



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

% **Reserved on: 31st May, 2023**
Pronounced on: 19th July, 2023

+ **CS(COMM) 346/2023 and I.A. Nos. 10319-23/2023**

MRS SARAWJEET SINGH & ANR. Plaintiffs
 Through: Mr.Anil K.Airi, Senior Advocate
 with Mr.Ravi K.Chandra,
 Mr.Karan Chhibber and Mr.Mudit
 Ruhella, Advocates

versus

ASIAN HOTELS (NORTH) LIMITED Defendant
 Through: Mr.Sidhant Kumar and
 Mr.Shivankar Rao, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant plaint has been filed on behalf of the plaintiffs seeking the following reliefs:

"a) Pass a decree thereby declaring the alleged termination of lease deed dated 4.10.2017 vide letter dated 27.06.2020 as bad in law and not binding upon the parties.

b) Pass a decree declaring the said lease deed dated 4.10.2017 as continuing, subsisting and binding upon the parties;

c) Decree in favour of the plaintiffs and against the defendants towards the payment of arrears of rent to the tune of Rs.5,38,75,117/-



- d) Grant pendente-lite and future interest in favour of the plaintiff and 12% P.A on the said amount.*
- e) Pass a decree in favour of the Plaintiffs and against the Defendant thereby directing the Defendant to pay the interest on the delayed amount from the date of filing of the present suit and till the date of its actual realization;*

OR IN THE ALTERNATIVE TO PRAYERS A TO E

- f) In case the Hon'ble court comes to the conclusion that the termination is valid, the Hon'ble court may kindly be pleased to*
- g) Grant pendente lite and future interest in favour of plaintiff and 12 % P.A on the said amount.*
- h) Award costs of the suit throughout in favour of Plaintiffs and against the defendant; &*
- i) Pass any further order/orders in favour of Plaintiffs and against the defendants.”*

FACTUAL MATRIX

2. Defendant is a company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of operation and management of hotel and serviced apartments.
3. Plaintiffs and defendant entered into a Perpetual Lease Deed (First Lease Deed) on 25th September 2017 for an aggregated area admeasuring super area of 2009 sq. ft. and having a covered area of 1205 ft. situated on the 2nd floor bearing residential Service Apartment No. 2004 of Block A/New Tower (“Premises”).
4. The plaintiffs paid an amount of Rs. 6,70,00,000/- as a consolidated one-time consideration for the lease of the premises and as one time rent amount. The plaintiffs also paid an agreed annual rent reserved of Rs. 1 in advance for a period of 99 years simultaneous with



the execution of the lease. It was also agreed that the lease will automatically renew for a successive term of 99 years till perpetuity.

5. Plaintiffs and defendant also entered into a Sub-Lease Deed (Second Lease Deed) of the suit property on 4th October 2017 for a period of 11 years from the lease at a monthly rent of Rs. 9,58,000/- with commencement date of 1st October 2017 by which the defendant took back the premises on rent from the plaintiff.

6. As per the terms agreed between the parties, laid therein, the Sub-Lease Deed could not be terminated by the defendant during the initial 11 years of the execution of the deed and even after that the same could be terminated by giving a notice of 6 months in advance. The deed could be terminated prior to the expiry of the lock-in period only in the case of violation and breach of the terms of the deed by the plaintiffs which if not cured by the plaintiff within 30 days of receipt of notice from the defendant in this regard.

7. Relying on the Clause 15.2 of the Sub-Lease Deed, which enumerates the termination of the Contract on the *Force Majeure* Clause, the defendant terminated the lease by Notice of Termination dated 27th June 2020 referring to the Government regulations passed during the COVID-19 pandemic leading to the closure of non-essential activities, hospitality sector in the present case. The major contention of the defendant is that the restriction to the access to the leased premises due to governmental regulations in the pandemic period led to the frustration of the Contract. Due to this frustration of Contract the defendant did not pay the rent mandated under the Sub-Lease Deed for the remaining lock-in period and claims that the lease was terminated on 27th June 2020 only.



8. Aggrieved by the said termination, the present suit has been filed by the plaintiffs for the recovery of the arrears of rent from the defendant and to declare that the Sub-Lease Deed is continuing, subsisting and binding upon the parties. Further, the plaintiffs claim that the maintenance charges are payable by the defendant as per the lease.

SUBMISSIONS

(On behalf of the Plaintiffs)

9. It is submitted by learned senior counsel appearing on behalf of the plaintiffs that the defendant, through its Managing Director and authorized representatives, approached the plaintiffs and represented the availability of the residential service apartment on perpetual lease. The defendant further represented that the defendant company would be taking back the premises for a period of 11 years and 6 months as a lock-in period. On the representations of the defendant, the plaintiffs agreed on taking the premises from the defendant on Perpetual Lease and subsequently, a registered Lease Deed (Perpetual Lease Deed/First Lease Deed) was entered into on 25th September 2017 for a period of 99 years.

10. It is further submitted that the plaintiffs paid an amount of Rs.6,70,00,000/- for the lease of the suit property and as One Time Rent Amount. The plaintiffs also paid an agreed annual rent reserved of Rs.1 in advance for a period of 99 years simultaneous with the execution of the lease which will automatically renew for a successive term of 99 years till perpetuity.

11. It is submitted on behalf of the plaintiffs that it was agreed between the parties that the Lease Deed could not be terminated by the defendant



during the initial 11 years of the execution of the deed and even after that the same could be terminated by giving a notice of 6 months in advance. The termination of the Lease Deed was allowed only in the cases of breach and violation of the terms of the Lease Deed by the plaintiffs if not cured within 30 days of the receipt of the notice from the defendant. It is submitted that the termination clauses could not be invoked in the present case as there has been no default on the part of the plaintiffs. It is further submitted that as per the Deed if the defendant terminated the lease prior to the expiry of the lock-in period, he shall be liable to pay the entire amount of rent and taxes for the remainder period simultaneous to serving the subject termination notice.

12. It is submitted by learned senior counsel appearing on behalf of the plaintiffs that the defendant has failed to maintain the financial discipline and has paid the rent of the suit property only till January 2020 and the rents for the months of February and March 2020 have been adjusted from the security deposit. Despite defendant requesting to make good the entire 6 months security deposit, it has failed to do the same and hence, is liable to pay the additional security deposit for 2 months. The defendant is in continuous default of payment of arrears of rent since the month of April 2020.

