IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 944 OF 2022
IN
NOTICE OF MOTION NO.2577 OF 2022
IN
SUIT NO. 1644 OF 2022

Deluxe Caterers Pvt. Ltd. … Appellant

Versus

1. M/s. Narayani Associates
2. Trade Wings Ltd.
3. Narayani Hospitality and Academic Institution Pvt. Ltd. …Respondents

WITH
INTERIM APPLICATION NO. 18715 OF 2022
IN
APPEAL FROM ORDER NO. 944 OF 2022

M/s. Narayani Associates … Applicant

In the matter between

Deluxe Caterers Pvt. Ltd. … Appellant

Versus

1. M/s. Narayani Associates
2. Trade Wings Ltd.
3. Narayani Hospitality and Academic Institution Pvt. Ltd. …Respondents

Mr. Ravi Kadam, Senior Advocate with Mr. Prateek Sakseria, Mr. Soham Khinkhabwala, Mr. Priyam Amin and Mr. Kaushal Parsekar i/b. Desai Desai Carrimjee and Mulla for Appellant.

Mr. S. U. Kamdar, Senior Advocate with Ajay Panicker i/b. Ajay Law Assocaites, for Respondent No. 1.

Mr. Aseem Naphade with Mr. Arvind Tiwari i/b. Mr. Atal Dubey for Respondent Nos. 2 and 3.

CORAM: G. S. KULKARNI, J.

Reserved on 15 February, 2023
Pronounced on 17 February, 2023

JUDGMENT :

1. This Appeal from Order assails an order dated 27 September, 2022 passed by the City Civil Court at Mumbai whereby Notice of Motion No. 2577 of 2022 filed by the appellant(original plaintiff) in Suit No. 1644 of 2022 has been dismissed.

2. A short issue which arises for consideration in this appeal is as to whether the term of the Conducting Agreement (for short **"the Agreement"**) dated 20 November, 2017 entered, between respondent no. 1 and the appellant would stand extended by virtue of the appellant invoking the ***force majeure*** clause.

3. The facts relevant for adjudication of this appeal are: Respondent nos. 2 and 3 (original defendant nos. 2 and 3) are owners of two units, bearing Unit Nos. 4129 and 4130 situated on the ground floor (part) of the building known as "Kalaghoda Buildings Bhadekaru Cooperative Premises Society Ltd." situated at 30, K. Dubash Marg, Kalaghoda, Fort, Mumbai – 400 001 (for short "**suit premises**"). Respondent nos. 2 and 3 have let out the suit premises on leave and licence to respondent no. 1 (original defendant no. 1) under a registered Leave and Licence Agreement dated 18 October, 2017. In turn,

respondent no. 1 with the consent, permission and authorization of respondent nos. 2 and 3 has entered into the suit agreement dated 20 November, 2017 with the appellant whereunder respondent no. 1 has permitted and authorized the appellant to use and occupy the suit premises for the purpose of running and operating its restaurant known as "Copper Chimney", on terms and conditions as agreed between the parties and as contained in the Agreement. The agreement describes the appellant as "Conductor" and respondent no. 1 as "Narayani". Under Article 6 of the agreement, the parties have agreed that the appellant shall *inter alia* pay respondent no. 1 a fixed fee of Rs.6,00,000/- per month and in addition to the Fixed Conducting Fee, the appellant was to pay an additional fee equivalent to 18% of Net Annual Turnover above Rs.200 lakhs for the financial year 2017-2018 and with agreed increases as set out in Article 6.2 thereof; under Article 7, it was agreed between the parties that under the Leave and Licence Agreement entered between respondent nos. 2 and 3 and respondent no. 1, respondent no. 1 was entitled to use and occupy the suit premises for a period of five years, effective from 1 October, 2017 and expiring on 30 September, 2022, being the licencee of the suit premises. The period of the Conducting Agreement as agreed between respondent no. 1 and appellant as recorded in "Clause 16" was from 1 October, 2017 till 30 September, 2022. Article 19 of the Agreement is the "*Force Majeure*" Clause. Article 32 of the agreement is a Clause in regard to "No Oral Change". These

being the relevant clauses and subject matter of discussion at the bar, the same are required to be noted hereunder:

