

17. With the above, the present petition stands disposed of. Pending application also stands disposed of.”

5. In compliance to directions in the above order, a detailed order was passed by Commissioner, SDMC on 31.01.2020 by which certain claims of MEP were partially allowed and rest of the claims of MEP were rejected. In terms of the order dated 31.01.2020, SDMC issued a demand notice for Rs.592.67 crores alongwith penalty @ 0.1%, being Rs.163.90 crores. By way of writ petition No.2241/2020, the order dated 31.01.2020 passed by Commissioner of SDMC and the demand notice dated 14.02.2020 were challenged. While hearing the interim prayers of the MEP, i.e., the petitioner, the learned Single Judge was pleased to pass an order dated 02.03.2020, which is reproduced hereunder:

“W.P.(C) 2241/2020 & CM APPL No.7822/2020

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.

7. List on 31.3.2020 at 2:15 PM.

8. Needless to add, in case the payment of Rs.20 crore per week in future is defaulted or any other default takes place as stated above, the interim order passed shall automatically stand vacated.

9. In the meantime the respondent will take instructions as to whether the matter can be referred to a Retired

Judge of this court as a Sole Arbitrator to be nominated by the respondent.

10. A copy of this order be given dasti under signatures of the Court Master to learned counsel for the parties.”

6. Being not satisfied with the order dated 02.03.2020, MEP moved C.M.No.11093/2020 for modification of order dated 02.03.2020 and vide impugned order dated 12.06.2020, the learned Single Judge was pleased to modify the order dated 02.03.2020. The relevant portion of the said order is reproduced hereunder:

“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 nonperformance 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 nonperformance 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 premature 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".

7. The MEP also filed a review petition No. 107/2020, which was disposed of on 24.06.2020 by learned Single Judge and relevant portion of the said order is reproduced hereunder:

"REVIEW PET. 107/2020"

5. The hearing was conducted through video conferencing.

6. This Review Petition seeks modification of the order dated 12.06.2020 on the ground that there are two errors: (i) that once force majeure has been made applicable by the court from 19.02.2020, then the Rs.20 crores weekly payment by the petitioner would stand suspended and as a corollary, the outstanding amount of Rs.115.04 crores, as recorded in this Court's order dated 02.03.2020, would be reduced by roughly Rs.38 crores (i.e. amount computed for 19th February to 2 nd March 2020 @Rs.20 crores per week) . It is contended that Rs.115.04 crores as recorded, was the sum total of the

earlier weekly payments, claimed as dues by the respondent Corporation. Thus, after deducting Rs.38 crores from Rs.115.04 crores, only an amount of Rs.77 crores would be payable. Of this Rs.68.05 crores stand paid, leaving a payable balance of Rs.8.99 crores. It is contended that nevertheless, the petitioner is ready and willing to pay the respondent a larger amount of Rs.15 crores by way of a Bank Draft, instead of the Rs.77.04 as directed by the order dated 12.6.2020 and (ii) that once the force majeure clause was made applicable by MORTH from 19.02.2020, as recorded by this court, then that day becomes the cut-off date for suspension of all subsequent contractual obligations.

7. The court, however, is not persuaded by either of the said contentions and does not find any error on the face of the record to review its order. Para 30 of the order clearly reasons that the amount, which was admittedly agreed between the parties as payable as of 02.03.2020 was Rs.115.04 crores. No objection was raised by the petitioner apropos the said quantum either at that stage or at any subsequent stage. An issue is being raised now only on the basis of this court's order of 12.6.2020. Furthermore, the petitioner had never contended at any earlier stage, of it being prejudiced by the force majeure condition from 19.2.2020 till 2.3.2020, as invoked by MORTH, or that its revenue/toll collection had reduced in any manner during that period because of the force majeure condition. Indeed, the petitioner itself referred to the 19.2.2020 Circular of MORTH for the first time, a full month later, on 19.3.2020. The national lockdown took effect from midnight of 24th/25th March, thereby virtually barring movement of motor vehicular traffic. It is only as a result of this bar that the revenue collection of the petitioner could be said to have been affected. Resultantly, only the recurring weekly payment after 2nd March could be said to be affected. The acknowledged outstanding amount of Rs.115.04 crores cannot be sought to be revised now, because it was not dependent on fresh

revenue collection but were dues of many weeks, prior to 2nd March. If the petitioner had an any reservation apropos the same i.e. such previous amount of Rs.115.04 crores, having already been affected by force majeure disability, it could have brought the same to the notice of the court or expressed its inability to pay the same. The acknowledged dues of Rs.115.04 could have been a subject matter of review on 2.3.2020 only if the petitioner had averred or shown that motor vehicular traffic between 19th February and 2nd March had already been affected on date. Surely the petitioner would have known of the ground reality/toll collections/traffic volume, between 19.2.20 and 2.3.20. Therefore, for the petitioner to now submit that the force majeure had affected its toll collection before 2nd March, is untenable. The order of 12.6.2020 is clear apropos the amount due before 2nd March and the recurring weekly dues thereafter. It does not call for any review or modification.

8.The Court finds no merit in the review petition. It is, accordingly, dismissed.

9. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the counsels through email. ”

8. In the meantime, SDMC and others have challenged the order dated 12.06.2020 by filing LPA No. 165/2020 praying for setting aside the order dated 12.06.2020 and allowing C.M.No.11397/2020 seeking dismissal of the writ petition. On the other hand, MEP has also filed an appeal bearing LPA No. 167/2020 challenging certain parts of order dated 12.06.2020 as well as the order dated 24.06.2020 in review petition No. 107/2020. Notices were issued and extensive

arguments have been heard in both the LPAs together. Certain interim directions were also passed during pendency of the LPAs for ensuring interim compliance of order dated 12.06.2020 passed by the learned Single Judge. Written submissions have also been submitted on behalf of both the parties along with bulky compilation of documents, submissions and the case laws etc. filed on behalf of them.

9. Ld. ASG Sh. Sanjay Jain, assisted by Ms. Garima Prashad, Standing Counsel for SDMC, has vehemently argued the appeal on behalf of the SDMC and he has stressed the following points:

(1) **REPEATED VIOLATION OF ALL COURT ORDERS:**

It has been submitted by Ld. ASG that the Ld. Single Judge has erred in granting relief to MEP, which has repeatedly violated each and every order passed by this Hon'ble Court. MEP failed to comply with order dated 26.11.2019 in W.P.(C) No. 12483/2019 and orders dated 02.03.2020, 20.04.2020, 12.06.2020 in W.P.(C) No. 2241/2020. MEP even failed to comply with order dated 20.03.2020 passed by this Hon'ble Division Bench in LPA 139/2020 & LPA 140/2020. It has also not deposited the ECC amounts in gross violation of orders dated 09.10.2015 & 16.12.2015 passed by Hon'ble Supreme Court.