13. It is submitted by learned senior counsel appearing on behalf of the plaintiffs that the plaintiffs *vide* letter dated 10th July 2020 called upon the defendant to make the payments due and payable under the Lease Deed but no heed was given by the defendant for the same. Plaintiffs again issued a letter dated 13th January 2021 and 5th May 2021 demanding the amounts due to be payable and reminding the defendant the enhancement



of rent in terms of the Lease Deed with effect from 1st October 2020. It is submitted that despite all these letters the defendant failed to make the payment to the plaintiffs.

14. It is submitted by the learned senior counsel appearing on behalf of the plaintiffs that the defendant on 11th May 2021 sent a reply to the plaintiffs referring to a letter dated 27th June 2020 claiming termination of the Sub Lease Deed dated 4th October 2017 in terms of Clause 15.2 of the Lease Deed. It is further submitted that no Notice of Termination was received by the plaintiffs at any point of time and it is apparent from the contents of the letter dated 11th May 2021 that the alleged letter dated 27th June 2020 is forged, fabricated and ante-dated.

15. It is further submitted that according to Clause 12 of the Lease Deed, in the case of termination, the rent for the entire lock-in period has to be paid simultaneously and the defendant ought to have paid Rs.12,60,53,268/- for seeking termination of Lease Deed.

16. It is further submitted that letter dated 11th May 2021 was issued to the plaintiffs claiming maintenance charges for the suit property but the same is governed by the Lease Deed and in terms of the Lease Deed the defendant is liable to make the payment of maintenance charges. It is further submitted that the claims towards the maintenance charges made by the defendant in the letter dated 11th May 2021 is against Clause 10.3 of the Sub Lease dated 4th October 2017 and also against Clause 6.1 of the Original Lease dated 25th September 2017 stating that the Lessee would have the sole responsibility and shall be liable to bear all maintenance charges applicable or payable per terms of the original deed in its entirety for the said property during the term of Lease Deed.



17. It is submitted that the plaintiffs issued a letter dated 21st May 2021 and pointed out that no letter of termination was ever received by the plaintiffs and that the contents of the letter dated 11th May 2021 were untenable and were denied by the plaintiff. The letter further stated that the Perpetual Lease and the Sub Lease between the plaintiffs and defendant are binding in nature and they are to be read in consonance with each other and cannot be separated. The 11 years' period in the sub-lease is the lock-in period commencing from 1st October 2017 to 30th September 2028.

18. It is further submitted that the defendant issued a letter dated 18th June 2021 in response to the plaintiffs' letter dated 21st May 2021 providing plaintiffs with the copy of the Notice of Termination letter dated 27th June 2020 for the first time. Since, the plaintiffs were not aware about the Notice of Termination and the termination is not in accordance with the agreed terms, it is submitted that the sum of Rs. 12,60,53,268/- became due and payable on 27th June 2020 only. Hence, the plaintiffs are entitled to recover the said amount for the relationship of lessor and lessee coming to an end.

19. Hence, in view of the foregoing discussion, it is prayed by the plaintiffs that the suit is to be decreed in the favour of the plaintiffs and the plaintiffs are entitled to the recovery of the arrears of rent from the defendant and the defendant is also liable for the maintenance charges.

(On behalf of the defendant)

20. It is submitted by learned counsel appearing on behalf of the defendant that the plaint in the present case does not disclose a valid



cause of action and is therefore barred under Order VII Rule 11 of the Code of Civil Procedure, 1908 and the Court shall not permit the continuance of the meritless claim as it does not disclose a valid cause of action.

21. It is submitted by learned counsel appearing on behalf of the defendant that the Sub-Lease Deed dated 4th October 2017 was terminated by the defendant *vide* letter dated 27th June 2020 in terms of the *Force Majeure* Clause contained in the deed and after following the due procedure. The relevant provision, that is, Clause 15.2 specifically stated that:

“The Lessee shall not be held responsible for any consequences or liabilities under this Deed if it is prevented in performing its obligations under the terms of this Deed by reason of any restrictive governmental laws or regulations, riots, insurrection, war, terrorist action, strike, public demonstrations, rallies, acts of God, etc.”

22. It is submitted that there is an unequivocal admission on the part of the plaintiffs to have received the Notice of Termination on 9th July 2020. This is clearly mentioned on the copy of Notice of Termination dated 27th June 2020 filed by the plaintiffs themselves. The noting on the top of the Termination Notice stated that the plaintiffs had received the Notice dated 27th June 2020 on 9th July 2020. It is further submitted that no acknowledgment has been given in respect of the receipt of the Notice of Termination. Further, no such noting of 9th July 2020 can be seen in the copy of notice filed separately in the list of documents by the plaintiff on the Communication dated 18th June 2021. The plaintiffs have not disputed this noting on the document and hence, it is an unequivocal admission on



the part of the plaintiffs to have received the Notice of Termination on 9th July 2020. Reliance has been placed by the defendant on the case of ***Uttam Singh Duggal & Co. v. United Bank of India and Ors., 2000 7 SCC 120*** which states that the Court is empowered to adjudicate the present date based on the unequivocal and unambiguous admission made by the plaintiffs.

23. It is further submitted that the defendant, consequent to the Notice of Termination dated 27th June 2020, offered to plaintiffs the possession of the premises. It is submitted that this offering of the possession led to the legal/ constructive possession to the plaintiff. The defendant being a tenant cannot force the plaintiffs to take possession and it is incumbent on the plaintiffs to take possession of the premises.

24. It is further submitted on behalf of the defendant that the allegations by the plaintiffs that the premises are only capable of being used as a part of defendant's hotel and is not capable of being used as an independent use cannot be contended as the recitals of the Lease Deed shows that premises were separate from the hotel and Clause 9 of the First Lease Deed also enabled the plaintiffs to put the premises to any usage permissible under the applicable law.

25. It is further submitted that the plaintiffs have not asserted any interference with its use and possession of the premises and there is no relief claimed with respect to the possession of the premises. Hence, in law and fact the premises are vested with the plaintiffs.

26. It is further submitted that the plaintiffs are claiming the rent for the rest of the lock-in-period from April 2020 to September 2028 which seeks to enforce Clause 12.3 of the Second Lease Deed that requires



payment of rent for unexpired lock-in period. The claim for the rent of remaining lock-in period seeks recovery as a matter of contractual entitlement. This stipulation requires payment without regard to any damage caused to the plaintiffs. There is no assertion of damage as the plaintiff is already in possession of the premises.

