IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6322 of 2023

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M/s Ashutosh Enterprises, a Proprietary concern having its place of business at Shop No. 14, Jupiter Apartment, Dolphin Garden, Poonam Sagar Complex, Mira Road, East, Thane, P.S. Thane, District Thane (Maharashtra) through its Proprietor Sandeep Bholanath Shukla, Male, Aged about 35 years, Son of Sri Bholanath Shukla, Resident of B101, Jupiter Apartment, Dolphin Garden, Poonam Sagar Complex, Mira Road, East, Thane, P.S. Thane, District Thane (Maharashtra).

... ... Petitioner/s

Versus

1. The Union of India Ministry of Railways through the Senior Divisional Commercial Manager, NF Railway, Katihar.
2. The Senior Divisional Commercial Manager, NF Railway, Katihar.
3. The Divisional Commercial Manager, NF Railway, Katihar.
4. The Secretary, Ministry of Home Affairs, Government of India, New Delhi.
5. The Secretary, Department of Expenditure, Ministry of Finance, Procurement Policy Division, Government of India, New Delhi.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Umesh Prasad Singh, Sr. Advocate Mr. Madhumay Madhup, Advocate Mr. Anand Kumar Tiwari, Advocate Mr. Nishikant, Advocate Mr. Aditya Raj, Advocate
For the Respondent/s	:	Ms. Kanak Verma, CGC

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE HARISH KUMAR)

Date : 16-04-2024

We have heard Mr. Umesh Prasad Singh, learned Senior Counsel along with Mr. Madhumay Madhup, learned Counsel for the petitioner and Ms. Kanak Verma, learned Central Government Counsel for the respondent-Railways.

2. The petitioner, a proprietary concern having its

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Head Office in the State of Maharashtra has invoked the equitable jurisdiction of this Court under Article 226 of the Constitution of India seeking quashing of the order issued by the respondent no. 2 as contained in letter dated 01.02.2021 marked as Annexure – 21 to the writ petition, whereby purportedly the respondents terminated the contract and forfeited the securities and license fees of the petitioner. The petitioner relied on the request made by them to the respondents to treat the contract closed in view of the frustration of contract due to *force majeure* on account of statutory lockdown for the period of more than three months, by communication dated 26.10.2020 and sought refund of the securities and license fees.

3. Before coming to the facts of this case, the learned Senior Counsel representing the petitioner apprised this Court that for the grievance raised in the writ petition, the petitioner had earlier preferred a writ petition before the Guwahati High Court as the Headquarter of the North Frontier (hereinafter referred to as 'NF') Railways is situated at Maligaon near Guwahati in the State of Assam. However, on the question being raised with regard to the jurisdiction of that Court, on the premise of the tender being issued in Katihar, by an independent division of NF Railways and the work order issued from Katihar in the State of Bihar, the petitioner was permitted to withdraw

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the writ petition with liberty to file a fresh writ petition before this Court, the copy of which is produced as Annexure – 23. Hence, the present writ petition.

4. The petitioner having been declared the highest and most suitable bidder in response to the E-Tender notice dated 27.01.2020, was awarded a parking stand contract at New Jalpaiguri Station and its circulating area within the Katihar Division of NF Railways. The petitioner was, thereupon, communicated the Letter of Acceptance dated 28.02.2020. By the Letter of Acceptance dated 28.02.2020, the petitioner was directed to deposit three months' license fees of Rs. 18,75,000/- and the first year license fees was also to be deposited within fifteen days. The petitioner was also required to submit security money of Rs. 12,41,250/- and the performance guarantee of Rs. 12,41,250/- along with the GST on license fees and other allied charges.

5. Pursuant to the Letter of Acceptance, the petitioner deposited the quarterly license fees of Rs. 18,75,000/- along with GST amount of Rs. 3,37,500/- and other allied charges through Demand Drafts.

6. Adverting to the aforesaid facts, learned Senior Counsel representing the petitioner contended that the petitioner undertook to fulfill all its obligations and accordingly, it was

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served the work order dated 20.03.2020 with an intimation that it shall be permitted to start the work of collection of parking charges from the users of parking stand at New Jalpaiguri Station and Circulating Area after taking over the charge of the parking stand within three days after intimation to that office. The work order was received by the petitioner on 23.03.2020. Unfortunately, on 24.03.2020, a nation-wide lockdown was announced amid Covid-19 pandemic vide notification issued under the signature of Union Home Secretary in exercise of power under the Disaster Management Act, 2005.