(2) **MEP ALLOWED TO WRIGGLE OUT OF ALL ITS CONTRACTUAL OBLIGATIONS IN PERPETUITY:**

It has been submitted on behalf of SDMC that as per clause 1 of the Contract Agreement dated 28.09.2017, MEP has agreed to pay a cumulative and lump-sum weekly remittance of Rs.23.13 crores (which is Rs.1206 crores per annum) for two years w.e.f. 01.10.2017 and Rs. 24.29 crores (which is Rs.1206 crores per annum) w.e.f. 01.10.2019 after enhancement of 5% in the awarded amount/committed amount. As per SDMC, the Ld. Single Judge, while exercising Writ jurisdiction, has arbitrarily permitted the Contractor to wriggle out of all its past, present and future contractual obligations in the name of COVID-19, without appreciating the past conduct of MEP. Judgment of Hon'ble Supreme Court in the case of *Energy Watchdog vs. Central Electricity Regulatory Commission, (2017) 14 SCC 80* has been relied, in which it is held that “*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.*”

(3) **PAST CONDUCT OF MEP PRIOR TO THE OUTBREAK OF COVID-19:**

It has been the case of SDMC that even before the first lockdown took place from 25.03.2020, MEP was in default of toll tax dues of Rs.840.17 crores as per Agreement. The breach or non-performance by MEP since October, 2017 cannot be justified or excused merely by invocation of COVID-19 as a Force Majeure event. The termination notice dated 16.03.2020 was issued by SDMC considering the past conduct of the MEP and repeated violation of terms and conditions of contract agreement dated 28.09.2017 by MEP. The said company has neither paid Rs.24.29 crores per week as per contract nor paid Rs.20.00 crores per week in compliance of the Court orders dated 26.11.2019 and 02.03.2020. It has also violated other conditions imposed by Courts.

(4) **NHAI FOUND MEP ILLEGALLY COLLECTING ENTRY TAX FROM FREE LANES:**

As per SDMC, MEP has been misrepresenting that SDMC has restricted it to six lanes at NH8 and is not allowing it to collect Toll Tax from the free lanes. This is a totally false plea and contrary to records. The true facts submitted by SDMC are as under:

(a) NHAI has provided only 6 Toll Lanes out of 16 Toll Lanes to SDMC for its Toll Collection under the directions of Hon'ble High Court of Delhi in OMP No. 171/2014 dated 26.02.2014.

(b) Therefore, the Agreement with MEP allowed it to collect toll tax only through the above 6 toll lanes located on extreme left side on Jaipur-Delhi bound carriageway. The remaining 10 lanes were never available to SDMC to authorise collection of toll through its contractor. MEP was thus never authorized to collect Toll Tax from these 10 free lanes.

(c) However, MEP was authorised to collect penalty from the vehicles found evading toll tax by passing through the free lanes, and as per its own data, MEP has collected penalty amount of Rs.138.15 crores from 01.10.2017 to 31.10.2019. SDMC has never restricted MEP from collecting penalty from the free lane violators.

(d) That a PIL No. 1238/2018 was filed in Delhi High Court alleging mismanagement of Toll Plazas. The Hon'ble Court directed NHAI to take remedial action. Thereafter, NHAI made inquiries and found that there is gross mismanagement at the

Toll Plazas due to illegal Entry Tax being collected from the free lanes beyond the authorized jurisdiction of SDMC. NHAI directed SDMC as well as MEP vide letter dated 25.04.2018 to restrict collection of Toll through the earmarked 06 Toll lanes only. This letter has been challenged MEP before this Hon'ble Court in W.P.(C) No. 570/2020.

Thus, MEP is trying to hide its own wrongs and is misleading the Court by making false statements only to avoid making payments as per terms of contract.

(5) **MEP NOT ENTITLED TO ANY BENEFIT FROM OPENING OF WPE & EPE:**

It is also case of SDMC that MEP has been misrepresenting that SDMC is not compensating for loss of traffic after opening of EPE (Eastern Periphery Expressway) and WPE (Western Periphery Expressway). This is a totally false plea. To the contrary, this issue had been addressed during the pre-bid meeting prior to receipt of tender bid and therefore, the Clause of "*Surrender of Contract*" was introduced in the Agreement dated 28.09.2017.

Since the Agreement was on the basis of cumulative and lump-sum fixed weekly amount of Rs.23.13 crores, irrespective of actual collection, SDMC would not be entitled to claim any further amount in case the Contractor's collection increases. Also, in the same vein, SDMC would not compensate the Contractor in case its collection decreases due to any reason whatsoever. MEP thus acknowledged that it will not seek reduction in Contract Fee due to any reason whatsoever. Clause 3 (e) of the contract is as under:

“The Contractor agrees and confirms that it shall not be entitled to any compensation rebate or reduction in Toll Collection Contract Fee on account of change or variation in traffic pattern, volume or intensity for any reason whatsoever other than as specifically permitted in accordance with this Agreement.”

- (6) **MEP IS DIRECTLY COLLECTING MORE THAN 50% OF TOTAL TOLL TAX REVENUE WHICH IT IS NOT DEPOSITING. SDMC IS GETTING LESS THAN 50% AND NOT 85%**

As per SDMC, the MEP has been making false statements that since 23.03.2020 SDMC is getting more than 85% of toll tax amount directly from the RFID system installed at 13 entry points which have a total traffic volume of around 85%. This is absolutely wrong and

misleading statement. 85% Traffic Volume does not mean 85% revenue.

A study of the data of 2017-19 provided by MEP including statement of income, monthly passes and the income from penalty shows that less than 50% amount, out of total collection, directly comes to SDMC.

(7) **FALSE STATEMENTS BY MEP BEFORE COURT:**

The Ld. ASG on behalf of SDMC stressed that MEP, through its senior counsels, has made several blatant false statements misrepresenting the facts before the learned Single Judge and recorded in the impugned order dated 12.06.2020 in para 6, 8, 9 and 10, which are contrary to record and terms of the agreement. In fact, in para 6 of the impugned order it is recorded that "*Presently, the petitioner is paying approximately Rs.19.27 crores per week.*" This is a blatantly false statement. The impugned order passed on the basis of such false and misleading statements is wrong and deserves to be set aside.

(8) **BREACH OF AGREEMENT BY MEP- Non-replenishment of performance Guarantee within 10 days:**

Case of the SDMC is that the Ld. Single Judge has ignored breach of Clause 12.1 (a) (b) of the Agreement by MEP, which requires that once the Bank Guarantee has been encashed due to default, the Performance Guarantee shall be replenished by the Contractor within 10 days from the date of such recovery, failing which the contract is liable to be terminated. The Bank Guarantees were encashed by SDMC on 31.03.2020, 03.04.2020 and 07.04.2020 in view of repeated defaults. MEP did not replenish the Performance Guarantee worth Rs.64 crores within 10 days in breach of the contract. Thus, the finding of the Ld. Single Judge that since the Bank Guarantee was encashed later, there was no breach of order dated 02.03.2020 is erroneous and deserves to be set aside.

(9) **SDMC WAS BOUND BY ORDER DATED 02.03.2020 AND COULD NOT HAVE ENCASHED BANK GUARANTEE ON 09.03.2020:**

It is further submitted on behalf of SDMC that the order dated 02.03.2020 had restrained it from taking any coercive steps against MEP which included encashment of BG. Accordingly, the conclusion by Ld. Single Judge that *“It was a ready fund to be dipped into and appropriated by the respondent, in case of default in payments”* on

09.03.2020, thereby expecting SDMC to violate the order dated 02.03.2020 and encash the BG on 9th March 2020, is a gravely wrong finding and deserves to be set aside. Significantly, it has been overlooked that a Bank Guarantee could have been invoked only if there was a default of the contractual amount and not to prevent a default.

It is also submitted that MEP has itself admitted in its letter dated 19.03.2020 that it has not complied with order dated 02.03.2020. MEP admits in para 6 of the letter that the first compliance of order dated 02.03.2020 was to be made on 09.03.2020 and it was not able to pay. It seeks application of Force Majeure on operation of order dated 02.03.2020. It is relevant to state that the letter does not even mention O.M. dated 19.02.2020 issued by Ministry of Finance, Government of India.

