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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.02.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP (MD) No.1726 of 2021

and

WMP (MD) Nos.1469 & 1470 of 2021

M.Ravi

...Petitioner

Vs.

1.The District Collector,
Disaster Management Department,
Dindigul District.

2.The Commissioner,
Kodaikanal Municipality,
Kodaikanal - 624 101,
Dindigul District.

...Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records relating to the impugned Tender notice by the 2nd respondent as per Kodaikanal Council resolution no.945 dt 28.12.2020 inviting for public tender auction to be held on 3.2.2021 by the 2nd respondent and quash the same with respect to Serial No.1 of Tender notice and consequently direct the 2nd respondent to extend the petitioners present contract/lease period for 190 days that is from 1.4.2021 till 7.10.2021 on account of Covid 19 Pandemic lockdown and in lieu of the amount already paid for the entire lease period.

For Petitioner
For Respondent

:Mr.M.S.Suresh Kumar
:Mrs.S.Srimathy,
Special Government Pleader for R1

Mr.L.P.Maurya for R2

ORDER

Heard the learned counsel on either side. By consent of both parties, this writ petition is taken up for final disposal at the admission stage itself.

2.The petitioner was granted lease to collect entrance fee from the users at Coakers Walk, Kodaikanal for the period 2018-2021. The petitioner had paid the entire license fee.

3.The petitioner's counsel points out that due to



announcement of lockdown in the wake of pandemic, the said tourist place remain closed for almost 28 weeks from the last week of March 2020 to the first week of October 2020. The petitioner therefore wants corresponding extension of the license period.

4. I am afraid that I cannot accept this request. It is true that the petitioner could not enjoy the fruits of the license on account of the measures announced by the Government. In similar matters, I have held that the licensee will be entitled to refund of the proportionate license amount for the period when the park was closed. The question of granting extension of the license period will not arise. This is because the revenue interest of the local body is involved. It is open to the local body to issue a fresh tender notification for the subsequent period commencing from April 2021.

5. The reason for directing refund of the proportionate license amount is as follows :

(1) The relationship between the parties is contractual in nature. The rights of the parties will normally have to be determined in terms of the contract. But when the performance of a contract is affected by post-ontract events, the situation will have to be resolved either by invoking the doctrine of frustration or the principle of force majeure. "Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do" (Lord Radcliffe's classic formulation in *Davis Contractors Ltd. V. Fareham Urban District Council* [(1956) A.C. 696]. "Force majeure" is defined as an event outside the control of the parties and which prevents one or both of the parties from performing their contractual obligations. Force majeure clause is a clause in a contract specifying certain events which would excuse the non-performance of a contractual obligation (P.Ramanatha Aiyar's *Advanced Law Lexicon* (5th Edition). The distinction between the two has been brought out in "Goode on Commercial Law" as follows :

"A contract is said to be frustrated when a supervening event occurs which so fundamentally affects the performance of the contract that in the eyes of the law the contract comes to an end and both parties are discharged from any future duty to perform. The English law doctrine of frustration is quite different from, say, the French law concept of force majeure. Frustration operates as a matter of law to bring the contract to an end, whether or not the parties wish it and, indeed, whether or not they are aware of the frustrating event or its legal effect on the contract. By contrast, force majeure under



French law is a doctrine under which the impediment excuses a party from non-performance of a particular obligation without as such affecting the continuance of the contract. It is for the party complaining of the non-performance to seek rescission of the contract and for the court to decide whether to grant rescission or to adjust the rights and obligations of the parties to take account of the effect of the impediment. The party invoking the force majeure event is required to give notice of it as soon as practicable. Force majeure clauses are common in contracts governed by English law, which, however, does not possess any legal concept of force majeure. Accordingly, the events constituting force majeure, the impact of force majeure and the conditions in which it may be invoked stem entirely from the terms of the contract. English law knows no tertium quid between frustration and non-frustration. If the contract is frustrated it automatically comes to an end. If it is not, the parties must perform, however burdensome the contract may have become and however much the circumstances may have changed. There is no duty on the parties to renegotiate the contract terms, nor does the court have power to modify the contract on the ground of hardship or change in the economic equilibrium of the contract, which may be particularly difficult to envisage or take into account in the negotiation of long-term contracts. It is thus left to the parties to provide in hardship clauses for renegotiation."