27. Learned counsel for the defendant, for strengthening his arguments, has relied upon the judgments of the Coordinate Bench of this Court in ***Deepak Chopra vs FLAKT (India) Pvt Ltd., 2020 SCC Online Del 103*** and ***Tower Vision (India) v. Procall, 2012 SCC Online Del 4396***, wherein this Court has held that a suit for the recovery of lock-in rent is not maintainable and the lock-in period rent cannot be claimed without pleading the loss suffered by the landlord. This Court stated that:

“11. The position with respect to rent of lock-in period is akin to that of earnest money/security and qua which the Supreme Court in Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136, followed by me in Speed Track Cargo v. State Bank of Patiala, 2016 SCC OnLine Del 919, Palm Art Apparels Pvt. Ltd. v. Enkay Builders Pvt. Ltd., 2017 SCC OnLine Del 12776, Mera Baba Pvt. Ltd. v. Ram Lubhaya Puri, 2018 SCC OnLine Del 9502, KlintoZ Pharmaceuticals Pvt. Ltd. v. Ravinder Shankar Mathur, 2018 SCC OnLine Del 11954, Satish Verma v. Garment Craft (India) Pvt. Ltd., 2018 SCC OnLine Del 6829 and Mahendera Verma v. Suresh T. Kilachand, 2019 SCC OnLine Del 9333, held that mere entitlement in the agreement to forfeit is not enough and loss/damages from breach of contract has to be proved. In fact, the matter is no longer res integra. The Division Bench of this Court in Tower Vision India Pvt. Ltd. v. Procall Pvt. Ltd., 2012 SCC OnLine Del 4396 (DB) has held that rent of the lock-in period in a Lease Deed cannot be claimed without pleading loss from vacation by the tenant of the property prior to the



expiry of the term of lease. I have also, following the said dicta of the Division Bench, in order dated 2 December, 2019 in CS (COMM) 1438/2016 titled L.R. Builders Pvt. v. Goldenara Leisure & Entertainment Pvt. Ltd. and order dated 18 December, 2019 in CS (OS) 1789/2006 titled Sunita Rekhi v. Y.D. Puri taken the same view.”

28. It is submitted on behalf of the defendant that a stipulation for the breach of contract without regard to the existence of damages is penal in nature and unenforceable. These clauses are *in terrorem* seeking only to penalize breach of contract.

29. It is submitted that the termination of the Sub-Lease is valid and binding as owing to the then COVID 19 pandemic, the hotel services were restricted by the government and the access to the leased premises was restricted, bringing no liabilities/obligations on the defendant as per Clause 15.2 of the lease deed to pay rent or continue with the Contract. Clause 15.2 of the Sub-Lease or Second Lease Deed entitled the defendant to terminate the Lease Deed if prohibited from performing its obligations under the lease for a period of 90 days on account of any restrictive governmental laws or regulations. The Clause states that:

“15.2 Force Majeure - In the event the Said Property or any part thereof is destroyed or damaged due to a Force Majeure event, not caused by wilful act or negligence of the Lessee thereby rendering it impossible/ unsafe/ unfit/ non-feasible to operate out of the Said Property the Lessee may, temporarily vacate the Said Property, as may be required, to enable the Lessor to carry out repairs to restore the Said Property to as good condition as it was in on the Lease Commencement Date. In such an event, all payments specified under this Deed for the Said Property or portion thereof shall abate till the time the Said Property is



repaired and restored to as good condition as it was in at the time of handover of the Said Property for interior/fit-outs.

The Lessee shall not be held responsible for any consequences or liabilities under this Deed if it's prevented in performing its obligations under the terms of this Deed by reason of any restrictive governmental laws or regulations, riots, insurrection, war, terrorist action, strike, public demonstrations, rallies, acts of God, etc.

Furthermore, if the above situation continues for a period of more than 90 (ninety) calendar days, the Lessee may terminate this Deed by giving a prior written notice of 30 (thirty) days."

30. It is further submitted that the defendant followed the due procedure for terminating the Lease Deed by issuing a Notice *vide* letter dated 27th June 2020 explaining the reason for terminating the Lease Deed. The letter specifically stated that:

"We would like to draw your kind attention to Clause 15.2 of the Lease Deed. You are well aware that the undersigned has been prevented from utilizing the leased premises due to the restrictive governmental regulations suspending the operations of hotels and is therefore not responsible for any of its consequences and/or liabilities/ obligations under the lease deed the lease deed with effect from 25.03.2020.

The situation and restrictive orders due to which the undersigned has been unable to utilise the leased premises has already exceeded several months and consequent thereto, the Lease Deed stands terminated with immediate effect."

31. It is further submitted that Clause 8 of the Second Lease Deed stipulated that the premises were meant to be used by the defendant as part of its hotel but due to COVID-19 pandemic, the governmental regulations prohibited the defendant from intended use of the premises as



the hotels were not permitted to operate from 25th March 2020 until 21st August 2020.

32. The defendant has placed reliance on the judgment of this Court in ***Mehra Jewel Palace Pvt. Ltd. v. Miniso Life Style Pvt Ltd., 2022 SCC OnLine Del 1557*** whereby a Coordinate Bench of this Court has held that COVID-19 is an ‘Act of God’ and hence, a *Force Majeure* event. The Court stated that:

“50. As noted above, the O.M. dated 19 February, 2020 recognizes the COVID-19 pandemic as an “Act of God” and this has been affirmed in the decision of this Court in MEP Infrastructure supra. In view of the DDMA order dated 25 March, 2020, an “embargo” was imposed on the operation of shops which were not selling essential commodities. The demised premises was not covered in the said exception and was therefore, not operational. Therefore, in my view, the COVID-19 pandemic, to the extent that it resulted in the closure of the demised premises, would constitute a force majeure event in terms of Clause 12 of the Lease Deed, as the same would be covered under the expression “Act of God” as well as “Embargo” and therefore, would be a contingency under Section 32 of the Indian Contract Act. A similar view was also expressed by this Court while issuing summons in the suit vide order dated 11 September, 2020.”

33. It is further submitted that the defendant is not liable for the arrears of rent as the defendant has followed all the due procedure enumerated in the Lease Deed for its termination of the Lease Deed. Further, the plaintiffs have not taken any action in denying the receipt of the Notice of Termination dated 27th June 2020 to prevent any liability/obligation.

34. It is further submitted by learned counsel for the defendant that the defendant is not liable for the maintenance charges of the suit property



and the plaintiff is liable for the maintenance charges which have been claimed by the defendant *vide* letter dated 11th May 2021. Hence, in view of the foregoing discussion it is submitted on behalf of the defendant that the suit is liable to be dismissed.

ANALYSIS AND FINDINGS

35. Heard learned counsel for the parties and perused the record. Having considered the factual scenario of the matter, judicial pronouncements relied upon by the parties, pleadings presented and arguments advanced by the learned counsel for the parties, following issues have been framed for consideration of this Court:

“1. Whether the termination of lease deed dated 4th October 2017 vide letter dated 27th June 2020 is bad in law and not binding on the parties?”