(10) **MEP IS NEITHER GIVING TRAFFIC DATA NOR DEPOSITING TOLL AMOUNT RECEIVED:**

As per SDMC, MEP has deliberately not given data of “Average Weekly Traffic Count” since 01.11.2019 even though the same is specifically required under Clause 8.7 of the agreement. In

fact, since 23.03.2020, MEP has not deposited any amount directly with SDMC, which is in gross violation of High Court orders dated 20.04.2020 and 12.06.2020.

(11) **FORCE MAJEURE RELIEF TO BE GOVERNED BY MORT&H LETTER DATED 18.05.2020, NOT O.M. DATED 19.02.2020:**

Further case of SDMC is that Ld. Single Judge has erred in holding that the OM dated 19.02.2020 issued by the Ministry of Finance will be applicable in present case in the context of Force Majeure for the period of COVID-19. This O.M. is not applicable in the present case as it is applicable only for procurement of goods. The NHAI has later issued directions in accordance with MORT&H letter dated 18.05.2020 giving Force Majeure relief for all National Highways for Toll contractors having effective date starting from 26.03.2020. It further provides for a 2nd Force Majeure period post resumption of tolling from 24.04.2020 till traffic resumes 90% of the traffic in pre-lockdown (period 15.03.2020 to 21.03.2020) weekly average traffic count. The impugned order giving a finding contrary to the NHAI directives applicable to both MEP and SDMC is wrong and deserve to be set aside.

(12) **DOCTRINE OF FORCE MAJEURE CANNOT BE APPLIED ON COMPLIANCE OF THE COURT ORDER:**

The basic contention of the SDMC is that the doctrine of Force Majeure cannot be applied on the compliance of the Court Order so as to annihilate the Court directions and it cannot be applied except in accordance with the prerequisite and the procedure laid out in the contract. Moreover, learned Single Judge fell into error by misreading the OM dated 19.02.2020 issued by the Ministry of Finance in the context of Force Majeure. The letter dated 19.03.2020 having been issued by MEP after the termination of the contract, so there was no occasion for MEP to invoke Force Majeure and in any event, notice was not issued within 5 days following such occurrence as provided in the contract.

(13) **ENTIRE TENDER PROCESS FOR NEW CONTRACTOR DONE WITH APPROVAL OF THE COURT:**

Another argument put forward by SDMC is that the entire tender process for appointing the new contractor was repeatedly approved by the Division Bench of this Hon'ble Court in W.P.(C) 2995/2020 (order dated 27.05.2020) and W.P.(C) No. 3129/2020 (order dated 15.05.2020). Also, on 20.04.2020, Ld. Single Judge in

W.P.(C) 2241/2020 further approved the tender process and permitted SDMC to continue with it and also award the contract to a third party subject to handing over of sites only on 25.05.2020. This order was challenged in review by MEP but again no relief was granted to MEP on 27.04.2020. LOI was thus issued on 27.05.2020 to the successful bidder in compliance of directions of Hon'ble High Court dated 20.04.2020, which order is still valid and subsisting.

(14) **STATUTORY PUBLIC FUNDS BEING ILLEGALLY SIPHONED OFF BY MEP:**

As per SDMC, toll tax is a major source of revenue for the Municipal Corporation. While MEP has misappropriated thousands of crores of public funds, SDMC is facing a major financial crisis and is unable to fulfil its municipal duties or even pay salaries of its employees. The impugned order makes a serious mistake in giving a *carte blanche* to MEP and permit them to escape from their liability to pay even as per the Court order. Since the beginning of the contract, MEP has been playing tactics to delay and avoid paying its contractual dues. It has been further submitted that in view of the above, all applications filed by MEP were liable to be dismissed including the application for modification of the order dated 02.03.2020. In fact, the

petition itself ought to be dismissed in view of the subsequent events as held in *Shipping Corporation India Ltd. vs. Machado Brothers & Ors.* (2004) 11 SCC 168. The impugned order based on such a misconstrued and misconceived presuppositions has resulted in a grave miscarriage of justice and unless it is set aside, till then it leaves no scope for the Appellant to stay afloat in the original writ. The above conduct of MEP ought to have been noticed by the learned Single Judge and no reliefs were merited to such a litigant. The above anomalies need to be corrected by this Appellate Court.

CITATIONS ON BEHALF OF SDMC

10. Ld. ASG has relied upon the following judgments in support of his arguments:

1. Energy Watchdog Vs. CERC & Ors. (2017) 14 SCC 80: It is held in this judgment that Force Majeure is governed by Section 32 and Section 56 of the Indian Contract Act, 1872, depending upon the circumstances as to whether it is part of the contract or not.

2. *Satyabrata Ghose Vs. Mugneeram Bangur & Co. AIR 1954*

SC 44: As per this decision, in context of India, the supervening impossibility is governed by Section 56 of the Indian Contract Act.

3. *O.M.P.(I)(Comm) No. 88/2020 M/S Halliburton Offshore*

Services Inc. Vs. Vedanta Limited & Anr: This judgment reiterates the law laid down in *Energy Watchdog vs. CERC* (Supra). Conduct of the parties prior to COVID-19 is to be examined.

4. *Assistant Collector of Central Excise Chandan Nagar, West*

Bengal Vs. Dunlop India Ltd. & Ors. (1985) 1 SCC 260: It is observed that Governments do not run on Bank Guarantees.

5. *Kerala State Electricity Board & Anr. Vs. Kurien E.*

Kalathil & Ors. (2000) 6 SCC 293: It is held that interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition.

6. *Nabha Power Limited (Npl) Vs. Punjab State Power*

Corporation Limited (Pspcl) & Anr. (2018) 11 SCC 508: The

contract is to be read as a whole and a particular clause should not do violence to another part of the contract.

7. *Burmah Shell Oil Distributing Now Known as Bharat Petroleum Corporation Ltd. Vs. Khaja Midhat Noor & Ors. (1988) 3 SCC 44:* It was held that notice must be read in the context of the facts of each particular case having regard to the situation of the parties to whom it is addressed.

8. *Akash Ganga Builders & Engineers (P) Ltd. Vs. G.P. Seth HUF & Anr. 1999(50) DRJ (DB):* As per this judgment, earlier communication to terminate the tenancy by end of the month and vacate the premises and hand over the possession is to be read with the subsequent letter which gave one week's more grace to the tenant and it does not render the earlier notice invalid.

9. *Shipping Corporation of India Ltd. Vs. Machado Brothers & Ors. (2004) 11 SCC 168:* Continuation of a suit after disappearance of the cause of action would amount to an abuse of process of the court.

10. State of Kerala & Ors. Vs. M.K. Jose (2015) 9 SCC 433:

Where alternative and equally efficacious remedy is available, the litigant should pursue that remedy instead of filing a writ petition.

We have gone through all the above-mentioned judgments thoroughly and have taken into consideration the law laid down in these judgments while deciding these appeals.

SUBMISSIONS ON BEHALF OF MEP:

11. Mr. Mukul Rohatgi, Senior Advocate and Mr. Abhishek Manu Singhvi, Senior Advocate with Mr. Rajiv S. Dwivedi and Mr. Azeem Samuel, Advocates have submitted on behalf of MEP as under:

A. THE FORCE MAJEURE (FM) CLAUSE COMES INTO OPERATION FROM 19.02.2020 EVEN THOUGH NOTICE INVOKING FM CLAUSE IS DATED 19.03.2020:

A1. The FM Clause 15 of the contract is very clear. It provides for reduction of weekly instalments if any circumstance causes a “material adverse impact”. It is settled law that an FM clause by its very nature tends to override all other provisions of the agreement.