7. Referring to the aforesaid notification, emphasis has been made that by the said notification, especially as per Clause-6, thereof, it was made clear that all transport services *viz.* air, rail and roadways will remain suspended. It is further contended that the lockdown was extended from time to time by different notifications, the copies of which have been produced as Annexures – 5 and 6 series.

8. Having taken this Court to the notifications issued by the Government of India from time to time, emphasis has been laid on the complete lockdown and complete prohibition of running of trains for more than four months. Even thereafter, the running of trains were regulated, with only special trains being allowed to run. On account of the nationwide lockdown, the

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petitioner although submitted its license fees for the first quarter along with other charges; could not enter into the formal contract with the Railways as required in the "instruction to the tenderers" within fifteen days after notice to do so.

9. Faced with such a grim situation, when the petitioner's personnel visited NGP Railway Station, they found a lot of problems because of unauthorized encroachments due to which the petitioner was unable to take over the charge of parking area. However, in the meantime, to the utter dismay of the petitioner, it was served with a letter dated 04.09.2020 (Annexure – 8 to the writ petition) intimating it to deposit second installment of license fees, failing which action was threatened. The petitioner immediately wrote a letter to the respondent no. 3 narrating the entire facts, including the lockdown and the circumstances of suspension of running of trains which had not been resumed till the date of his response made on 05.09.2020.

10. The petitioner was again served letters one after another, the copies of which have been placed on record, directing it to take over possession of parking stand in terms of the work order dated 20.03.2020 with the caveat that, if he failed to respond, necessary action will be taken against him. In response to all the letters, the petitioner made it clear that since

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on the very next date of receipt of Letter of Acceptance, the contract has fallen through by reason of *force majeure* conditions, which continued unabated. As per clause 26 of the tender document read with notification of the Finance Department and the lockdown notifications, the contract which could not be commenced for more than three months, was required to be closed.

11. The learned Senior Counsel placed reliance on an office memorandum dated 19.02.2020 to the effect that if the performance in whole or in part of an obligation under any contract is prevented or delayed by any reason, for a period exceeding 90 days, either party may at its option terminate the contract without any financial repercussions on either side. The pandemic, under the office memorandum, has also been included in the *force majeure* clause.

12. In the aforesaid facts, the writ petitioner vide its letter dated 26.10.2020 exercised its right to invoke *force majeure* clause and terminated the contract form its side with a request to the respondents to refund its security deposit, performance guarantee, advance of quarterly license fees, advance of GST and other additional fees and charges.

13. Despite the request tendered by the writ petitioner, the respondent kept continuously insisting the petitioner to enter

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into a contract and to commence the parking stand work. Finally, the Senior Divisional Commercial Manager, NF Railways, Katihar instead of appreciating the extra-ordinary situation of *force majeure* and the condition arising out of Covid-19, served a show-cause notice to the petitioner as to why a penal action of termination of contract be not taken against him and all the deposits and advances be not forfeited.

14. The aforesaid letter was immediately responded by the petitioner reiterating its stand that the tender documents, which was floated was binding on both the parties and either of the parties cannot unilaterally impose conditions upon the other. However, to the utter shock and surprise of the petitioner, by the impugned letter dated 01.02.2021, the respondent no. 2 came out with a decision to terminate the contract with immediate effect and forfeited all the deposits of the petitioner, since the petitioner failed to start the work of parking stand; as per the contract.

15. The learned Senior Counsel while questioning the impugned order has submitted that the work order was issued on 20.03.2020 and thereafter, the statutory lockdown across the nation was imposed resulting in the entire nation coming to a grinding halt. The running of trains was also suspended for an indefinite period. The Government of India issued office orders

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with regard to *force majeure* conditions regulating the contracts in the country specifically providing that if the performance in whole or in part or any obligation under the contract is prevented or delayed by *force majeure* situation for a period exceeding 90 days, either party may at its option terminate the contract. The petitioner exercised its option in terms of the office memorandum and terminated the contract. Thus, in the aforesaid facts, the Letter of Award became non-existent. Moreover, the formal contract could never come into existence, before which on valid grounds invoking the *force majeure* situation the petitioner withdrew from the tender.