2. Whether defendant liable to pay plaintiff the arrears of rent to the tune of Rs. 5,38,75,117/-?”

ISSUE NO. 1

Whether the termination of lease deed dated 4th October 2017 vide letter dated 27th June 2020 is bad in law and not binding on the parties?

36. It is submitted on behalf of the plaintiffs that the termination of Lease Deed between plaintiffs and defendant *vide* letter containing Notice of Termination dated 27th June 2020 is bad in law and not binding on the parties. It is contended on behalf of the plaintiffs that they never received the copy of the letter of termination and the defendant used an ante-dated and forged letter to prevent the liabilities and obligations arising out of Lease Deed. *Per contra*, it is submitted on behalf of the defendant that the



defendant was prevented from utilizing the leased premises rendering the Lease Deed terminated. It is further submitted that there is a noting on the Notice of Termination dated 27th June 2020 made by the plaintiff that the Notice was read on 9th July 2020 but no acknowledgment was given by the plaintiffs. This writing on the notice, according to the defendant, is an unequivocal admission made by the plaintiffs in respect of the receipt of the said Notice.

37. It would be appropriate to reproduce the relevant portion from the letter dated 27th June 2020 terminating the Sub-Lease Deed with immediate effect as per Clause 15.3 of the Lease Deed. The relevant portion reads to the effect:

“We would like to draw your kind attention to Clause 15.2 of the Lease Deed. You are well aware that the undersigned has been prevented from utilizing the leased premises due to the restrictive governmental regulations suspending the operations of hotels and is therefore not responsible for any of its consequences and for liabilities /obligations under the lease deed with effect from 25.03.2020.

The situation and restrictive orders due to which the undersigned has been unable to utilise the leased premises has already exceeded several months and consequent thereto, the Lease Deed stands terminated with immediate effect.”

38. The defendant whilst placing reliance on the *Force Majeure* Clause submitted that the government regulations due to the then prevailing COVID-19 pandemic prevented defendant from accessing the leased premises leading to the termination of the Lease Deed. In turn, the Sub-Lease Deed became impossible to perform and hence, the main purpose of the Lease Deed got frustrated.



39. It is important for this Court to peruse the government regulations imposing lockdown which prevented defendant's access to the hotel premises from 25th March 2020 until 21st August 2020. Notification No. 40-3/2020-DM-I(A) passed by the Ministry of Home Affairs dated 24th March 2020 imposing a nation-wide lockdown owing to the COVID-19 specifically directing that the hospitality services would also remain suspended. The relevant portion of the Notification reads as under:

"Whereas in exercise of the powers under section 6(2)(i) of the Disaster Management Act, 2005, the National Disaster Management Authority (NOMA), has Issued an Order no. 1-29/2020-PP (Pt.II) dated 24.03.2020 {Copy enclosed} directing the Ministries/ Departments of Government of India, State/Union Territory Governments and State/ Union Territory Authorities to take effective measures so as to prevent the spread of COVID-19 in the country; Whereas under directions of the aforesaid Order of NOMA, and in exercise of the powers, conferred under Section 10(2)(1) of the Disaster Management Act. The undersigned, in his capacity as Chairperson, National Executive Committee, hereby issues guidelines, as per the Annexure, to Ministries/ Departments of Government of India, State/Union Territory Governments and State/ Union Territory Authorities with the directions for their strict implementation. This Order shall remain in force, in all parts of the country for a period of 21 days with effect from 25.03.2020.

xxx

xxx

xxx

7. Hospitality Services to remain suspended

Exceptions:

- a. Hotels, homestays, lodges and motels, which are accommodating tourists and persons stranded due to lockdown, medical and emergency staff, air and sea crew.*
- b. Establishments used/ earmarked for quarantine facilities."*



40. This lockdown was again extended till 14th April, 2020 to curb COVID-19. Relevant extracts are as follows:

“And whereas Delhi Disaster Management Authority (DDMA) has notified lockdown in Territory of NCT of Delhi w.e.f. 25th March, 2020 till midnight of 14th April, 2020 to curb the menace of COVID-19 vide order dated 25.03.2020 along with the guidelines,

And whereas, Delhi Disaster Management Authority (DDMA) has issued various subsequent orders/Instructions to authorities concerned of NCT of Delhi to take all required measures to appropriately deal with the situation;

And whereas, Govt. of India has extended the lockdown period all over India, Including the territory of NCT of Delhi, further w.e.f. dated 15.04.2020 to 3rd May, 2020 to curb the menace of COVID-19.”

41. The lockdown was finally relaxed and vide Notification No. F. DDMA/COVID-19/2020/1/292 dated 21st August 2020, the Ministry allowed the opening of the hotels. The relevant extracts are reproduced herein:

“And whereas, in pursuance of Ministry of Home Affairs, Govt. of India Order as well as DO letter dated 29.07.2020, DDMA has issued Order No. 275 dated 31.07.2020 with regard to extension of lockdown in the containment zones and to maintain status quo (except removal of night curfew) in the territory of NCT of Delhi till the mid night of 31.08.2020;

And whereas, Ministry of Home Affairs, Govt. of India, vide Order No. 40- 3/2020-DM-l(A) dated 30.05.2020 annexed with guidelines for Phased Re-opening (Unlock 1) has already permitted to open Hotels & other hospitality services in the area outside the Containment Zones with the observation & compliance of Standard Operating Procedure (SOP) to be prescribed by the Ministry of Health & Family Welfare, Govt. of India. Ministry of Health & Family



Welfare, Govt. of India vide OM dated 04.06.2020 has also issued SOP for Hotels & other hospitality services, which is enclosed herewith;

And whereas, the current situation of ongoing pandemic of COVID-19 in Delhi has been reviewed during the meeting of Delhi Disaster Management Authority held, through video conferencing, on August 19, 2020 under the Chairmanship of Hon'ble Lt. Governor, Delhi and it has been decided that the Hotels will be allowed to open in NCT of Delhi in all the areas outside the Containment Zones:

Now, therefore, in exercise of powers conferred under section 22 of the Disaster Management Act, 2005, the undersigned, In his capacity as Chairperson, State Executive Committee, DDMA, Govt. of NCT of Delhi, hereby, In partial modification of DDMA order dated 31.07.2020, directs all authorities concerned that Hotels shall be permitted to operate throughout the NCT of Delhi in all areas, except in containment zones, subject to the strict compliance of Standard Operating Procedure (SOP) issued in this regard by Ministry of Health & Family Welfare, Govt. of India dated 04.06.2020, annexed with this order as well as other directions / instructions / guidelines issued by the Government of India and Government of NCT of Delhi from time to time."