A2. It is impossible to pin point a starting date for an FM Event such as the Coronavirus and MEP believes that impact in collection were being felt from start of February 2020. However, since SDMC itself acknowledged that circular of 19.02.2020 constituted FM, so MEP has also accepted the same.

A3. SDMC being a public body must be penalized for acting in such an unbecoming manner. On one hand, it says that the circular dated 19.02.2020 constitutes FM and on the other it says that for MEP it doesn't.

A4. There are two kinds of FMs defined in the agreement between MEP and SDMC. FM simpliciter (Clause 15.1) and FM event (Clause 15.2 and 15.3). The requirement for giving notice is only with respect to FM event and not FM simpliciter. COVID pandemic is covered under FM simpliciter – as a circumstance having “material adverse impact”. Therefore, no notice required to be given within 5 days under clause 15.3.

A5. Even guidelines issued by MORTH dated 18.05.2020 supports the contention that COVID-19 pandemic constitutes

FM and toll concessionaires such as MEP can't be asked to deposit full amount as per the agreement.

A6. The Hon'ble Single Judge has therefore rightly concluded vide the order dated 12.06.2020 that COVID-19 pandemic constitutes a Force Majeure and that all payments thereafter would have to be guided by special equities.

B. EFFECT OF 19.02.2020 BEING DATE ON WHICH FM CLAUSE COMES INTO OPERATION:

B1. Even though Hon'ble Single Judge has rightly concluded vide order dated 12.06.2020 that 19.02.2020 is the effective date on which FM clause came into operation, he has erred in application of the said finding. MEP has filed LPA 167/2020 in respect of the same.

B2. From a conjoint reading of paras 25, 29, 30 and 31 of the order dated 12.06.2020, the following are discernible:

- (i) That the Force Majeure clause between the parties came into operation with effect from 19.02.2020. *“which in effect means that the amount payable by the petitioner to the respondent would have to be put into abeyance”*

implying thereby that MEP was not required to pay Rs.20.00 Cr/week after 19.02.2020.

- (ii) That this finding is contradicted in para 30, where court holds that *“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 global pandemic/nationwide lockdown or reduction of volume of traffic, as a consequence thereof. Therefore, the said amounts ought to be paid as directed”*,

B3. The chart below shows that as on 19.02.2020, MEP was only in default of Rs.15.00 Cr. in respect of the directions contained in order dated 26.11.2019:

Amount payable between 26.11.2019 to 17.02.2020 as per order dated 26.11.2020 (12 weeks x 20 cr/week)	240.00 Cr.
Amount paid between 26.11.2019 to 17.02.2020	161.55 Cr
Balance amount	79.00 Cr.

Amount of BG encashed by SDMC	64.00 Cr.
Balance payable	15.00 Cr.

B4. This amount of Rs.15.00 Cr. has already been paid by MEP.

C. WHETHER MEP HAS BEEN AN HABITUAL DEFAULTER WHO HAS REFUSED TO PAY DUES TO SDMC?

C1. THIS IS ABSOLUTELY INCORRECT. In respect of the same it has been submitted that MEP had bid to give Rs.23.12 Cr./week in the absence of any FM circumstances exerting downward pressure on the said figure. It is important to mention herein that toll collected by MEP is in the nature of a tax and MEP acts only as a tax collection agency. MEP cannot be expected to pay tax that it has not been able to collect on account of intervening FM circumstances.

C2. There are two major FM circumstances that MEP has been trying to get adjudicated but a fair adjudication has been deliberately denied to MEP by the SDMC.

- a. Vehicles evading toll tax using free lanes and SDMC not permitting MEP to collect toll tax nor penalty on free

lanes. SDMC's own report says Rs. 37 lakhs lost/day excluding penalty as per a report by Tesidel. This issue has been eating into collection of MEP from the very beginning as is evidenced from letter dated 17.11.2017 and regularly thereafter, written by MEP. In this regard, it is most important to note herein that SDMC has vide its letter dated 04.06.2018 has specifically prohibited MEP from collecting toll from these vehicles running away from free lanes. Despite tying the arms of the MEP behind its back and not allowing it to collect toll tax from evading vehicles, SDMC refuses to give relief on the basis of the said claim.

- b. Opening of Eastern and Western Peripheral Highway, which has reduced traffic inflow by 30%. They opened on 25.05.2018 (9 months post MEP taking over on 28.09.2017). SDMC's own report (Samarth Softech) says gross toll collecting maxing out at Rs.19.25 Cr/week and letter dated 22.10.2019 to this effect was sent by the Commissioner to the Municipal Secretary. It is to be

noted that the Senior advocate and ASG advising SDMC had himself held that there has been a reduction of traffic due to opening of EPE & WPE.

C3. The total loss suffered by MEP on account of various FM circumstances on the basis of which MEP sought reduction in liability to pay was to the tune of Rs.2068 Cr.

C4. The order dated 31.01.2020 passed by SDMC commissioner rejected the aforementioned claims without giving any reasons whatsoever. The loss on account of vehicle evading by using free lanes and opening of EPH and WPH is admitted in the own reports commissioned by SDMC and yet SDMC does not wish to treat the same as FM. It is humbly submitted that common sense dictates that both these facts have “material adverse effect” on collection and therefore concession is required.

C5. It has been further humbly submitted by MEP that especially with respect to the issue of free lanes, since 17th October, 2017 MEP has been writing letters to SDMC on the issue of facing problem in collecting tolls from specified

vehicles as per Toll Tax Bye Laws dated 31st October, 2007. If MEP allows vehicles to run free, how are they supposed to meet the revenue collecting target? SDMC has so far refused to give a concrete answer in respect of the same in any forum.

C6. MEP points out that it is also argued by SDMC that there is an option to surrender the contract if MEP does not find it viable. This argument has no legal basis. Surrender of contract is an additional elective right given to MEP, it is under no obligation to choose. Also, it is important to note that MEP has so far before the COVID pandemic paid an average amount of Rs.19 Cr./week to SDMC as against the Rs.15.00 odd crores it will get from the new contractor. Why SDMC officials are keen to given contract to a contractor that undercuts SDMC revenues is any body's guess.

D. WHETHER MEP IS SEEKING TO ARGUE FM AGAINST THE COURT ORDER?

D1. As per MEP the answer is “No”.

D2. It has been submitted by MEP that SDMC is deliberately trying to twist the facts.

D3. The Impugned Order has been passed in an application moved by MEP seeking modification of the direction to pay Rs.20.00 Cr./week basis on FM clause coming into operation.

D4. There is no bar in law to seek modification of an order, and once order has been modified then the argument raised by SDMC has no legs to stand on.

E. WAS TERMINATION OF THE CONTRACT OF MEP AND SUBSEQUENT ALLOCATION OF THE SAME TO SAHAKAR VALID?

E1. Termination notice dated 16.03.2020 issued to MEP is on the basis of non-compliance with the twin directions contained in the order dated 02.03.2020 to pay 1/3rd of Rs.115 Cr by 17th March and to continue to pay 20.00 Cr/week.

E2. 1/3rd of Rs.115 Cr. amounts Rs.38 Crore. SDMC has encashed MEP's BG of Rs.64 Cr. There SDMC recovered almost twice of Rs.38 Cr.

