

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.8307 of 2020

Manish Kumar, aged around 27 yrs, Male, son of Shri Kameshwar Kumar, resident of Village Mahinawa, P.O. + P.S. - Maner, District - Patna, Bihar - 801108.

... .. Petitioner/s

Versus

1. Urban Development & Housing Department, through the Secretary, Vikas Bhawan, Bailey Road, Patna - 800001.
2. Executive Officer, Nagar Panchayat, Maner, District - Patna.
3. Department of Transport, through the Secretary, Vishwesaraiya Bhawan, Bailey Road, Patna – 800015.
4. Nagar Panchayat, Maner through the Executive Officer, Patna

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Apurv Harsh, Advocate

Mr. Manu Tripurari, Advocate

For the Respondent No.2: Mr. Anil Kumar, Advocate

Mr. Upendra Pratap Singh, A.C. to S.C. – 4

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
CAV ORDER

9 22-03-2021 Heard Mr. Apurv Harsh, learned counsel for the petitioner, Mr. Anil Kumar, learned counsel appearing for the respondent no. 2 – Executive Officer, Nagar Panchayat, Maner and Mr. Upendra Pratap Singh, learned A.C. to Standing Counsel No. 4.

2. The present writ application has been filed for a direction to the respondent authorities to extend the time period of contract allotted in favour of the petitioner for collection of parking charges within the area of Nagar Panchayat- Maner or



in the alternative refund of the entire deposited amount of Rs. 17,35,080/- paid by the petitioner as advance / security to the respondent no. 2.

3. The main ground on which the petitioner has filed the present writ application is that the petitioner could not utilize the parking area and could not realize the parking charges due to the intervening pandemic situation and complete national lockdown imposed in the State of Bihar till 31.07.2020.

4. The brief facts giving rise to the present writ application is that the respondent no. 2 – Executive Officer, Nagar Panchayat, Maner came out with a notice dated 27.02.2020 inviting tender for various purposes in the Nagar Panchayat, Maner including collection of parking charges of bus / jeep and Ramghat vehicle parking as described at serial no. 1 of the tender notice dated 27.02.2020 (Annexure – “1” to the writ petition) for the financial year 2020-21. The petitioner was declared the highest bidder in the said tender and deposited an amount of Rs. 17,35,080/- on 12th & 13th March, 2020 vide receipts dated 12.03.2020 and 13.03.2020 and also submitted security cheques bearing nos. 000005 and 000007 of the Bank of Baroda, Digha Branch for the balance amount of Rs. 17,33,994/-. The period for which the contract was awarded to



the petitioner was from 01.04.2020 to 31.03.2021. The respondent no. 2 thereafter issued a letter bearing no. 225 dated 18.03.2020 (Annexure – 3 to writ application) whereby the petitioner was allowed to realize the parking charges from bus, jeep and other vehicles within the area of Nagar Panchayat, Maner starting from the period 01.04.2020 to 31.03.2021. The highest amount quoted by the petitioner is mentioned in the letter of award (i.e. Annexure- 3 to the writ petition) as Rs. 34,69,000/-.

5. The further case of the petitioner is that the nation faced severe threat and crisis due to COVID- 19 pandemic in March, 2020 and by way of precaution and in order to prevent the disease from spreading throughout India, the Government of India after due consultation with the States including the State of Bihar enforced complete lockdown throughout India on 24.03.2020. The lockdown was extended from time to time and as a result of lockdown all institutions and Offices including public and private establishments were closed down and plying of all vehicles was prohibited in Bihar including Patna excluding vehicles belonging to super emergency services.

6. In the light of above mentioned development / lockdown coming into effect within six days after issuance of



parking allotment letter no. 225 dated 18.03.2020 (Annexure – 3 to the writ application) the parking area was closed down even before the tender period starting from 01.04.2020. The writ petitioner further states that without having regard to such prevailing exigency due to COVID -19 pandemic and usual invoking of force majeure which has been claimed by the State Government and its agencies for various contracts / projects the respondent no. 2 has been pressurizing the petitioner to make payment of the balance bid amount and is holding security cheques deposited by the petitioner of Rs. 17,33,994/-. The petitioner made several representations before the respondents and requested for extension of the contract since there has been no operations owing to the lowkdown and also no revenue could be generated but the respondents did not take any decision either for extension of the period of tender or refund of earnest money / deposited (Annexure- P/4 Series to the writ petition are the copies of the representations submitted by the petitioner). Thus, the petitioner stated that in the light of the pandemic and prevailing situation it would be just to grant six months extension to the petitioner or in alternative to refund the amount paid by the petitioner i.e. Rs. 17,35,080/-.