42. From the above circulars, it is clear that the defendant was prevented from accessing the hotel and the premises for a period of 6 months w.e.f. 25th March 2020 until 21st August 2020.

43. It is also important to peruse Clause 15.2 of the Sub-Lease or Second Lease Deed which entitles the defendant to terminate the Lease Deed if prohibited from performing its obligations under the lease for a period of 90 days on account of any restrictive governmental laws or regulations. The Clause states that:



“15.2 Force Majeure – the Said Property or any part thereof is destroyed or damaged due to a Force Majeure event, not caused by wilful act or negligence of the Lessee thereby rendering it impossible/ unsafe/ unfit/ non-feasible to operate out of the Said Property the Lessee may, temporarily vacate the Said Property, as may be required, to enable the Lessor to carry out repairs to restore the Said Property to as good condition as it was in on the Lease Commencement Date. In such an event, all payments specified under this Deed for the Said Property or portion thereof shall abate till the time they Said Property is repaired and restored to as good condition as it was in at the time of handover of the Said Property for interior/fit-outs.

The Lessee shall not be held responsible for any consequences or liabilities under this Deed if it's prevented in performing its obligations under the terms of this Deed by reason of any restrictive governmental laws or regulations, riots, insurrection, war, terrorist action, strike, public demonstrations, rallies, acts of God, etc.

Furthermore, if the above situation continues for a period of more than 90 (ninety) calendar days, the Lessee may terminate this Deed by giving a prior written notice of 30 (thirty) days.”

44. Since, the primary ground taken by the respondent is of the frustration by Contract due to *Force Majeure*, this Court shall delve into the doctrine and principles surrounding the same. *Force Majeure* and doctrine of frustration are embodied in the Indian Contract Act, 1872 (hereinafter referred to as “Contract Act”) under Sections 32 and 56. Section 32 of the Contract Act states that:

“32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. — Contingent contracts to do or not to do anything if an



uncertain future event happens, cannot be enforced by law unless and until that event has happened." If the event becomes impossible, such contracts become void."

45. Section 56 of the Contract Act reads as under:

"56. Agreement to do impossible act.-

An agreement to do an act impossible in itself is void. Contract to do an 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.

Compensation for loss through non-performance of act known to be impossible or unlawful.— Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

46. Explaining the *Force Majeure* Clause and the application of the same on contracts, the Ministry of Finance, on 19th February, 2020, issued an Office Memorandum (O.M.) with respect to invocation of the *Force Majeure* Clause provided in paragraph 9.7.7 of the Manual for Procurement of Goods, 2017. The same is set out below:

"A Force Majeure (FM) means extraordinary events or circumstance beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strike, riots, crimes (but not including negligence or wrong-doing, predictable/seasonal rain and any other events specifically excluded in the clause). An FM clause in the contract frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract. An FM clause



does not excuse a party's non-performance entirely, but only suspends it for the duration of the FM. The firm has to give notice of FM as soon as it occurs and it cannot be claimed ex-post facto. There may be a FM situation affecting the purchase organisation only. In such a situation, the purchase organisation is to communicate with the supplier along similar lines as above for further necessary action. If the performance in whole or in part or any obligation under this contract is prevented or delayed by any reason of FM for a period exceeding 90 (Ninety) days, either party may at its option terminate the contract without any financial repercussion on either side.

A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above.”

47. The Hon’ble Supreme Court in ***Energy Watchdog v. CERC***, (2017) 14 SCC 80 has explained that if a contract contains the Force Majeure Clause itself then it shall be governed by Section 32 of the Contract Act but if the terms are not expressly mentioned in the contract, then Section 56 of the Contract Act shall govern the contract and the course of impossible events. The Court observed as under:

“34. “Force majeure” is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:



“32. Enforcement of contracts contingent on an event happening.— Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

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.

Compensation for loss through non-performance of act known to be impossible or unlawful.— Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

35. Prior to the decision in *Taylor v. Caldwell* [*Taylor v. Caldwell*, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER Rep 24] , the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the Common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in *Taylor v. Caldwell* [*Taylor v. Caldwell*, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER Rep 24] in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.



36. The law in India has been laid down in the seminal decision of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word “impossible” has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. 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. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place dehors the contract, it will be governed by Section 56.

37. In Alopi Parshad & Sons Ltd. v. Union of India [Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588] , this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different



situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [*Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, (1968) 1 SCR 821 : AIR 1968 SC 522], this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of *Satyabrata Ghose v. Mugneeram Bangur & Co.* [*Satyabrata Ghose v. Mugneeram Bangur & Co.*, 1954 SCR 310 : AIR 1954 SC 44] Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.”

48. Supreme Court in *Halliburton Offshore Service Inc. v. Vedanta Limited*, 2020 SCC OnLine Del 2068 has summarized the law laid down by the Supreme Court in *Energy Watchdog (Supra)* stating that *Force Majeure* operates within the ambit of Section 32 of the Contract Act if contained in a contract as contingency and would operate independently if not contained in the contract. Impossibility of the performance of contract takes place if the untoward event totally disrupts the foundation upon which the agreement was entered into. The Court held as follows:

“64. 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.”

49. The Coordinate Bench of this Court in ***Ramanand and Ors. v. Dr. Girish Soni and Anr.***, 2020 SCC OnLine Del 635 has elaborated upon the application of *Force Majeure* and the applicability of Section 32 of



Contract Act in case the stipulations are provided in the contract itself.

The Court stated that:

“12. Contracts of tenancy and leases could be of different kinds including—

- (i) Oral tenancies with a month-to-month payment of rent;*
- (ii) Short term tenancy agreements with a monthly rent payable;*
- (iii) Long term leases with force majeure clauses;*
- (iv) Lease agreements which are structured as revenue sharing agreements and;*
- (v) Lease agreements which are in the nature of monthly payments as a percentage of the sales turnover.*

13. The above list is however not exhaustive. The question of waiver, suspension or any remission in the rental payments would operate differently for each category of agreements. Where there is a contract, whether there is a force majeure clause or any other condition that could permit waiver or suspension of the agreed monthly payment, would be governed by the contractual terms. If, however, there is no contract at all or if there is no specific force majeure clause, then the issues would have to be determined on the basis of the applicable law.

14. In circumstances such as the outbreak of a pandemic, like the current COVID 19 outbreak, the grounds on which the tenants/lessees or other similarly situated parties could seek waiver or non-payment of the monthly amounts, under contracts which have a force majeure clause would be governed by Section 32 of the Indian Contract Act, 1872 (hereinafter, “ICA”). This section reads as under:

“32. Enforcement of contracts contingent on an event happening. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.”