(2) It is true that there is no "force majeure" clause in the agreement between the parties. On the other hand, in the tender notification, there is a stipulation that the licensee will not be excused from his payment obligation under any circumstance.

(3) The doctrine of frustration is embodied in Section 56 of the Indian Contract Act, 1872. Section 56 reads as follows :

"56. Agreement to do impossible act.-An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.

— A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

The jurisprudential aspects of this provision have been recently dealt with by the Hon'ble Supreme Court of India in South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd., reported in (2020) 5 SCC 164. It was held therein as follows :

"19...Under Indian contract law, the consequences of a force majeure event are provided for under Section 56 of the Contract Act, which states that on the occurrence of an event the performance impossible, the contract becomes



void thereafter.

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23. In India, the Contract Act, 1872 had already recognised the harsh consequences of such frustration to some extent and had provided for a limited mechanism to ameliorate the same under Section 65 of the Contract Act, 1872. Section 65 provides as under: **"65. Obligation of person who has received advantage under void agreement, or contract that becomes void.-**

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The aforesaid clause provides the basis of restitution for "failure of basis". We are cognizant that the aforesaid provision addresses limited circumstances wherein an agreement is void *ab initio* or the contract becomes subsequently void.

26....under the Indian Contract law, the effect of the doctrine of frustration is that it discharges all the parties from future obligations "

(4) Since the consequence of invoking the doctrine of frustration is that it puts an end to the contract, the same cannot be applied to the case on hand. Both the parties are proceeding on the premise that the contractual relationship is very much holding good. After the lockdown was lifted, the petitioner was permitted to run the park and he is presently carrying on his business. The license is in force though it will expire shortly. Hence, invocation of doctrine of frustration is ruled out.

(5) The question is whether notwithstanding the stipulation of absolute performance cast on the licensee, this Court would be justified in treating the "lock down" as a force majeure event which will relieve the licensee from performing his obligation to the corresponding extent.

(6) My answer is in the affirmative. Section 51 of the Indian Contract Act, 1872 states that when a contract consists of reciprocal promise to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. As per Section 54, performance cannot be claimed till the other has been performed. The local body must keep the park stand open and in good repair. The licensee must be permitted to keep the licensed park open. If the local body had directed the licensee to close down the park, it cannot demand fee from the licensee for the period when the park remained closed. Of course, the licensee must be free of any wrong doing. If the licensee is made to suffer for no fault of his by direction to



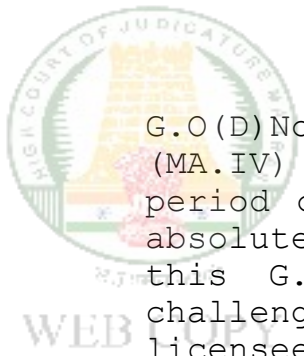
close down the park, then, the question of payment of fee will not arise. This is clearly an implied term in the contract.

(7) There is a greater reason too. The petitioner has contracted not with a private party but with the local body. It is a State instrumentality. Local bodies have been given constitutional status. In the case on hand, their actions have been governed by the directives issued by the Central and State Governments. When one party to the contract is the local body, then this Court would be justified in applying the principles of reasonableness and fairness.

(8) The Hon'ble Supreme Court in the decision reported in (2004) 3 SCC 214 (Jamshed Hormusji Wadia vs Board Of Trustees, Port Of Mumbai) held that the State and its authorities including instrumentalities of States have to be just, fair and reasonable in all their activities including those in the field of contracts. Even while playing the role of a landlord or a tenant, the State and its authorities remain so and cannot be heard or seen causing displeasure or discomfort to Article 14 of the Constitution of India. A State cannot be seen to be indulging in rack-renting, profiteering and indulging in whimsical or unreasonable evictions or bargains. The validity of their actions in the field of landlord-tenant relationship is available to be tested not under the rent control legislation but under the Constitution. The rent control legislations are temporary, if not seasonal; the Constitution is permanent and all time law.

(9) In Bharat Petroleum Corpn.Ltd vs. Maddula Ratnavalli [(2007) 6 SCC 81], it was held that where an entity is a State within the meaning of Article 12 of the Constitution of India, it is enjoined with a duty to act fairly and reasonably. The State acting whether as a landlord or a tenant is required to act bonafide and not arbitrarily, when the same is likely to affect prejudicially the right of others. A statute must be construed justly. An unjust law is no law at all. A statutory order or discretion exercised by a statutory authority must be tested on the anvil of the constitutional scheme. The action on the part of the State must be reasonable even in contractual matters.