> *"Article 19. FORCE MAJEURE*
>
> *In the event either Party is unable to perform its obligations under this Agreement for a period greater than 60 (sixty) days as a result of any failure or delay where such failure or delay is due to any cause or causes beyond its control, including but not limited to flood, damage by the elements, act of God, strike, lock out or other labour disorders, act of foreign or domestic de jure or de facto Government, whether by law, order, legislation, decree, rule, regulation or otherwise revolution, civil distrubance, breach of the peace, declared or undeclared war, act of interference or action by civil or military authorities, terrorist acts, or due to any other cause beyond the Party's control notwithstanding what is stated hereinabove, the other Party shall be entitled to fortwith terminate this Agreement.*
>
> *Article 32 NO ORAL CHANGE*
>
> *This Agreement cannot be changed, modified or supplemented in any manner except by an instrument in writing duly executed by the Parties. Any amendment, addition or variation to this Agreement shall be valid and binding only if the same are mutually agreed upon by the Parties and executed in writing and signed by the Owners /Narayani and the Conductor."*

4. The dispute between the parties has arisen on account of the fact that during the five years term of the agreement, the nation was hit by the Covid-19 pandemic with effect from the month of March, 2020. Confronted by the situation as created by the pandemic, the appellant addressed a letter dated 23 March, 2020 to respondent no. 1 invoking the *force majeure* clause recording that the agreement will remain in 'suspended animation' until such time that the existing event of *force majeure* continues. It was requested that the appellant therefore be *interalia* exempted/excused from performing its obligations of payments of conducting fees, CAM charges, utility costs, interest, escalation and other monetary obligations pursuant to the agreement. The

fulcrum of the dispute being the letter of the appellant dated 23 March, 2020 addressed to respondent no.1 the relevant extract of the said letter is required to be noted, which reads thus:-

> *"In the given circumstances of us having validly invoked and declared Force Majeure Event, we put you on notice that the Agreement will remain in suspended amination until such time that the existing Force Majeure Event continues, and we are also therefore inter alia be exempted/excused from performing our obligations of payments of conducting fees, CAM charges, utility costs, interest, escalation and other monetary obligations pursuant to the said Agreement.*
>
> *Hence we reiterate, with immediate effect, there shall be waiver of all penal and/or interest charges towards delay fee/charge/payments along with any foreseeable escalation in our rentals / fees for a period of two (2) months from the date of this letter.*
>
> *Kindly note that we are issuing this notice without prejudice to our right to modify our requests after evaluating the impact of the Force Majeure Event as detailed in the Agreement referred above and also in case of any further developments which may affect us directly or indirectly.*
>
> *We therefore reiterate that you please treat this letter as our formal written notice of Force Majeure Event as required to be provided under the said Agreement and applicable with immediate effect."*

5. On 25 March, 2020, respondent no. 1 addressed an email to the appellant stating that respondent no. 1 was in receipt of appellant's mail dated 23 March, 2020 being the *force majeure* notice, and that respondent no. 1 by its earlier email had informed and clarified that respondent no. 1 was not in a position to suspend the appellant's obligation under the agreement for the various reasons as mentioned in the said mail. It was stated that respondent no. 1's emails dated 19 March, 2020 and 21 March, 2020 recorded that Chairman Dr. Mittal and Mr. Sunil Kapur already had discussions in this

regard, and that respondent no. 1 was confident that the appellant will understand, agree and abide by the same.

6. By a further email of respondent no. 1 dated 9 April, 2020 addressed to the appellant respondent no. 1 stated that it accepted the appellant's notice dated 23 March, 2020, invoking *force majeure* and recorded that as per the provisions of Article 19 of the agreement, the appellant should take note that respondent no. 1 shall be entitled to forthwith terminate the agreement on the 61st day, i.e., 23 May, 2020, if the appellant continued to remain unable to perform its obligations under the agreement. It was also recorded that the notice of the appellant invoking *force majeure* is from 23 March, 2020. Respondent no. 1 also requested the appellant to pay all dues towards conducting fees, CAM charges and variable fees upto 22 March, 2020. The relevant extract of the said reply of respondent no. 1 is required to be noted, which reads thus:

> *"We accept your notice invoking Force Majeure dated 23 March 2020. As per provisions of clause under Article 19 which is reproduced below, kindly note that we shall be entitled to forthwith terminate this agreement on 61st day i.e. on 23 May 2020, if you continue to remain unable to perform your obligations under this Agreement.*
>
> *Further your notice invoking Force Majeure is from 23rd March 2020.*
>
> *We request you to pay all dues towards conducting fees, Cam charges and variable fees upto 22nd March 2020. We will send you the calculations of the same by a separate email.*