15. 'Force Majeure' is defined by Black's Law Dictionary as "an event or effect that can be neither anticipated nor controlled". As per the dictionary, "The term includes both acts of nature (e.g. floods and hurricanes) and acts of people (e.g. riots, strikes and wars)".

16. The Supreme Court in *Energy Watchdog v. CERC*, (2017) 14 SCC 80 has clearly held that in case the contract itself contains an express or implied term relating to a force majeure condition, the same shall be governed by Section 32 of the ICA. Section 56 of the ICA, which deals with impossibility of performance, would apply in cases where a force majeure event occurs outside the contract. The Supreme Court observed:

"34. "Force majeure" is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act."

17. Thus, in agreements providing for a force majeure clause, the Court would examine the same in the light of Section 32. The said clause could be differently worded in different contracts, as there is no standard draft, application or interpretation. The fundamental principle would be that if the contract contains a clause providing for some sort of waiver or suspension of rent, only then the tenant could claim the same. The force majeure clause in the contract could also be a contingency under Section 32 which may allow the tenant to claim that the contract has become void and surrender the premises. However, if the tenant wishes to retain the premises and there is no clause giving any respite to the tenant, the rent or the monthly charges would be payable."



50. It has been clearly stipulated by the Hon'ble Supreme Court in the case of *NTPC Limited v. Voith Hydro Joint Venture*, 2020 SCC OnLine SC 1071 that the express provision of the contract stating the *Force Majeure* Clause would prevail over the plain language of Section 56 of the Contract Act. The Court stated that:

“54. The Contract, essentially, has two facets. The first relates to the performance of reciprocal promises that parties are obliged to perform but for any supervening event. These obligations would obviously be curtailed if their performances are rendered impossible. To that extent, the Contract would stand frustrated as being incapable of performance. However, to the extent that the parties have already contemplated the consequences of such supervening event, the same would remain binding and parties would not be absolved to act in accordance with the commitment made in contemplation of such eventuality. It is open for the parties to agree that if on account of any force majeure condition it is impossible to perform a contract, a party would compensate the other for the efforts made notwithstanding that it is impossible to fully perform the same. It would be erroneous to contend that in such cases, the party who has so agreed to compensate the other contracting party for the efforts undertaken would be absolved of its obligation to do so merely because of a supervening event, the possibility of which was contemplated, had occurred. In this view, this Court is unable to find any fault with the decision of the Arbitral Tribunal that in such cases, the contractual provisions would prevail over the plain language of Section 56 of the Contract Act.”

51. Applying the principles enunciated above, it is clear that Section 32 would apply in the present scenario as there is a clear stipulation in the Contract regarding the *Force Majeure* Clause contained in Clause 15.2 of



the Sub Lease Deed. Clause 15.2 states that the *Force Majeure* Clause would apply if there are ‘*restrictive governmental laws or regulations, riots, insurrection, war, terrorist action, strike, public demonstrations, rallies, acts of God, etc*’ and the stipulation continues for a period more than 90 days.

52. It is relevant at this stage to mention ***Mugneeram Bangur and Co. v. Gurbachan Singh, (1965) 2 SCR 630*** wherein the Hon’ble Supreme Court has interpreted frustration doctrine and explained the concept of supervening impossibility which should not be absolute but must lead to an impracticable performance which neither of the parties are responsible for. The Court observed as under:

“5. Insofar as discharge of contract by reason of frustration is concerned there is no question of implying a term in the contract a term fundamental for its performance, as is done by the courts in England because we have here the provisions of Section 56 as well as those of Section 32 of the Contract Act. This is what was held by this Court in the earlier case and that decision binds us. No doubt, a contract can be frustrated either because of supervening impossibility of performance or because performance has become unlawful by reason of circumstances for which neither of the parties was responsible. In the earlier case this Court has held that where the performance of an essential condition of the contract has become impossible due to supervening circumstances the contract would be discharged. This Court has further held that the impossibility need not be an absolute one but it is sufficient if further performance becomes impracticable by some cause for which neither of the parties was responsible. It, however, held that the mere fact that the performance of an essential term of the contract, that is to say, of undertaking development of the area under the scheme could not be undertaken because the land had been requisitioned, did not have the effect of



frustrating the contract. For though the term regarding development was an essential term of the contract, the requisitioning of the land was only for a temporary period. Further the parties had deliberately not placed any time limit within which roads and drains had to be made apparently because they were aware of the difficulties in carrying on the work on account of scarcity of materials and the various restrictions which the Government had placed on such activities. This Court also pointed out:

“Another important thing that requires notice in this connection is that the war was already on, when the parties entered into the contract. Requisition orders for taking temporary possession of lands for war purposes were normal events during this period.” (pp. 326-27)

Though these observations were made while dealing with the argument that the contract has been frustrated by reason of impossibility of performance they would not be wholly out of place while considering the argument based upon the ground that continued performance of the contract had been rendered unlawful.”

53. This Court finds it relevant to cite **Pollock & Mulla on The Indian Contract Act, 1872 (15th ed)** which states that the intent of the doctrine of frustration is to escape from the injustice and the Court while interpreting the frustration clause need not travel outside the contract. It elaborates the principle as follows:

“The doctrine of frustration has been stated to have been developed by the law as an expedient to escape from injustice, where such would result from enforcement of a contract in its literal terms after a significant change in circumstances. “It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands”.

Section 56 is exhaustive, and it is not permissible for the Courts to travel outside the provisions. When an event of change of circumstances occurs, which is so fundamental as



to be regarded by law as striking at the root of the contract, it is the Court which can pronounce the contract to be frustrated and at an end. The Court has to examine the contract, the circumstances under which it was made, the belief, knowledge and intention of the parties, being evidence of whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This, in England, is termed as rule of construction; in India, this is really a rule of positive law and as such comes under section 56 of the Contract Act.”

54. The Supreme Court in ***Satyabrata Ghose v Mugneeram Bangur & Co., AIR 1954 SC 44*** has interpreted the frustration of contract explaining the impossibility to perform an act and the import of physical and literal impossibility in the section. The Court stated thus:

“The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word 'impossible' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.”



55. The Hon'ble Supreme Court in the case of ***Industrial Finance Corp of India Ltd v Cannanore Spinning and Weaving Mills Ltd, (2002) 5 SCC 54*** has analyzed the intent of the doctrine of frustration or supervening impossibility stating that the Court cannot compel a party to do which it cannot possibly perform. The Court stated that:

“It is then, a general rule which admits of ample practical illustration, that impotentia excusat legem; where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general excuse him and though the impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse.”