E3. On the issue of liability to pay Rs.20 Cr/week, as correctly held vide order dated 12.06.2020, once the FM clause kicks in, there is no requirement to continue to pay

Rs.20Cr/week. Therefore, the argument of SDMC that they could have issued termination letter any day after 9th March 2020, has no legs to stand. Even otherwise, SDMC always had option to first make good the shortfall from the BG.

E4. Also, to be noted that order of 3 Judges bench, dated 25.03.2020 has extended all interim orders operating on 16.03.2020 till 15.05.2020, which has been extended further. Therefore, the notice of termination issued to MEP is per se bad, as rightly held to be *non-est* by the Hon'ble Single Judge.

E5. The selection of “Sahakar” as a replacement for MEP is also bad. There have been three NITs so far:

1st dated 16.03.2020— which was withdrawn. Reserve Price of Rs.636 Cr. only.

2nd dated 06.04.2020— wherein bids were held but since only one bid came, it had to be withdrawn. Reserve Price of Rs.636 Cr. only.

3rd NIT dated 28.04.2020- where two bids came on 15.05.2020. However, only one proper bid as the other bid is much below the reserve price of Rs.636 Cr.

E6. The Bid which SDMC is taking so much effort now to execute is for Rs.787 Cr. annually which is approx Rs.15 Cr/week. This sum is peanuts as compared to the sum offered by MEP. Even this amount shall be payable by Sahakar, only after the *Force Majeure* situation of Corona Virus is over.

E7. The termination notice has been rightly cancelled by Ld. Single Judge vide his order dated 12.06.2020.

F. WHETHER A RETIRED JUDGE SHOULD BE APPOINTED TO ADJUDICATE THE DISPUTES BETWEEN THE SDMC AND MEP?

F1. As per MEP, it is evident from a bare reading of the order dated 31.01.2020 that though it is lengthy order, it is non-reasoned and reflects of prejudice. The SDMC has not been asked to file its reply. The documents of SDMC have suddenly appeared in the order, without the same being either brought on record by SDMC, nor the same were argued or even presented by them. The Commissioner proceeded as if he is the Party

Respondent, therefore, he is aware of all the documents and facts of SDMC. It is to be further noted that many of the arguments advanced by the Commissioner to deny relief were not argued by SDMC. Since they had not filed any reply, therefore there is no question of any pleading on behalf of SDMC. In fact, SDMC barely replied orally to any assertion made by MEP and the order of the Commissioner, SDMC dated 31.01.2020 appears at best to be a reply of the SDMC to the allegations made by MEP. These allegations and “reply” in the form of an “Order” needs to be independently adjudicated.

F2. This dispute resolution clause 19 contained in Agreement is provided for a two-step adjudication. The first step is presided over by the Competent Officer, clause 5, and the second step is presided over by the Commissioner, SDMC.

F3. The unique thing of this case is that till 16.12.2019, the Commissioner SDMC was adjudicating as the Competent Officer and he had already rejected the claims of MEP. It is for this reason that the order dated 26.11.2019 passed by this

Hon'ble Court gave the Commissioner a way out by appointing a Retired Judge.

F4. It is to be noted that in order to cover up the loophole of not having appointed a "Competent Officer", the Commissioner sought to do the same on 16.12.2019 and they proceeded to hear the matter.

F5. MEP specifically moved an application before the Commissioner to appoint a Retired Judge dated 20.12.2019 and 07.01.2019 which was dismissed, it seems orally without even the decision being communicated to MEP and MEP learning of the same only in the order dated 31.01.2020.

F6. When the MEP made a prayer before the Ld. Single Judge to appoint a retired High Court Judge, to give report on the disputes between the parties, the SDMC, to counter this contention, relied upon the decision of the Supreme Court in *State of Kerala & Ors. v. M. K. Jose (2015) 9 SCC 433*, referred to in para 18 & 19 of the 12th June order and the Court held:

Para 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.....

Para 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.

F7. In this regard, MEP begs to submit that the aforesaid judgement is wholly inapplicable in the facts of this case. This was a case where in a writ petition, *the Division Bench had appointed two Advocates as Joint Commissioners to inspect the site and to submit the report in respect of the disputed questions mentioned in the order.....*

F8. In the instant case, the prayer of the MEP is that since the Dispute Resolution Clause (Clause 16) of the Agreement has been rendered un-workable by the conduct of SDMC, and SDMC has violated the first principle of natural justice, therefore, a retired High Court Judge may be nominated to

adjudicate the disputes between the parties. This prayer has wrongly been rejected by the Single Judge on the basis of an inapplicable judgment. The said rejection has been challenged in the LPA 167/2020.

G. WHETHER the orders of the High Court precluded SDMC from encashing the Bank Guarantee therefore the BG does not amount to payment?

G1. As per MEP, the FM comes into effect on 19.02.2020 and therefore the liability to pay Rs.20 Cr. per week stood suspended from 19.02.2020. Therefore, per se MEP could not have been defaulted due to non-payment of Rs.20 Cr. on 09.03.2020 and 16.03.2020.

G2. Without prejudice to the above contention, it is submitted by MEP that a bare reading of orders dated 26.11.2019 and 02.03.2020 shows clearly that the Court did not disturb the working of the Contract, except to the extent of reducing the weekly remittance.

H. Issue of Post-Dated Cheques.

H1. At the outset it is stated that PDC's never formed part of the agreement between MEP and SDMC. The very fact that SDMC now insists on the same shows the arbitrary manner in which it functions taking advantage of its dominant position.

H2. It was argued by SDMC that MEP offered to pay PDCs to secure amount, which statement is false as this illegal demand was generated on account of advice received by SDMC from its legal advisor Mr. Gaurav Banerjee, Sr. Advocate and Ms. Pinky Anand, Sr. Advocate, ASG and the same is recorded in the letter dated 21.10.2018.

H3. That the said demand for PDC was first communicated to MEP vide letter dated 07.02.2019, wherein the requirement was only for one-month worth of PDC's.

H4. It is pertinent to mention herein that on one hand SDMC refuses to refer the matter to an independent arbitrator for adjudication since according to it clause 16 does not permit the same and yet on the other hand it modified the contract to suits its interests.

In the light of the above submissions, it has been prayed on behalf of MEP that this Hon'ble court may kindly be pleased to allow the LPA 167/2020 and dismiss LPA No. 165/2020.

12. While considering the case of both parties, it is to be kept in mind that original writ petition bearing No. 2241/2020 is still pending and it has not progressed any further after the impugned orders have been passed. The orders dated 12.06.2020 and 24.06.2020 impugned before us are interim orders and any observations made therein are to be taken prima facie for disposal of the applications pending before the learned Single Judge without affecting the merits of the case and these interim directions/orders shall finally merge with the final order to be passed by the learned Single Judge on merits of the writ petition after giving chance to both the sides to make submissions in support of their respective stands before the learned Single Judge on the dispute in hand. We will endeavor not to express any opinion on the pending controversies before the learned Single Judge, although both the parties have made submissions beyond the scope of these appeals.