7. A counter affidavit has been filed by respondent



no. 2 / Executive Officer, Nagar Pancyahat, Maner stating therein that the petitioner was allotted the tender / work for collecting parking charges upon payment of Rs. 34,69,000/- for the period 01.04.2020 to 31.03.2021 and the petitioner deposited the security money and further he had to deposit the rest of the tender money along with stamp duty of 3% as per the agreement / terms and conditions of the agreement notice. It has further been stated that the petitioner had to deposit Rs. 17 Lacs out of the total bid amount of Rs. 34,69,000/- but the cheque of Rs. 866994/- deposited on 30.06.2020 on behalf of the petitioner bounced due to lack of sufficient balance in the account of the petitioner and further the stamp duty of 3 % was not deposited. The entire conduct of the petitioner shows that the petitioner himself violated the terms and conditions of the tender notice dated 27.02.2020 and accordingly as per the terms and conditions of the tender notice and considering the representation of the petitioner dated 28.08.2020 seeking surrender of the tender allotted to him, the respondent no. 2 cancelled the “*parwana*” issued in favour of the petitioner by a speaking and reasoned order vide letter no. 791 dated 29.10.2020 (Annexure – “A” to the counter affidavit) and further stopped the petitioner from making any collections from



the allotted area with effect from 01.11.2020.

8. The petitioner filed an interlocutory application bearing I.A. No. 1 of 2020 for quashing the letter no. 791 dated 29.10.2020 issued by the respondent no.- 2 whereby the respondents have cancelled the tender of the petitioner with effect from 01.11.2020 stating therein that the action of the respondents is contrary to public interest and general public policy inasmuch due to the lockdown the State itself prevented the petitioner from carrying out its part of the contract thereby frustrating the entire contract and further exasperated the contract by demanding the full amount for entire period of lockdown when the parking area was non- operational due to Government's directives. The petitioner further stated that he has proved his *bona fide* by taking every possible step including a proposal to grant extension of six months or in the alternative refund of the deposited amount of Rs. 17,35,080/-.

9. A supplementary counter affidavit has been filed on behalf of the respondent no. 2 in response to the I.A. No. 01 of 2020 filed by the petitioner stating therein that the petitioner was drawing benefits of the tender and was collecting the parking fees from the allotted parking area and he himself deposited cheques in the office of Nagar Panchayat, Maner but



the same was bounced due to insufficient balance which violates the terms and conditions of the tender and accordingly the allotment was rightly cancelled vide order dated 29.10.2020.

10. A supplementary affidavit has been filed by the petitioner bringing on record the Government of India / Government of Bihar notifications issued from time to time regarding imposition and extension of lockdowns.

11. Learned counsel for the petitioner in support of his contention raised in the writ petition submits that admittedly the work for collection of parking charges was allotted to the petitioner on 18.03.2020 (Annexure - "3" to the writ petition) to be effective from 01.04.2020 to 31.03.2021. It is further submitted that lockdown due to COVID-19 pandemic was imposed throughout India on 24.03.2020 i.e. before 01.04.2020 and there was restriction on plying of vehicles which resulted in non-operation of the collection of parking charges by the petitioner from the parking area allotted to him at Maner Nagar Panchayat. The lockdown was extended from time to time and unlock process was initiated from 1st June, 2020 in a phased manner and was applicable until June 30th, 2020. However, there was restriction on the movement of vehicles and complete lockdown was imposed in the containment zone.



Thereafter, Unlock - 2 was introduced effective from 1st July, 2020 which allowed further relaxation in the movement of people. However, States were granted liberty to implement their own restrictions. The Home Department, Government of Bihar vide order dated 30.07.2020 initiated Unlock-3 process and imposed certain restrictions on the movement of traffic and the same was allowed only through valid PASS system. However, from perusal of Annexure – 13 to the supplementary affidavit filed by the petitioner it would be evident that all transport services were kept suspended.

12. Learned counsel relying upon Annexure – 14 to the supplementary affidavit filed by the petitioner submits that vide order dated 17.08.2020 the restrictions on vehicles movement and additional restrictions were extended up to 06.09.2020. The Home Department, Government of Bihar vide order dated 01.10.2020 extended lockdown in the containment zone till 31.10.2020 and the guidelines of the Central Government was enforced effectively across the State. The petitioner further submitted that representations dated 05.08.2020 & 28.8.2020 (Annexure “P-4” to the writ petition) were submitted by the petitioner before the respondent authorities wherein categorical request was made for extension



of the contract period for further six months owing to lockdown inasmuch as the petitioner could not collect parking charges and no revenue was generated due to stoppage / restrictions on vehicles movement. The petitioner in alternative requested for refund of the earnest money deposited by him.

13. Learned counsel for the petitioner vehemently submits that the respondents authorities have failed to appreciate that complete ban on movement of transport services due to lockdown made it impossible and impracticable for the petitioner to operate the allotted parking area at Maner Nagar Panchayat and the respondents were adamant not to grant extension of period of contract nor willing to refund the deposited amount. The petitioner raised a plea that the contract became impossible to perform on account of the circumstances beyond control of the petitioner and this aspect of the matter is covered by Section 56 of the Indian Contract Act, 1872 and the respondents authorities ought to have appreciated the outcome of frustration of contract inasmuch as the situation was beyond control of the petitioner. In support of his argument learned counsel for the petitioner relied upon a judgment of the Hon'ble Apex Court reported in **(2016) 13 Supreme Court Cases 561 (Delhi Development Authority versus Kenneth Builders and**



Developers Private Limited and Others).