7. On 24 April 2020, Respondent no. 1 addressed a further email to the appellant referring to the appellant's *force majeure* notice dated 23 March, 2020, as also referring to its reply dated 9 April 2020, *interalia* stating that the appellant was already put to notice that as per Article 19, the agreement the agreement will stand terminated on the 61st day, i.e., on 23 May, 2020, if the appellant failed to pay the conducting fees and other amounts. It was recorded that if the appellant failed to pay conducting fees and CAM charges for the full month of March 2020 and April 2020 and additional fees for the year 2019-2020 on or before 22 May, 2020, the conducting agreement will stand terminated forthwith from 23 May 2020 and all consequences of termination will follow. The contents of the said email of respondent no. 1 are required to be noted, which reads thus:

> *"Dear Ritesh*
>
> *This refers to your Force Majeure Notice dated 23rd March, 2020 wherein you invoked Article 19 of the Conducting Agreement and sought exemption from payment of conducting fees, Cam charges, interest, penalty and other monetary obligations under the said conducting agreement.*
>
> *We had in our multiple conversations with Mr. Sanju Arora and Mr. Sunil Kapur given clarity to Article 19 of the Conducting Agreement. The clause very clearly states that if one party fails to perform its obligation under this agreement, which in this case is payment of conducting fees, cam charges, interest, penalty and other monetary obligations, for more than 60 days then the other party (which is Narayani Associates) can terminate this agreement forthwith.*
>
> *In our reply dated 9th April, 2020, we have accepted your notice under Article 19 of the Conducting Agreement invoking force majeure and we have given you a notice of termination under the same Article 19. The conducting agreement will stand terminated on the 61st day, i.e., on 23rd May, 2020 if you fail to pay conducting fees (both fixed and additional), cam charges, any other monetary obligations under this agreement, which has become due and payable under the agreement, before 22nd May, 2020.*

> *To reiterate the above point, kindly note that if you fail to pay conducting fees and cam charges for the full month of March 2020 and April 2020 and additional fees for the year 2019-2020 on or before 22 May, 2020, the conducting agreement will stand terminated forthwith from 23 May 2020 and all consequences of termination will follow.*
>
> *We also request you to clear all bills upto the date of your force majeure notice as per the amounts mentioned in bills sent to you."*

8. The above email of respondent no. 1 was replied by the appellant by its letter dated 12 May, 2020 whereby the appellant stated that the interpretation of respondent no. 1 of the *force majeure* clause was not correct and that the *force majeure* clause in the agreement was to save the performing party from the consequences of anything over which he has no control and hence the appellant was not liable for payment of conducting fees and any additional charges as per the agreement during the said period. It was recorded that the invocation by respondent no. 1 of the termination right under Article 19 of the agreement was not tenable. It was also stated that in the event of any purported termination attempted by respondent no. 1, the appellant shall rightfully claim the full value of all capital assets and investments along with any monies expended by the appellant for the upkeep of the premises. It was recorded that in the event of termination, the appellant shall have the right to demand from respondent no. 1 an amount of Rs.25 crores as damages including amounts due to loss of profit etc. The appellant accordingly called upon respondent no. 1 to withdraw the said termination of the agreement as

informed to the appellant by respondent no. 1's email dated 24 April, 2020 and 9 April, 2020.

9. Respondent no. 1 replied the appellant's letter dated 12 May, 2020 by its email dated 13 May, 2020 thereby recording that there was no flawed understanding of the *force majeure* clause by respondent no. 1 and that respondent no. 1 fully understood as to what was agreed in the *force majeure* clause. It was recorded that the parties had agreed that if either party is unable to perform its obligations under the agreement, the other party is entitled to forthwith terminate the agreement. It was also recorded that respondent no. 1 was demanding payment of conducting fees and CAM charges for the period during which the appellant was operating from the premises and was not claiming any amount for the period from which *force majeure* notice was issued. It was hence stated that respondent no. 1 was withholding its rights under the agreement to terminate the agreement, if the appellant failed to honour its obligations under the agreement on or before 22 May, 2020, failing which the Agreement shall stand terminated on 23 May, 2020.