13. The order dated 02.03.2020 is basically a continuation of earlier order passed on 26.11.2019 by which MEP was directed to pay

Rs.20.00 crores per week. There had been some defaults in the meantime and on 02.03.2020, the learned Single Judge quantified the said defaults in compliance with the order dated 26.11.2019 to the tune of Rs.115.04 crores and as mentioned in para 5 of the said order, this amount was directed to be paid by MEP to SDMC in three equal monthly installments; the first installment to be paid within 15 days from 02.03.2020 and the said payments were to be made without prejudice to the respective rights and contentions of the parties. Apart from this, MEP was to pay Rs.20.00 crores per week in terms of the earlier order dated 26.11.2019 and another direction regarding issuance of fresh post-dated cheques was also to be complied with by MEP. Stay against coercive steps was granted subject to compliance of these directions and it was clarified that in case the payment of Rs.20.00 crores per week is not made or MEP commits any other default, the interim order shall stand automatically vacated. It appears that SDMC was more or less satisfied with this order, being interim in nature, subject to final outcome of the writ and the payments being made at reduced rate of Rs.20.00 crores per week by MEP instead of the contractual amount. On the other hand, MEP filed a detailed

application being C.M.No.11093/2020 for modification of order dated 02.03.2020 purportedly on account of certain events which had taken place in the meantime. The main ground urged is the application of clause 15 of the contract regarding Force Majeure with effect from 19.02.2020 in terms of Govt. of India's notification of even date by which the spread of Pandemic i.e. Covid-19 was termed as an instance of Force Majeure (FM) and on the same basis modification of the order dated 02.03.2020 was prayed seeking exemption from paying Rs.20.00 crores per week and from making other payments during the period when Force Majeure is in force. Reliance was also placed on notification dated 18.05.2020 of Ministry of Road Transport and Highways (hereinafter referred as "MORTH"), Government of India wherein details have been mentioned as to how period of pandemic is to be treated in the contracts entered into by NHAI for construction of highways and for collection of tolls.

14. Another development which had taken place in the meantime was that on 16.03.2020 SDMC had served a notice on MEP terminating the contract of MEP for committing defaults in making payments in terms of order dated 02.03.2020. It is the admitted case

of both parties that the court ordered payment of Rs.20.00 crores per week was not paid in full on 09.03.2020 when the first payment was due for the week commencing from 02.03.2020 to 08.03.2020 and as per SDMC, only Rs.13.50 crores were received from MEP leaving behind a short payment of Rs.6.50 crores. Similarly, for the second week i.e. from 09.03.2020 to 15.03.2020, out of due payment of Rs.20.00 crores, as per SDMC, only a sum of Rs.3.00 crore was received from MEP leaving behind an unpaid amount of Rs.23.50 crores for these two weeks. Moreover, the 1/3rd payment due out of Rs.115.04 crores as quantified in the order dated 02.03.2020 was not paid. In these circumstances, SDMC served termination notice under clause 17 of the contract and MEP was directed to hand over the toll booths to SDMC by 14.04.2020. On 19.03.2020 MEP sent a letter to SDMC claiming invocation of Force Majeure. On 20.03.2020 in LPA No. 140/2020, filed by MEP against order dated 02.03.2020, the Division Bench ordered MEP to comply with the order dated 02.03.2020 by 24.03.2020. On 24.03.2020 MEP again wrote a letter to the SDMC invoking Force Majeure on the basis of Government of India's O.M. dated 19.02.2020.

15. Another incident on which MEP has based its claim for modification of order dated 02.03.2020 and for challenging the termination of the contract by SDMC on 16.03.2020 is that on 25.03.2020 a Full Bench of this Court passed an order extending all interim orders in operation as on 16.03.2020 and thereafter this order was extended from time to time due to the pandemic situation as the physical hearings were suspended in the High Court of Delhi. SDMC encashed bank guarantees submitted by MEP totalling to Rs.64.00 crores between 31.03.2020 to 07.04.2020. In the meantime, the date of handing over of the toll booths was extended from time to time by learned Single Judge. On 14.05.2020, MEP had withdrawn its earlier LPAs against order dated 02.03.2020 passed in WPC No. 2241/2020 and a final order passed on 26.11.2019 in the earlier writ petition filed by the MEP. An online tender was issued by the SDMC and letter of intent was issued on 27.05.2020 to the successful bidder M/s Sahakar Global Limited.

16. By the impugned order dated 12.06.2020, learned Single Judge has come to the conclusion that the Force Majeure clause was rightly invoked by MEP vide notice dated 19.03.2020; however, national

lockdown was declared on 24.03.2020, which was to be effective from the next day. Learned Single Judge had noticed that till the invocation of Force Majeure, the MEP had to comply with the directions issued by the Court and as per the said directions, a sum of Rs.20.00 crores had fallen due on 09.03.2020, out of which MEP had paid only Rs.12.00 crores, leaving behind an unpaid amount balance of Rs.8.00 crores on the said date and it has been further observed that ex-facie, it could be construed as breach of the interim stay order. In view of the learned Single Judge, as bank guarantees of Rs.64.00 crores were lying with SDMC, which could have been encashed to meet the short fall in the payment promised by MEP and it was prerogative of the SDMC to invoke the said bank guarantees as per clause 12 (b) of the contract. Hence, on the basis of availability of the bank guarantee amount of Rs. 64.00 crores, which was ultimately invoked by MCD in the end of March 2020/early April, 2020, learned Single Judge came to conclusion that there was no breach of the order passed by him on 02.03.2020. The calculation done by learned Single Judge in para 26 of the impugned order shows that on 16.03.2020, a sum of Rs.78.00 crores was due, which comprises of two weekly installments of

Rs.20.00 crores each and Rs.38.00 crores as the 1/3rd payment of Rs.115.04 crores as arrears. A sum of Rs.14.50 crores was directly paid into the bank account of SDMC by MEP and if this amount is added with Rs.64.00 crores bank guarantee encashed later on, the total sum becomes Rs.78.50 crores which is more than Rs.78.00 crores due on the said date. It seems that learned Single Judge has inadvertently missed out the amount of Environment Compensation Cess (ECC), which was to be paid over and above contractual amount and as mentioned in para 32 and 33 of C.M.No.11094/2020 moved by MEP itself, the said amount overdue amount was Rs.22.60 crores. The calculation made by MEP shows that on the date of encashment of the bank guarantee, after excluding the ECC amount, which was payable as per the directions of the Hon'ble Supreme Court and the said amount was to be collected by the MEP and to be deposited in Government exchequer, the amount liable to be adjusted against the court directed payments comes to Rs.41.40 crores out of the bank guarantee amount of Rs.64.00 crores and if we add Rs.14.50 crores said to be paid by MEP to it, the total amount available with SDMC comes to only Rs.55.90 crores. The net short fall on 16.03.2020 is

Rs.22.10 crores, for which there is no explanation in the impugned order.

17. As per learned Single Judge, the nest installment of Rs.20.00 crores had fallen due on 24.03.2020, which apparently is wrong date as it should have been 23.03.2020 and the said payment of Rs.20.00 crores has been said to be deferred on the ground of Force Majeure as per circular dated 19.02.2020 as well as order of the Full Bench of this Court dated 25.03.2020 extending interim orders prevailing as on 16.03.2020 till 15.05.2020 in first instance, which had subsequently been extended from time to time. It appears that the learned Single Judge has fallen into the error while observing in para 29 of the impugned order that Force Majeure came into effect from 19.02.2020 itself and this vital change was not brought to the notice of Court when order dated 02.03.2020 was passed. In the said paragraph itself, it was also observed that the payments due from MEP would have to be put into abeyance and directed time-line would not be applicable.