56. On the issue of government regulations leading to frustration of contract, ***Ram Kumar v. P.C. Roy and Co., (India) Ltd. AIR 1952 Cal 335*** becomes relevant as in this case the Calcutta High Court has explained the doctrine of frustration and its application during the restrictive governmental regulations leading to impossibility in performance of a contract. The Court observed as under:

“The main object of the contract was the transshipment of the goods from Bihar to Bengal by Railway and in my opinion having regard to the events that have happened the basis of the contract has been overthrown. In the absence of express intention of the parties I have to determine what is just and reasonable in view of the non-availability of wagons for transport and the difficulties created by the restrictions or emergency orders. It may be now accepted as settled law that when people enter into a contract which is dependant for its performance on the continued availability of a specific thing and that availability comes to an end by reason of



circumstances beyond the control of the parties, the contract is dissolved. According to Lord Wright the expression 'frustration of the contract' is an elliptical expression. The fuller and more accurate expression is 'frustration of the adventure or the commercial or practical purpose of the contract'. In my view, the commercial or practical purpose of this contract was defeated or over-thrown by the refusal on the part of the Government to issue permit and by the non-availability of the transport facilities and the restrictions and embargoes put by the Government and ultimately by requisition of the stock of the plaintiff. The real object of the contract as contemplated by the parties was 'the purchase or employment of the goods for a particular purpose and therefore the doctrine of frustration can be imported and if necessary, the requisite terms can be implied.'"

57. Madhya Pradesh High Court has laid down a test in ***Firm Bachhraj Amolakchand v. Firm Nandlal Sitaram, 1962 SCC OnLine MP 120*** for finding out frustration of the contract and the impossibility.

The test is as follows:

"23. Applying the test and principles discussed in the above cases, it is clear that in each case, the following three questions arise for consideration:

(1) What was the foundation of the contracts having regard to all the circumstances of the case?

(2) Whether the performance of the contract was prevented; and

(3) Whether the event which prevented the performances of the contract was of such a character that it could not reasonably be said to be in the contemplation of the parties at the date of the contract."

58. The Hon'ble Supreme Court in ***Sushila Devi v. Hari Singh, (1971) 2 SCC 288*** mentioned that the performance of the contracts becomes



impossible when the impossibility strikes at the root of the contract and makes it impossible to perform the terms of the contract. The Court observed as under:

“11. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract.

12. From the facts found in this case it is clear that the plaintiffs sought to take on lease the properties in question with a view to enjoy those properties either by personally cultivating them or by sub-leasing them to others. That object became impossible because of the supervening events. Further the terms of the agreement between the parties relating to taking possession of the properties also became impossible of performance. Therefore, we agree with the trial court as well as the appellate court that the contract had become impossible of performance.”

59. It has also been held that applying the doctrine of frustration must always be within the narrow limits. In an instructive English judgment namely, *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH, 1962 AC 93* despite the closure of the Suez canal, and despite the fact that the customary route for shipping the goods was only through the Suez canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that



even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

60. *Li Ching Wing v. Xuan Yi Xiong*, [2004] 1 HKLRD 754 passed by Hong Kong Court also becomes relevant here. It suggests prospects in arguing that agreements are frustrated by closures caused by Covid-19. In the said case, a residence was leased for a 2-year fixed term. Due to the SARS outbreak, an isolation order was issued due to which the tenant has to move out. Later the tenant issued a letter to terminate the lease and the landlord accepted his termination. Relying upon UK House of Lords decision in *National Carriers v Panalpina*, [1981] AC 675 which had approved the prior decision of *Cricklewood Property and Investment Trust v Leightons Investment Trusts*, [1945] AC 221 the Court has refused to accept the tenants' contention that the contract was frustrated. In the former case, Lord Simon of Glaisdale had defined frustration as:

"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance. (at 700F)"

61. Importantly, the House of Lords in *Cricklewood Property and Investment Trust v Leightons Investment Trusts* (*supra*) observed that:



"An event which causes an interruption in the expected use of the premises by the lessee will not frustrate the lease, unless the interruption is expected to last for the unexpired term of the lease, or, at least, for a long period of that unexpired term. Therefore, emphasis was placed on the length (both qualitative and quantitative) of the supervening event vis a vis the remainder of the lease term".

62. Finally, the High Court of Bombay in ***Standard Retail Pvt. Ltd. v. M/s G.S. Global Corp & Ors., Commercial Arbitration Petition (L) No. 404 of 2020*** dismissed a plea invoking the *Force Majeure* exemption in a contract involving steel importers. While dismissing, it observed that the distribution of steel has been declared as an essential service, and there have been no significant restrictions on the movement of vehicles and manpower in the context of the steel industry, or operations of container freight stations and warehouses for steel. It further noted that the lockdown would be for a limited period and the lockdown cannot come to the rescue of the petitioners so as to resile from its contractual obligations to the respondent of making payments.

63. The Hon'ble Supreme Court in ***Halliburton Offshore Service Inc. (Supra)*** has explained whether or not the COVID-19 pandemic would justify non-performance or breach of a contract. The Court stated that:

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



assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.

70. 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."

64. From the above discussion, it is clear that the doctrine of frustration and impossibility would apply if a party is prevented from performing the terms of the contract which are essential and strike at the root of the contract. In other words, the government regulations are specifically mentioned in the Lease Deed and they operate as *Force Majeure*. The Government regulations prevented the defendant from accessing the leased premises for about 6 months which constitutes a 'real justification' as per the *Hallibuton judgment* and brings an exception as to excuse the non-performance of the contractual obligations in the present case.

65. Even if the Contract did not stipulate Government regulations still the landmark English authority of ***Metropolitan Water Board v. Dick Kerr & Co. Ltd., 1918 AC 119 (HL)*** would have covered the issue and the impossibility to access the leased premises would still operate as a *Force Majeure Event* preventing the completion of contract and leading to termination of the same. In that case, by a contract made in July 1914,



a firm of contractors contracted with a Water Board to construct a reservoir to be completed within six months. But by a notice issued under the Defence of the Realms Acts, the contractors were required to cease work on their contract and they stopped the work accordingly. They claimed that the effect of the notice was to put an end to the contract. The House of Lords held that the interruption created by the prohibition was of such a character and duration so as to make the contract when resumed a different contract from the contract broken off, and that contract had ceased to operate.

66. The *Metropolitan Water Board case* has been followed in the subsequent cases of *C. Czarnikow Ltd. v. Centrala Handlu Zagaraniczneo Rolimpex*, 1979 AC 351 where contracts were frustrated as the Government Monopoly Corporation ended on the ban on exports and later on followed in *Syed Khursed Ali v. State of Orissa*, AIR 2007 Ori 56, where beef could not be supplied under the contract because of the Orissa Prevention of Cow Slaughter Act, 1960, and it was held that it was not an intentional failure of contract of supply.