16. On the other hand, learned Counsel representing the respondent-Railways submitted that after depositing the first installment of first year license fees, the petitioner was requested to start work with effect from 22.03.2020. The petitioner not only failed to commence work but also failed to inform the concerned authority that it has not started the work under the contract. It is further contended that the second installment of license fees became due on 20.06.2020. The same was not deposited in time and the petitioner had requested to deposit the second installment vide letter dated 04.09.2020.

17. Learned Counsel for the respondents also contended that on account of Covid-19 pandemic, the Railway

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Board granted 90 days relaxation in license fee to existing commercial operational contracts by treating the period from 25.03.2020 to 22.06.2020 as "Dies Non" subject to submission of undertaking through an affidavit that they will not surrender the contract midway. It is next contended that so far as the contention of the petitioner and its reliance on *force majeure* clause, the same was not applicable to the petitioner as the contract had never been executed between the parties. All the more, the petitioner requested to terminate the contract on 11.01.2021, when the lockdown was not in force.

18. It was further argued that despite the repeated request and relaxation accorded to the petitioner, he failed to commence the work, resulting in loss of revenue. The Railway also could not invite fresh tender because of the inaction of the petitioner leading to termination of the contract, in question, vide office order dated 01.02.2021. The office memorandum dated 19.02.2020 is not a General Policy Decision of the Government of India applicable to the present case; it is argued by the respondents.

19. Before scrutinizing the legality of the impugned order, this Court would deem it apt to examine the jurisdictional point. It would be worth mentioning that Articles 226/227 of the Constitution of India empowers the Court to issue a writ, order

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or direction, if cause of action, wholly or partially arises within its territorial jurisdiction even if person or the authority against whom writ is issued is located outside or within its territorial jurisdiction. What is required to be looked into is, as to whether the petitioner is able to establish that his legal right has been infringed by the respondents and the cause of action arose within the territorial limits of the concerned High Court.

20. The records clearly demonstrate that all the correspondences on the part of the Railways have been made by the Senior Divisional Commercial Manager or Divisional Commercial Manager, NF Railways, Katihar Division. The impugned order has been issued by the Senior Divisional Commercial Manager, NF Railways, Katihar. The tendering having been made from Katihar and the award of work also having occured therefrom, so far as the jurisdiction of this Court is concerned, this Court does not find it lacks territorial jurisdiction. Reliance may be placed on decisions rendered by the Hon'ble Apex Court in the case of ***Union of India and Ors. Vs. Adani Exports Limited and Anr.*** reported in ***(2002) 1 SCC 567***, ***Om Prakash Srivastava Vs. Union of India and Anr.*** reported in ***(2006) 6 SCC 207*** and ***Nawal Kishore Sharma Vs. Union of India and Ors.*** reported in ***(2014) 9 SCC 329***.

21. Coming to the facts of the case, undisputedly the

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work order was issued on 20.03.2020, which was duly received by the petitioner on 23.03.2020. On the very next day nationwide lockdown was imposed by the Government of India vide letter dated 24th March, 2020, the period of which had further been extended by subsequent notification dated 14.04.2020, 01.05.2020, 17.05.2020 and 30.05.2020, the copies of which are marked as Annexures – 5 and 6 series.

22. In the extra-ordinary event and the circumstances beyond human control, the non-commencement of the parking stand work on the part of the petitioner, despite having issued Letter of Acceptance and work order cannot be faulted. Indisputably, the circumstances were beyond the control of the petitioner. The reliance is also on the office memorandum dated 19th February, 2020 with respect to *force majeure* clause issued by the Government of India in the Ministry of Finance, Department of Expenditure, Procurement Policy Division. Form the memorandum it is clear that if the performance in whole or in part of any obligation under any contract is prevented or delayed or any reason of Finance Ministry for a period exceeding 90 days, either party may at its option terminate the contract without any financial repercussions on either side. The said office memorandum has been issued by the Ministry of Finance and it was in the nature of a guideline for all the

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departments. Besides, similar memorandum have also been issued by other departments, including the Ministry of Railways. One such letter has been placed during the course of argument by the learned Senior Counsel, which has also been perused by us and extracted hereunder:

GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
RAILWAY BOARD

No. 2017/EnHM/26/04
New Delhi, dated 03.07.2020

General Managers
All Zonal Railways

SUB: Issue regarding payments in contracts of mechanised laundries in Covid times.

