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### DELHI HIGH COURT DEALS WITH THE FORCE MAJEURE CLAUSE IN CONSTRUCTION CONTRACTS

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A single-judge bench of the Hon'ble High Court of Delhi (High Court), in its judgment, *MEP Infrastructure Developers Limited v South Delhi Municipal Corporation & Ors.* dated 12 June 2020, held that a *force majeure* clause instantly comes into effect once it has been acknowledged by the other party. Accordingly, in such circumstances, the need to explicitly invoke the *force majeure* clause does not arise.

#### BRIEF FACTS

- The petitioner, a contractor of a highway development project, was liable to pay revenue to the respondent for being allowed to collect toll on a concerned stretch of road as per the terms of a Toll Collection Contract (Contract). The petitioner defaulted in making the weekly payment under the terms of the Contract. Consequently, the payment was directed to be made to the respondent in three equal monthly instalments *vide* an order dated 26 November 2019. Thereafter, *vide* an order dated 2 March 2020, the High Court, reaffirming its earlier order, directed the petitioner to (i) deposit the arrears of the defaulted payment in three equal monthly instalments; (ii) continue to make weekly payments as per the terms of the Contract; and (iii) ensure that payment is made in equal monthly instalments by way of fresh post-dated cheques. Subject to compliance with these directions, no coercive steps were to be taken against the petitioner until the next date of hearing. However, the respondent served a termination notice upon the petitioner on 16 March 2020.
- The petitioner preferred an application before the High Court seeking that the period of national lockdown ought to be taken into consideration while giving effect to the termination notice dated 16 March 2020.
- As per its interim order dated 25 March 2020, the High Court extended the interim protection available to any party, who had such protection as of 16 March 2020. This order was made applicable to all the matters which were pending adjudication before the High Court. Accordingly, the order dated 2 March 2020 stood extended.
- The High Court, in its interim order dated 20 April 2020, observed that despite the defaults of the petitioner, the respondent extended the effective date of termination in view of the nationwide lockdown. Accordingly, given the

respondent's acknowledgement of the extension, the High Court postponed the effective date of termination.

- Thereafter, the petitioner filed an application for modification of the order dated 2 March 2020 on the ground that the Contract had become temporarily non-operational/unfeasible in view of the nationwide lockdown. As per the application, the petitioner, *inter alia*, sought protection against the notice of termination of the Contract along with an extension for payment of the second and third instalments of the arrears.

## ARGUMENTS BY THE PETITIONER

- The petitioner submitted that the Department of Expenditure, Ministry of Finance Ministry of Road Transport and Highways *vide* its circular dated 19 February 2020 (Circular) declared the COVID-19 pandemic a natural calamity and *force majeure* situation. The Circular laid down that *force majeure* clauses could be invoked, wherever considered appropriate. Pursuant to this, the Ministry of Road Transport and Highways (MORTH) in its circular dated 18 May 2020 (MORTH Circular) classified COVID-19 as a *force majeure* event. Pertinently, the MORTH Circular was given retrospective effect. In view thereof, the petitioner contended that the MORTH Circular was a generic order and was applicable to all contracts of development in the road sector. Further, since Government of India had itself declared COVID-19 as a *force majeure* occurrence, an express invocation of the *force majeure* clause was not required for corollary effect under the Contract.
- The petitioner further contended that it was required to pay Rs. 78 Crores to the respondent under the Contract. However, an amount of Rs. 14.5 Crores had been paid to the respondent and the respondent had encashed the bank guarantee of Rs. 64 Crores. Therefore, the respondent had received 0.5 Crores in excess of the amount payable under the Contract, and the petitioner had complied with the order dated 2 March 2020.
- The petitioner put forth that despite repeated requests, no policy or measures had been put in place by the respondent and the underlying disputes between the parties ought to be adjudicated by an arbitrator. Consequently, the petitioner sought appointment of an arbitrator under the terms of the Contract.