10. On such backdrop it appears that the appellant continued to occupy and also conduct its business. On 10 May, 2021, the appellant addressed an email to respondent no. 1 *inter alia* stating that the appellant had started its operations with optimism post government allowing restaurant bars to open at

the end of 2020 and that the appellant was hopeful that one would see a recovery to the pre-covid numbers by early to mid 2021. It was stated that however, the new government restrictions and orders, were driven by the second wave, by which the operations were required to be shut since April 2021. The appellant hence requested for waiver on rentals and other occupational costs like CAM fees during the lockdown. However, the request of the appellant by its email dated 10 May, 2021 was turned down by respondent no. 1 by its email dated 11 May, 2021, wherein the appellant *inter alia* recorded as under:

> *"It was very clearly agreed during the discussion that from April 2021, the concession will not apply and Rs.6 Lacs + gst will be paid as per the conducting agreement per month. We had also conveyed this to Mr. Reetesh Shukla recently in response to his email dated 10th April 2021 wherein he requested to charge Rs 3 lacs instead of Rs 6 lacs as conducting fees for the months of April 21 to June 21.*
>
> *After all the above discussions and interactions during the month of April 2021, you are now sending request for waiver which is not acceptable to us. We also are going through a very difficult phase and almost all our businesses are shut. The banks are not waiving any of their interest or loan installments. They have compelled us to deposit all receipts of conducting fees against their interest and installments and non compliance of this condition will be treated as a default by them and appropriate actions will be initiated by them.*
>
> *Kindly note that your non payment of conducting fees and Cam charges for the month of April 2021 has constituted a breach of the terms and conditions of various clauses of Conducting Agreement. We call upon you to make the payment immediately and rectify this breach, failing which we will be compelled to initiate appropriate actions as per the terms of Conducting agreement."*

11. There was further correspondence between the parties which was mostly in regard to the demand by respondent no.1 on the amount of rentals and the other charges from the appellants and the response of the appellant of its

inability to pay the full amounts. It appears from the record that such correspondence ultimately ended in respondent no.1 addressing a notice dated 31 May, 2022 by which respondent no.1 informed the appellant that conducting agreement would expire by efflux of time on 30 September, 2022, the appellant was hence put to a notice to vacate the premises on or before 30 September, 2022. Respondent no.1 also informed the appellant that it had no intention of renewing the agreement after its expiry on 30 September, 2022 and that such intimation was being given in advance so as to enable the appellant to make alternate arrangements so that the suit premises are vacated on or before 30 September, 2022.

12. In the above circumstances the appellant approached the City Civil Court by filing the suit in question *inter alia* praying for the following substantive reliefs:

> "*(a) This Hon'ble Court be pleased to grant leave under Order II Rule 2 of Code of Civil Procedure, 1908;*
> *(b) This Hon'ble Court be pleased to quash and set-aside the Impugned Notice dated 31 May, 2022;*
>
> *(c) This Hon'ble Court, be pleased to pass an order for permanent injunction restraining the Defendants, their servants, officers, agents from entering upon and/or disturbing and/or interfering with the quiet and peaceful use, occupation and possession by the Plaintiff of the suit premises;*
>
> *(d) This Hon'ble Court be pleased to declare that the Term of the said Conducting Agreement stood extended from 30 September 2022 upto 08 October 2024, pursuant to the Covid-19 period and that the Plaintiff be allowed to peaceably use and occupy the suit premises upto 08 October, with renewal thereafter for a further period of 59 months;*
>
> *(e) This Hon'ble Court, be pleased to pass an order for permanent injunction restraining the Defendants, their servants, officers, agents from selling, alienating,*

transferring and/or inducting their party in to the suit premises;

(f) This Hon'ble Court, be pleased to pass an order for permanent injunction restraining the Defendants, their servants, officers, agents from issuing any further notices of termination/vacation to the Plaintiff;

13. In the appellant's suit the Notice of Motion in question came to be moved by the appellant praying for a relief of temporary injunction to restrain the respondents from disturbing and interfering with the appellant's quiet and peaceful possession and occupation of the suit premises and for a further relief to restrain the respondents from selling, eliminating, transferring and/or inducting a third party into the suit premises, as also for a direction that status quo in respect of the suit premises under the conducting agreement be ordered; and further restrain the respondents from issuing any further notice of termination / vacating of the suit premises by the appellants.