The issue of payments in contracts of mechanised laundries have been raised by some Railways in times of Covid-19 pandemic, including need to invoke Force Majeure Clause, when train services are restricted and linen is presently not being supplied in trains. Long term BOOT laundry contracts are PPP in nature, capital intensive due to setting up of infrastructure and machinery, and maintenance of the same even during lockdown. Further, each contract has to be dealt as per its terms and conditions including relevant GCC mentioned in that contract. Therefore, the issues in general are clarified as under:

1. Assured off-take: *Quantity based linen washing contracts will normally be based on bill of quantities. Where assured off-take is provided in BOOT laundry contract, the same can be followed/ continued in short to medium run. Quantities can be renegotiated for the long run, where feasible.*

2. Payment during Lockdown and restricted services period: *If break up of Labour, material, fuel, fixed components etc is provided in PVC clause or elsewhere in the contract, it can also be considered to work out the necessary payments in such contracts.*

Some BOOT contracts may not have assured load clause. For these, payments can be considered for Wage and Fixed components based on PVC

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clause.

If any payment is linked to contractor's workers, the payment to contractors should be released when proof of making payment to workers for previous month, for payment already received from Railways, is submitted. RB letter No. 2020/EnHM/25/01 dated 30.06.2020 may also be seen, where applicable.

3. Force Majeure: *If considered necessary and wherever applicable, parties to the contract may invoke the relevant / applicable Force Majeure Clause (FMC), after following / fulfilling due procedure. Ministry of Finance O.M.s No. F.18/4/2020-PPD dated 19.02.2020 and 13.05.2020 may also be seen for guidance in this regard.*

In summary, each existing contract has to be dealt with independently on its merits duly keeping in view its unique features, terms and conditions, relevant GCC etc., with concurrence of associate finance and approval of competent authority, where necessary. Views of associated Legal branch may also be taken, if required.

(Shivendra Mohan)
Executive Director
EnHM / ME

23. This Court cannot lose sight of the fact that the entire submission of the petitioner is based on the premise that the petitioner was prevented from acting upon the Letters of Acceptance on account of nationwide lockdown amid Covid-19 pandemic.

24. This Court would highlight the *force majeure* clause, a prescription of general conditions of contracts. Clause 26 of the general conditions of contract in clear terms prescribe that "if at any time, during the continuance of this contract, the performance in whole or in part by either party of any obligation under this contract shall be prevented or delayed by reason of

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any war, hostility, acts of public enemy, civil commotion, sabotage, serious loss or damage by fire, explosions, **epidemics**, strikes, lockouts or acts of God provided/ notice of the happening of any such event is given by either party to the other within 30 days from the date of occurrence thereof, neither party shall by reason of such event, be entitled to terminate this contract nor shall either party have any claim for damages in respect of such non-performance or delay in performance." The said clause further provided that if the performance in whole or in part of any obligation under this contract is prevented or delayed by reason of any such event for a period exceeding 120 days, either party may at its option terminate the contract by giving notice to the other party". In so far as the pandemic situation is concerned, it was unique and the Government of India had reduced the 120 days to 90 days for rescinding the contract, without any liability, as per the notification issued.

25. Indisputably, the nationwide lockdown as was imposed by the Government of India continued for several months and taking note of this fact, the respondent-Railways treated the period from 25.03.2020 to 22.06.2020 as "*dies non*". Hence, there is no dispute that the aforesaid period could not be counted for any legal purpose.

26. At this stage, this Court would also highlight the

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decision taken by the Ministry of Finance, Government of India as contained in office memorandum dated 19.02.2020, which made it clear that if the performance in whole or in part or any obligation under the contract is prevented or delayed by any reason of *force majeure* for a period exceeding 90 days, either party may at its option terminate the contract without any financial repercussions on either side. The spread of corona virus and the pandemic shall also be covered in the *force majeure* clause, as specified by the Government of India. The petitioner failed to issue notice on *force majeure*, as soon as it occurred, but it was done soon after the mandatory period of 90 days expired; on 26.10.2020, for premature closure of the contract by invocation of the *force majeure* clause and sought refund of security deposit, performance guarantee and advance license fees.

27. The record clearly reveals that at no point of time, the site in question, was either handed over to the petitioner or accepted by him on account of the reasons of encroachment, illegal stalls, drainage problems in addition to the Covid-19 pandemic situation.