## ARGUMENTS BY THE RESPONDENT

- The respondent contended that the *force majeure* clause was invoked by the petitioner on 19 March 2020 which was after the petitioner had defaulted in making payment of three weekly instalments. The respondent further contended that as per the terms of the Contract, the invocation of the *force majeure* clause would come into effect only five days after the said notice i.e., on 24 March 2020. Accordingly, the petitioner could not claim benefit of any circumstance prior to the said date.
- The respondent placed reliance on decision of the Hon'ble Supreme Court in *Energy Watch Dog v Central Electricity Regulatory Commission & Ors* and the judgement of the High Court in *M/s Halliburton Offshore Services Inc. v Vedanta Limited & Anr.* to establish its claim against the invocation of the *force majeure* clause. These judgments observed, *inter alia*, that *force majeure* clauses should be interpreted narrowly, and the parties ought to be compelled to adhere to

contractual terms. Further, excusing non-performance should be only be granted by the courts in exceptional situations.

- With respect to appointment of an arbitrator, the respondent placed reliance on the dicta of the Hon'ble Supreme Court in *Kvaerner Cementation Indian Ltd v Bajranlal Agarwal & Anr* and *State of Kerala & Ors. V. M.K. Jose*, whereby it was held that if a contract does not include an arbitration clause, arbitration cannot be imposed upon the parties without their free consent.

## ISSUES FOR CONSIDERATION BEFORE THE DELHI HIGH COURT

- Whether *force majeure* clause under the Contract between the parties was in force?
- Whether the appointment of an arbitrator was permissible in the absence of an arbitration clause?

## JUDGMENT

- The High Court observed that the Circular and the MORTH Circular referred to suspension of obligations between the parties with effect from 19 February 2020. Consequently, the full operability of the Contract between the parties had been hindered by these orders and this was beyond the control of the petitioner.
- The High Court while analysing the facts of matter further observed that:
  - The respondent itself circulated the Circular which clearly notified COVID-19 as a *force majeure* occurrence. In view thereof, the *force majeure* clause of the Contract became immediately applicable and a notice to that effect was not necessary. Resultantly, the strict timeline under the Contract was put in abeyance as the performance of the Contract was not feasible till restoration of pre-*force majeure* conditions; and
  - As per its order dated 25 March 2020, the High Court had directed that the interim orders obtained till 16 March 2020 would stand extended until 15 May 2020. This timeline was subsequently further extended. Accordingly, the termination notice dated 16 March 2020 issued by the respondent was in clear breach of the order dated 25 March 2020, passed by the High Court, extending the interim protection.
  - In view of the above, the High Court observed that since the *force majeure* clause and the Circular were acknowledged by the respondent by way of its own letter, the *force majeure* clause in the Contract would immediately come into effect.
  - The High Court also observed that since the Circular issued by the Government of India was effected on 2 March 2020, strict timelines with respect to payment could have been kept in abeyance. In view thereof, the High Court suspended the weekly payment as directed to be paid *vide* its order dated 2 March 2020 in view of the *force majeure* clause.
  - In view of the judgments passed by the Hon'ble Supreme Court in *Kvaerner Cementation Indian Ltd v Bajranlal Agarwal & Anr.* and *State of Kerala & Ors.*

V. M.K. Jose, the High Court rejected the appointment of an arbitrator whereby it was held that arbitration cannot be imposed upon the parties without their free consent.

## COMMENT

By way of the present judgment, the High Court clarified that once a party has acknowledged the prevalence of a *force majeure* situation, it cannot challenge the non-performance of the contract which is impacted by the pandemic. It also observed that since the pandemic has been explicitly classified as a *force majeure* event, there would be no requirement for a separate notice postulating the occurrence of the *force majeure* event. This observation acts as a clarification with respect to various road construction projects, which prescribe the issuance of an early warning notice as a pre-requisite for the invoking the *force majeure* clause.

The High Court also considered that despite some relaxations being given by the Central Government and various State Governments, it would not amount to abatement of the *force majeure* event with regard to at least the major contracts such as road construction projects. The High Court further identified the distinct impact of the nationwide lockdown, which is applicable not only to the construction contracts but various other contracts as well which may be affected by the *force majeure* conditions.

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