14. On the other hand, learned counsel for the respondent no. 2 submits that as per the allotment letter entire money was to be deposited by the petitioner on issuance of the work order but the petitioner failed to deposit the total bid amount and only deposited half of the amount to the tune of Rs. 17,35,080/- which amounts to violation of the terms and conditions of the agreement / allotment letter and the respondents have rightly cancelled the agreement vide letter no. 791 dated 29.10.2020.

15. I have heard learned counsel for the parties and have gone through the entire pleadings. It appears that within six days after issuance of allotment letter no. 225 dated 18.03.2020 in favour of the petitioner permitting him to collect parking charges starting from 01.04.2020 to 31.03.2021 nation wide lockdown was imposed effective from 24.03.2020 due to which no vehicles were being parked in the parking area and the same was closed even before the contract / tender period was started effective from 01.04.2020. It further appears to this court that petitioner showed his *bona fide* and filed representations in August, 2020 requesting therein for extension of the contract period for further six months or for refund of the earnest money



stating therein that no revenue could be generated owing to lockdown. From perusal of Annexure “13” to the supplementary affidavit it is evident that Home Department, Government of Bihar came out with an order dated 30.07.2020 by which Unlock- 3 was started but still all transport services were kept suspended.

16. I have gone through the judgment of the Hon’ble Apex Court relied upon by learned counsel for the petitioner in DDA Case (Supra) and it appears that the main question involved in the said judgment was that whether the development agreement between DDA and the developer-Kenneth Builders was frustrated within the meaning of Section 56 of the Contract Act, 1872 due to some intervening circumstances not contemplated by either party. Paragraphs nos. 28, 29 & 30 of the aforesaid judgment needs to be quoted, which are quoted hereinbelow:-

“28. Be that as it may, it appears to us that Kenneth Builders did take 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 activity. We agree with the learned counsel for Kenneth Builders that under these circumstances, the provisions of Section 56 of the Contract Act, 1872 (the



Contract Act) would be attracted to the facts of the case.

29. Section 56 of the Contract Act reads as follows:

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

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

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.”

30. The interpretation of Section 56 of the Contract Act came up for consideration in Satyabrata Ghose v. Mugneeram Bangur & Co. It was held by this Court that the word “impossible” used in Section 56 of the Contract Act has not been used in the sense of physical or literal impossibility. It ought to be interpreted as impracticable and useless from



the point of view of the object and purpose that the parties had in view when they entered into the contract. This impracticability or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated. However, if the intervening circumstance was contemplated by the parties, then the contract would stand despite the occurrence of such circumstance. In such an event, “there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.” This is what this Court had to say: (AIR pp. 46-49, paras 9-10 & 17)

“9. 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 at 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 finds it impossible to do the act which he promised to do.

10. Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

The parties shall be excused, as Lord Loreburn says:

“.....If substantially the whole contract becomes impossible of performance or in other words *impracticable* by some cause for which neither was responsible.

17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect



the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in *Matthey v. Curling*:

“... a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King’s enemies... or *vis major*.”

This being the legal position, a contention in the extreme form that the doctrine of frustration as recognized in English law does not come at all within the purview of Section 56 of the Contract Act cannot be accepted.”

17. Insofar as the present case is concerned certainly the petitioner did not contemplate at the time of entering into contract that there would be complete nationwide lockdown and all vehicular movement would be stopped and / or restricted. It is due to these circumstances the petitioner could not perform the obligations imposed upon him for collection of parking charges. It is these circumstances that frustrated the performance of contract making it impossible and impracticable for the petitioner to operate the parking area and in these circumstances



before expiry of contract period petitioner made a reasonable offer either to extend the tenure of contract by further six months or to refund the earnest money deposited by the petitioner, but the respondent no. 2 without application of mind, in a mechanical manner, has cancelled the agreement vide letter no. 791 dated 29.10.2020.

18. In view of the aforesaid discussion based upon the conspectus of facts and laws placed before this court, this court is satisfied that unforeseen circumstances had intervened making it impracticable for the petitioner to start collection of parking charges effective from 01.04.2020 and it could safely be said that contract between petitioner and respondent no. 2 became impossible to perform within the meaning of Section 56 of the Contract Act, 1872. Therefore, I reject the contention of the respondents that petitioner violated the terms and conditions of the contract.

19. As a result, this writ application is allowed.

20. The impugned letter of cancellation i.e. letter no. 791 dated 29.10.2020 (Annexure "6" to I.A. No. 1 of 2020) is hereby quashed and the respondent no. 2 / Executive Officer, Nagar Panchayat, Maner is directed to refund a sum of Rs. 17,35,080/- to the petitioner within a period of two months from



the date of receipt / production of a copy of this order. However,
there shall be no order as to cost.

(Anil Kumar Sinha, J)

Praful/- A.F.R.

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