28. True it is, that the petitioner and the respondent-Railways have never entered into a formal contract after issuance of Letters of Acceptance but needless to observe that

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once the petitioner has been declared a successful bidder in terms of the NIT in question, both the parties shall be guided by its terms and conditions. Further, the contention of the respondent that the office memorandum issued by the Ministry of Finance would not be applicable does not merit consideration as similar decisions has been taken by the Ministry of Railways, Government of India, which has been extracted hereinabove.

29. The specific contract referred to therein is that of mechanised laundries. *Force majeure* clause was allowed to be invoked since train services are restricted and there was no supply of linen in trains. The complete lock-down and the localised lock-downs later on completely hampered movement within the country. The rail traffic too was sporadic and need-based. The foot-falls in railway stations were minimal and hence there was also no parking of vehicles required on the scale it used to be. The letter produced by the petitioner bearing no. 2017/EnHM/26/04 dated 03.07.2020, while dealing with a situation of *force majeure* makes it clear that if considered necessary and wherever applicable, parties to the contract may invoke the relevant/applicable *Force Majeure Clause (FMC),* after following, fulfilling due procedure. The letter specifically states that Ministry of Finance office memorandum dated 19.02.2020 and 13.05.2020 may also be seen for guidance in

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this regard. In the aforesaid premise, the application of office memorandum issued by the Ministry of Finance is applicable to the case in hand, which relates to NIT issued by the NF Railways, Katihar.

30. Before parting with the case, this Court would also observe that in the facts of the case in hand, the provisions of Section 56 of the Contract Act, 1872 would also be attracted and it is thus extracted hereinbelow:

> *"**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."*

31. The interpretation of Section 56 of the Contract Act came up for consideration in ***Satyabrata Ghose Vs. Mugneeram Bangur and Company and Anr.*** reported in ***AIR***

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1954 SC 44, wherein, the Hon'ble Supreme Court held that the word "impossible" used in Section 56 of the Contract Act has not been used here in the sense of physical or literal impossibility. It ought to be incorporated as impracticable and useless from the point of view of the object and purpose which the parties had in view, when they entered into the contract. This impracticability or uselessness would arise due to some intervening or supervening circumstances which the parties had not contemplated. However, if the intervening circumstances was contemplated by the parties, then the contract would stand despite the occurrence of such circumstances. In such an event, there can be no case of frustration because the basis of contract being to demand performance despite the happening of a particular event, it cannot disappear when the event happens.

32. The Hon'ble Supreme Court following the dictum of the aforenoted decision in ***Satyabrata Ghose (supra)*** in the case of ***Delhi Development Authority Vs. Kenneth Builders and Developers Pvt. Ltd. and Ors.*** reported in ***(2016) 13 SCC 561*** while dismissing the appeal preferred by Delhi Development Authority has held that the respondent Kenneth Builders took all necessary steps to commence the construction activity on the project land but due to the impasse created by the governmental agencies, it could not proceed in the development

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activity. Hence, the provisions of Section 56 of the Contract Act, 1872 found attracted to the facts of the case. Thus directed to refund the deposit made by the Kenneth Builders with interest of 6 % per annum till realisation.

33. In the wake of extra-ordinary events, where the circumstances were beyond human control, the non-commencement of the parking stand work, despite issuance of Letters of Acceptance and work order; on account of Covid-19 pandemic and its consequential lockdown, the petitioner cannot be solely held to be responsible and further burdened with the liability of forfeiture of security deposits and license fees. The *force majeure* clause applies squarely.

34. In the aforesaid facts and circumstances, especially, where the contract is frustrated on account of *force majeure*, this Court finds that the petitioner must not suffer on account of the situation, which was beyond its control. Exercising the equitable jurisdiction of this Court under Article 226 of the Constitution of India we quash the impugned order dated 01.02.2021 produced as Annexure-21 to the writ petition. It is further directed that the forfeited security amounts and license fees paid by the petitioner shall be refunded, preferably within a period of three months from the date of receipt/production of a copy of this order.

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35. Accordingly, the present writ petition stands allowed. There shall no order as to cost.

(K. Vinod Chandran, CJ)

(Harish Kumar, J)

shivank/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	24.04.2024.
Transmission Date	NA

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