18. It appears that the relevant paras of the notification issued by MORTH, Government of India on 18.05.2020 might have escaped the minute attention of the learned Single Judge, although the notification

was reproduced in the impugned order itself. If we read the entire OM dated 18.05.2020, it clarifies that as far as the national highway works being executed under HAM and EPC models by the contractors are concerned, the Force Majeure comes into effect w.e.f. 19.02.2020 in terms of the notification of Department of Expenditure and accordingly in para 2(a) the reliefs to be provided to the said contractors, who are constructing the roads/highways, have been enlisted. Similarly, in para 2(b), the reliefs granted to the contractors executing the highway works on BOT method have been enlisted. The relevant para for toll collection contracts granted by NHAI is para 2 (c), which is again reproduced hereunder for reference and for clear explanation of the applicability of Force Majeure in the present case and the relevant periods during which it shall be applicable:

“2(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 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 user 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. 1st 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 the 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 (00:00hrs) 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 remittance 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.”*

19. As per OM dated 18.05.2020, the first period for which Force Majeure is to be invoked for toll collection is from 26.03.2020 to 19.04.2020 and the Government of India was pleased to waive the entire agreed remittance of the contractors and apart from this it was ordered that 75% of the administrative and toll collection expenses incurred by the collectors were to be reimbursed. It is to be noticed that this was the period of first nationwide lockdown/curfew during which the Government of India had suspended collection of tolls on the toll booths being operated by NHAI or its contractors. Since there was no collection of tolls by various contractors employed by NHAI, so the Government had waived off the agreed remittance amount due from the said contractors. In the present case, it has been vehemently argued on behalf of SDMC on the basis of details of the toll tax collected by the MEP that no suspension of collection of toll tax was ordered or implemented at the entry points of Delhi and MEP was regularly collecting the toll charges from the vehicles entering Delhi even during this period. The said details of collection made during this period have been detailed by SDMC as under:

Date wise details of Toll Tax Collection: February-20

Date	RFID Collection@ 13 toll plazas	Cash Collection for all 124 toll plazas	Total Collection
01.02.2020	2423700	3963800	6387500
02.02.2020	2137200	3717300	5854500
03.02.2020	2377900	4091800	6469700
04.02.2020	2579000	4239000	6818000
05.02.2020	2559400	4221800	6781200
06.02.2020	2569100	4228700	6797800
07.02.2020	2357700	3737000	6094700
08.02.2020	1976300	3294000	5270300
09.02.2020	2174200	3838800	6013000
10.02.2020	2643200	4189000	6832200
11.02.2020	2625300	4193800	6819100
12.02.2020	2604700	4314400	6919100
13.02.2020	2617400	4360000	6977400
14.02.2020	2475500	4441900	6917400
15.02.2020	2258000	4324200	6582200

16.02.2020	2064800	4026000	6090800
17.02.2020	2301400	4232500	6536900
18.02.2020	2424200	4318900	6743100
19.02.2020	2451900	4374500	6826400
20.02.2020	2359900	4277900	6637800
21.02.2020	2273900	4117500	6391400
22.02.2020	2147100	3811000	5958100
23.02.2020	1897200	3683800	5581000
24.02.2020	2077300	3924300	6001600
25.02.2020	2346600	3170300	5516900
26.02.2020	2372500	3150600	5523100
27.02.2020	2479800	3285000	5764800
28.02.2020	2494100	3370900	5865000
29.02.2020	2253300	2917500	5170800
Feb-20	68322600	113819200	182141800

Date wise details of Toll Tax Collection: March-20			
Date	RFID Collection@ 13 toll plazas	Cash Collection for all 124 toll plazas	Total Collection
01.03.2020	1885700	1496198	3381898
02.03.2020	2101900	1498502	3600402
03.03.2020	2150100	1473273	3623373
04.03.2020	2228900	1487400	3716300
05.03.2020	2285600	1498267	3783867
06.03.2020	2319800	1499701	3819501
07.03.2020	2190200	1509335	3699555
08.03.2020	1776500	1476458	3252958
09.03.2020	1405100	929137	2334237
10.03.2020	783900	575831	1361731
11.03.2020	1755000	1254234	3009234
12.03.2020	2132100	1497366	3629466
13.03.2020	2079100	1450355	3529455
14.03.2020	1885500	1393796	3279296

15.03.2020	1630800	1345931	2976731
16.03.2020	1869500	1377844	3247344
17.03.2020	1891400	1430643	3322043
18.03.2020	1949900	1465927	3415827
19.03.2020	1873600	1442066	3315666
20.03.2020	1823700	1470390	3294090
21.03.2020	1439200	1022826	2462026
22.03.2020	405300	298400	703700
23.03.2020	191400	240000	431400
24.03.2020	162100	171600	333700
25.03.2020	110700	113900	224600
26.03.2020	121300	162600	283900
27.03.2020	121600	136900	258500
28.03.2020	141900	138700	280600
29.03.2020	124900	140000	264900
30.03.2020	141300	154400	295700
31.03.2020	74100	104900	179000

Feb-20	41052100	30258900	71311000
Monthly Pass collection for the month			208890000
Total Collection			280201000

20. As per the OM dated 18.05.2020, the second phase of Force Majeure, post resumption of tolling activities, was from 20.04.2020 till traffic resumes 90% of the traffic plying during the pre-lockdown period on the basis of actual average traffic count and during this period, the agreed remittance was waived and estimated remittance based upon actual traffic data was allowed to be deposited by the contractors with NHAI subject to meeting of 50% of administrative and toll collection expenses to be calculated based upon fixed annual administrative charges. It means that from 20.04.2020, till the traffic reaches 90% of the weekly traffic prior to declaration of lockdown, the contractors were allowed to remit the actual collection of toll tax made by him after deduction of 50% of their administrative and toll collection expenses. In the present case, since toll collection activities were never suspended, so the para No. 2(C) (I) is not applicable and

the appropriate paragraph of OM dated 18.05.2020, which is applicable, is para 2(C) (II) and as such with effect from the date when lockdown was declared, i.e., 26.03.2020 onwards MEP was required to remit the actual toll collection to SDMC on the basis of invocation of Force Majeure after deducting 7.5% as administrative and toll collection expenses and not 15% as claimed by them and so ordered by Ld. Single Judge, because as per OM dated 18.05.2020 only 50% of the administrative and toll collection expenses were to be reimbursed and not 100% of the same. We hold that there was no need to give notice of Force Majeure as the Government of India itself has made the said declaration to be effective from 26.03.2020 vide its OM dated 18.05.2020. It also takes care of the objection of the SDMC that MEP had given notice of invocation of Force Majeure only on 19.03.2020.

21. As far as the observation of the learned Single Judge that the notice dated 16.03.2020 by which SDMC had cancelled the contract awarded to MEP is short by one day as 15 days' period to make payment of Rs.38.00 crores was to be over only on 17.03.2020, we agree with him. Although it has been argued on behalf of SDMC that

mere availability of a right to invoke bank guarantee cannot be treated equal to the payment to be made on weekly basis by MEP but the act of invocation of these bank guarantee by SDMC, without any reference to the Court, clearly shows that at least the amount of Rs.41.40 crores (after adjusting the ECC amount) was available to MCD at any given point of time and the short-fall in the weekly payment due on 09.03.2020 and 16.03.2020 could have been met by invoking the said bank guarantees. It is made clear that although by 16.03.2020 MEP was not in default in view of availability of the bank guarantees at the disposal of SDMC but on 17.03.2020 the MEP had committed default of the order of the court by not remitting the deficient amount to clear the payment of Rs.38.00 crores due on the said date. Moreover, on 23.03.2020 when the next payment of Rs.20.00 crore as due, there was no lockdown and hence no Force Majeure benefit was available to MEP, hence Rs.20.00 crores was to be paid on 23.03.2020, which apparently was not paid by MEP to SDMC, although SDMC must have collected a portion of it through the fast tag mode which transfers the money directly to the bank account of SDMC from the automated fast tag toll booths. For the

next three days i.e. 23.03.2020, 24.03.2020, 25.03.2020, the proportionate amount was due from MEP to SDMC, which MEP is liable to make payment as the applicability of the Force Majeure clause is applicable for toll collections from 26.03.2020 onwards till 90% of the traffic resumes as per MORTH's notification dated 18.05.2020.