67. Applying the above principles, considering the pandemic and the role of the government regulations, especially in the pandemic in frustrating the contracts between the parties, this Court is of the view that the defendant was prevented by the government regulations to access the leased premises. The term of the restriction is the subject of next issue but it is established that the restriction led to the prevention of the access.

68. Along with the application of *Force Majeure* in the present case, it is important for this Court to appreciate that there is a specific noting on the Notice of Termination dated 27th June 2020 in the documents filed by



the plaintiffs themselves stating that the Notice was read at 11:45 a.m. on 9th July 2020 and that no acknowledgment of reply was given by the plaintiffs. Thus, the claim of the plaintiffs that they never received the Notice of Termination cannot be accepted by this Court. It seems that the plaintiffs even after having read the Notice of Termination did not take any action in this regard and tried to put responsibility/ liability on the defendant.

69. Hence, it is clear that the application of *Force Majeure* because of the government regulations imposing a lockdown on the hospitality services coupled with the noting that the Notice of Termination dated 27th June 2020 was read by the plaintiff on 9th July 2020 make it clear that the Notice of Termination is not bad in law and, hence, binding on the parties.

ISSUE 2

Whether the defendant is liable to pay to plaintiff the arrears of rent to the tune of Rs. 5,38,75,117/-?

70. It is submitted by learned counsel for the defendant that it was prevented from accessing the leased premises for a period of about 6 months, w.e.f. 25th March 2020 until 21st August 2020.

71. Clause 8 of the Second Lease Deed expresses its object stating that the premises were meant to be used by defendant as a part of its hotel. Clause 8 states that:

“8. USE OF THE SAID PROPERTY

8.1 The lessee shall be entitled and free to use the Said Property as part of the Hotel for commercial gain for the customers/ guests (“Guests”) including as a service apartment/ suite/ hotel room in the manner as it deems fit



and proper without any interference by the Lessor whatsoever. Any amount/ revenue/ gains/ benefits received by the Lessee from such use of the Said Property and the rights attached therewith in terms of the Deed shall solely belong to the Lessee and Lessor shall have no right, interest, claim on any such amount/ revenue etc. or against the Lessee.”

From the government circulars cited and discussed above in issue No. 1 and perusing the object of the Second Lease Deed, it is clear that the defendant was prevented from accessing to the hotel from 25th March 2020 until 21st August 2020. It is clear that the defendant was prevented from using the premises for a period of more than 90 days as a matter of record. This has borne out of statutory orders issued by the Government of India and the Government of NCT of Delhi.

72. In the case of ***Mehra Jewel Palace Pvt. Ltd. v. Miniso Life Style Pvt Ltd., 2022 SCC OnLine Del 1557***, the Coordinate Bench of this Court has held that COVID-19 is an ‘Act of God’ and consequently, a *Force Majeure* event. Even otherwise, irrespective of the 90 days' requirement, the occurrence of ‘Act of God’ entitled parties to terminate the Second Lease Deed under Clause 15.2. These facts have borne out from the statutory instruments and therefore, do not require proof by adducing of evidences at the trial.

73. Furthermore, this Court has perused the copy of the Notice of Termination dated 27th June 2020 filed by the plaintiffs themselves bearing a noting on the top of the Termination Notice stating therein that the plaintiffs had received the Notice dated 27th June 2020 on 9th July 2020. This Court is, thus, of the view that there is an unequivocal admission on the part of the plaintiffs to have received the Notice of



Termination on 9th July 2020. If compared with the same Notice of Termination filed separately in the letter dated 18th June 2021 at the end of the list of plaintiffs' documents, no such noting of 9th July 2020 on the Communication dated 18th June 2021 is found. Further, it is clear that no acknowledgment has been given by the plaintiffs with respect to the receipt of the Notice of Termination.

74. It is also true that the possession was offered to the plaintiffs by the defendant and it is the plaintiffs' prerogative to take over the possession. The constructive possession was handed over to the plaintiffs by the 27th June 2020 letter. The said letter reads as under:

"Pursuant to said termination, you are called upon to take possession of the premises. Simultaneously you are also requested to refund the entire security deposit for which you may please contact Sanjeev Malik in the Accounts Department at sanjeev.malik@ahinorth.com."

75. Since, the plaintiffs had received the Notice of Termination dated 27th June 2020 and were aware of the defendant's call for the plaintiffs to take possession of the premises, the constructive possession of the premises was handed over to the plaintiff on 27th June 2020 only.

76. Hence, from the discussion above, this Court comes to the conclusion that the Sub Lease was terminated *vide* Notice of Termination letter dated 27th June 2020. Resultantly, the defendant is not liable for the arrears of rent to the tune of Rs.5,38,75,117/-. At the same time, it is important for the Court to take note of the representation filed by the defendant to pay the rent of the leased premises up to 9th July 2020. The defendant in his written submissions has stated that:



“Therefore, the claim of the Plaintiffs seeking rent for the period of April 2020 to April 2023 is baseless and devoid of merit. Without prejudice, the Defendant undertakes to pay the Plaintiff the rent up to 09.07.2020 in accordance with the Second Lease Deed.”

77. Since, the defendant on his own accord has offered to pay the arrears of rent till 9th July 2020 the plaintiffs may recover the arrears of rent till 9th July 2020.

CONCLUSION

78. COVID-19 brought the world to a halt and hospitality industry was no exception to it. The present case also pertains to parties affected by the COVID-19 and its adverse effects. The contractual obligations in the present suit concern the rent to be paid under a sub-lease but the contract itself became frustrated because of the lockdown order preventing the party from accessing the leased premises.

79. Considering the factual matrix of the case, authorities cited, pleadings filed and arguments advanced, this Court is of the view that the plaintiff is not entitled to the arrears of rent for the period contended as the Sub-Lease Deed was terminated *vide* letter dated 27th June 2020 by the defendant after following due procedure and after sufficient suffering at the hands of grappling pandemic existing at that time.

80. Thus, the Notice of Termination dated 27th June 2020 is valid and binding on both the parties, bringing an end to the Sub-Lease Deed entered between the parties. Consequently, the prayer for recovery of arrears of rent stands rejected but considering the representation by the defendant, the plaintiffs may recover the rent arrears till 9th July 2020.



81. Accordingly, in terms of the aforesaid discussion, the captioned suit stands dismissed.
82. Pending applications, if any, also stand dismissed.
83. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JULY 19, 2023
SV/DS