(10) Applying the ratio laid down by the Hon'ble Supreme Court in the aforesaid decisions, this Court holds that the terms of the license must be interpreted under the scanner of Article 14 of the Constitution of India. What applies to the landlord-tenant relationship when one party is State or its instrumentality, equally applies to the licensee-licensor relationship also. This sermon to the State is absolutely unnecessary. This is because the Government itself had recognized the lockdown as a force majeure event and issued



G.O(D)No.298, Municipal Administration and Water Supply (MA.IV) Department, dated 02.09.2020 directing waiver for a period of two months from 01.04.2020 to 31.05.2020. There is absolutely no merit in the contention of the respondents that this G.O has not been challenged. There is no need to challenge the G.O. This is because it confers benefit on the licensees/lessees. The only stand of the licensee is that the extent of conferment is inadequate. It is seen that the said G.O was issued in response to the letter dated 18.06.2020 sent by the Commissioner of Municipal Administration. A letter sent in the month of June 2020 will obviously cover only the preceding months of April and May. No one would have anticipated that the lockdown would continue for several more months. Therefore, when the G.O was issued in September, it straightaway accepted the proposal which was confined only to April and May 2020. That is how bureaucracy functions. The Secretary to Government did not deem it necessary to go beyond the terms of the request made by the Commissioner of Municipal Administration. But a constitutional court cannot have a blinkered vision. It must take into account the position that prevails on the date when the lis is adjudicated.

(11)The respondents themselves have chosen to treat the lock down restrictions as a force majeure event. But they have relieved the licensees from the obligation to pay the fees only for two months. The reason for granting waiver for the months of April and May would equally hold good for the entire "total lockdown" period. The respondents had directed the shutting down of the park and the petitioner was not permitted to operate his license or act according to the terms during the aforesaid period. Therefore, I hold that the petitioner is entitled to the benefit of complete waiver for the period from 01.06.2020 to 06.09.2020.

(12)During early stages of the pandemic, I read an article in Business Line by R.Yashod Vardhan/P.Vinod Kumar. The article concluded as follows :

"The ICA does not profess to be a complete code on the subject of contracts and cannot provide nuanced solutions to deal with the various problems caused by Covid-19. If the Central Government does not come out with an Ordinance and bridge the gaps in the law, what are we left with. In an old case, a Judge observed sagaciously: "In administering the law, it is the duty of the Judge to amplify its remedies and without usurping jurisdiction, to apply its rules to the advancement of substantial justice."



(MA.IV) Department, dated 02.09.2020, endeavors to fill the gap. However, it is only a baby step, when giant strides are required. It is therefore left to the court to cover the remaining distance.

6.I have no difficulty in coming to the conclusion that the petitioner stands relieved of his obligation to pay the license fee for the period from 24.03.2020 to 06.09.2020, when there was total lockdown. It is pointed out that for two more months thereafter, the licensee was allowed to open the park only for short duration every day. In other words, lockdown was not lifted completely. The park was not operational fully.

7.Therefore, I am of the view that the petitioner is entitled to call upon the respondents to revisit the quantum of license fee for the period subsequent to the lifting of total lockdown. It may not be open to this Court to enter into the finer details. I permit the petitioner to submit a fresh representation projecting his grievances regarding the period commencing from 07.09.2020 onwards. The second respondent shall consider the same and pass appropriate orders in accordance with law as expeditiously as possible.

8.Let me summarize the reliefs granted. For the period when there was total lockdown that is from 24.03.2020 to 06.09.2020, the licensee/petitioner is totally relieved from the obligation to pay the license fee. He is entitled to complete waiver. For the period subsequent to 06.09.2020 that is when there was partial relaxation and lifting of lock down restrictions, the petitioner is permitted to move the second respondent for relief.

9.The writ petition is allowed as indicated above. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1.The District Collector, Disaster Management Department,
Dindigul District.

2.The Commissioner, Kodaikanal Municipality,
Kodaikanal - 624 101,Dindigul District.

+1 CC to M/s.M.S.SURESH KUMAR, Advocate (SR-2936[F] dated
02/02/2021)

+1 CC to M/s.L.P.MAURYA, Advocate (SR-4988[F] dated 15/02/2021)

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and

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12.02.2021

RP (17.05.2021) P 5C