22. Keeping in view that gradually the lockdown has been opened up in different phases, an independent assessment is to be made by the learned Single Judge, with the help of officials from MORTH/NHAI or any other specialized agency as to whether 90% of the traffic has resumed so far, and if so, from which date. It is to be calculated in reference to the weekly traffic prior to the applicability of Force Majeure clause w.e.f. 26.03.2020. This direction has been issued keeping in view that almost all economic activities, barring opening of schools, etc. are open now and accordingly the traffic movement to and from Delhi to the neighbouring States has increased to a large extent.

23. It is needless to state that if the traffic has reached its 90% strength in comparison to the pre-lockdown period, which event might

have already taken place or will take place in the near future, MEP is bound to comply with the directions contained in the interim order dated 02.03.2020 of remitting Rs.20.00 crore per week from the date of reaching 90% traffic level during the pendency of the writ petition. Learned Addl. Solicitor General appearing on behalf of SDMC has vehemently argued that the writ petition itself is not maintainable for enforcement of a contract entered into by SDMC with one of its vendors and their application in this regard, being C.M.No.11397/2020, is pending disposal for the last many months. It is expected that the said application will be taken up on priority and disposed of at the earliest after affording opportunity to both sides to put forward their respective submissions.

24. It has been noticed that no progress has been made by both the parties in the main writ petition although there is no stay of proceedings ordered by this Court at any point to time. It is expected that both the parties shall complete the pleadings at the earliest and the writ petition will be disposed of as expeditiously as possible by the learned Single Judge after affording opportunity to both sides to address their arguments. The option of ordering the settlement of

dispute by alternative dispute resolution mechanism is also open to the learned Single Judge, of course with consent of the parties.

25. There is a serious dispute regarding the actual number of vehicles passing through the toll gates during the Force Majeure period as MCD is claiming that a large number of vehicles are passing through the said toll gates whereas claim of MEP is that lesser number of vehicles are passing through the said gates. MEP was expected under the clauses of the contract to give average weekly traffic count and to calibrate the toll collection system with the servers of MCD. To put this controversy at rest, the learned Single Judge may explore all the possibilities to arrive at a reasoned conclusion as to whether the number of vehicles passing through these toll plazas are correct or not as different figures are being claimed by the contesting parties. The said exercise is also necessary to decide two contempt petitions filed by both the parties against each other, which are pending adjudication before this Court. The MCD has submitted a video film showing the traffic passing through toll gates and on the other hand MEP has challenged even the appointment of the agency, which has allegedly conducted the said survey.

26. In case the system of actual collection of toll tax to be deposited by MEP with SDMC after adjustment of administrative and toll collection expenses continues for some time, the SMCD will be at liberty to get the said toll plazas inspected by its inspectors/staff on regular basis and/or by continuously monitoring the said toll plazas by installing the CCTV system or any other appropriate gadgets to enable it to count the actual number of vehicles passing through toll gates and paying the toll, so as to avoid continuous bickering between the two parties on this issue and the court being unable to continuously monitor implementation of directions to deposit the amount so collected by MEP in the bank accounts of SDMC after deducting the administrative and toll collection expenses @ 7.5%. It is made clear that the excess 7.5% administrative and toll expenses for the period from 26.03.2020 till today deducted by MEP from collection of toll tax made by it is to be deposited in the bank account of SDMC within 15 days of passing of this order by MEP as the actual rate of administrative and toll collection expenses allowed to be deducted by the contractor is 50% of the agreed expenses, which comes to 7.5% and not 15% as claimed earlier by the MEP.

27. As far as the appeal of MEP being LPA No.167/2020 is concerned, we are not inclined to allow the same as it has been clearly held by learned Single Judge that no objection was raised to the due amount arrived at on 02.03.2020 in compliance of the court order dated 26.11.2019, being Rs.115.04 crores. However, both the parties may reconcile their accounts from 03.03.2020 onwards to ensure strict compliance of the order dated 02.03.2020. The MEP shall ensure that all the bank guarantees and post-dated cheques have been deposited with SDMC and the bank guarantees are kept valid during the period when the writ petition No. 2241/2020 remains pending before the learned Single Judge. The steps to extend the bank guarantees and revalidate the post-dates cheques be taken well in time by MEP to ensure that no lapse is committed in this regard. As far as the request of MEP to appoint a retired Judge to decide the dispute is concerned, we are not inclined to order the same without the consent of the other party.

28. As far as the order of the Full Bench of this Court regarding extension of the interim order prevailing as on 16.03.2020 vide order dated 25.03.2020 is concerned, it is clarified that the said order

nowhere states that the conditional stay orders will be extended without complying with the conditions. Although the cancellation the contract cannot take place but if the contractor does not comply with condition of payment of ordered amount, it cannot take any benefit of the order of the Full Bench dated 25.03.2020.

29. In view of the above, we hereby dispose of both the Letters Patent Appeals by holding that:

1). The Force Majeure clause stands invoked w.e.f. 26.03.2020 in terms of OM dated 18.05.2020 issued by MORTH, Govt. of India and it shall stand revoked when 90% traffic, in comparison to the traffic before lockdown period of weekly basis, stands resumed.

2). The SDMC shall be entitled to weekly payments of Rs.20.00 crores till 25.03.2020 and after resumption of 90% traffic in comparison to the pre-lockdown period on weekly basis during pendency of the writ petition. Arrears of Rs.115.04 crores are held to be cleared without being affected by Force Majeure clause.

3). With effect from 26.03.2020 till resumption of 90% traffic in comparison to pre-lockdown period on weekly basis, MEP shall continue to deposit entire collection of toll tax, ECC, cash received from sale of monthly passes, fast tag stickers and any other revenue generated from any toll collection in the bank accounts of SDMC on daily basis by next day after deduction of administrative and toll collection expenses @7.5%. Excess administrative and toll collection expenses deducted by MEP are to be deposited by MEP with SDMC in 15 days.

4). Ld. Single Judge may order for an exercise to be conducted by a reputed agency to estimate the flow of traffic passing through toll gates managed by MEP from 26.03.2020 onwards on the basis of the available data and material. In the meantime, SDMC is at liberty to get the regular inspections done at toll plazas or to install CCTV or any other mechanism to count the vehicles passing through toll gates till 90% traffic is resumed.

5). The finding of the learned Single Judge regarding termination notice dated 16.03.2020 is upheld as it was issued a day in advance.

6). The full Bench order dated 25.03.2020 cannot be read to mean that MEP can take benefit of the interim stay order without complying with the conditions mentioned in the said order.

8). There is no occasion to appoint a Retired Judge to adjudicate the dispute at this stage. However, the Ld. Single Judge may explore the possibility of referring the matter to alternative dispute resolution with consent of parties.

7). Date of hearing before the Ld. Single Judge is preponed to 24th November, 2020 and the Ld. Single Judge is requested to decide the Writ Petition expeditiously. Both the parties shall extend full cooperation in this regard.

30. With these directions, both the Letters Patent Appeals and pending applications are disposed of.

**TALWANT SINGH
(JUDGE)**

**SIDDHARTH MRIDUL
(JUDGE)**

NOVEMBER 05, 2020
mr