14. The respondents filed their independent replies to the appellant's Notice of Motion, opposing the interim reliefs prayed by the appellant. The respondents contended that the agreement had come to an end by efflux of time on 30 September 2022 . It was contended that the appellants invoking *force majeure* clause would not amount to any modification of the agreement, so as to extend the term of the agreement beyond 30 September, 2022. There are other contentions raised in regard to the rights vested in respondent No.1

under the conducting agreement to terminate the conducting agreement, however, the same need not be discussed in detail.

15. The learned trial Judge examined the rival contentions and dismissed the notice of motion by the impugned order. The learned trial Judge in passing the impugned order has observed that the bare reading of the *force majeure* clause did not provide for the agreement to remain under suspended animation until such time till the *force majeure* continued. The learned trial Judge also observed that there is nothing on record to show that the parties had mutually agreed to renew or extend the agreement. The relevant observations in that regard are required to be noted which reads thus:-

> "36. *In view of my above discussion and in view of facts and circumstances of the case, it reveals that conducting agreement is expiring on 30th September 2022. There is nothing on record to show that parties have mutually agreed to renew or extend of the agreement. Article-16 of the conducting agreement dealt with renewal of agreement by mutual consent. Here further to be seen that neither defendant No.1 has agreed to get extend conducting agreement nor leave and license was extended by defendant Nos.2 & 3 in favour of defendant no.1. As per Article-21 of the conducting agreement no alteration or amendment to any such obligation will be effective or enforceable unless made in writing and signed by all parties to this Agreement. Therefore in the absence of any agreement or any written amendment for extension or renewal of the same, prima facie the plaintiff is not entitled for reliefs claim for extension of the agreement. So far as Force Majeure plea is concerned, as contended in Article 19 of the conducting agreement, it also does not give rise to any cause of action, as it provides, if either parties unable to perform its obligations for period greater than 60 days, as a result of any Force Majeure event, then either party shall be entitled to forthwith terminate the agreement. Inspite of having this knowledge, the plaintiff chose not to terminate the contract, but to continue in occupation of the suit premises. The Force Majeure clause no where allowed the plaintiff to seek extension of conducting agreement for the lock-down period of Covid-19, without consent of the defendants.*
>
> *37. The plaintiff being conductor of business of defendant No.1 does not have any right, title and interest in the business premises except to conduct business from suit premises till permission is withdrawn by the owner of the business or the*

agreed period has been elapsed. The plaintiff cannot claim any right which defendant No.1 does not possess. The plaintiff/conductor not in possession of suit premises cannot seek injunction to protect his possession after expiry of conducting agreement on 30.09.2022. It is well settled that no injunction can be granted against true owner of suit premises. Therefore considering overall facts and circumstances of the case as well as ratio laid down in above authorities, in my view the plaintiff failed to make out prima facie case in his favour, the needle of balance of convenience is also not tilt in favour of the plaintiff and thus question of causing any irreparable loss to the plaintiff, if injunction is refused, does not arise at all. Hence I answer to point no.1 in negative."

16. The learned trial Judge having dismissed the Appellant's notice of motion, the Appellant is before this Court in the present proceedings.

17. Mr. Ravi Kadam learned Senior Counsel for the appellant in assailing the impugned order passed by the learned trial Judge has made the following extensive submissions :-

i. The appellant having invoked the *force majeure* clause by its letter dated 23 March, 2020, respondent No.1 was put to notice that the conducting agreement will remain in suspended animation until such time the *force majeure* event continues. The consequences of such invocation being that the appellant was exempted/excused from performing its obligations of payments of conducting fees stamp charges, utility cost CAM charges, utility cost interest, escalation and other monetary obligation under the said agreement and that with immediate effect there was waiver of all penal and or interest charges towards delay fees/charge payments along with any foreseeable escalation in the

rental/fees for a period of two months from the date of the said invocation of *force majeure*. It also had legal consequences implicit in such invocation in regard to the extension of the term of the agreement.

ii. It is submitted that the *force majeure* notice was accepted by respondent No.1 by its e-mail dated 9 April, 2020 addressed to the appellant, once such notice was accepted the said two letters between the appellant and respondent No.1, constitute modification of the terms and conditions of the conducting agreement and/or a novatio that the term of the conducting agreement of five years expiring on 30 September, 2022 stood extended by a further period of pandemic i.e. from March 2020 to 2022.

iii. By virtue of such novatio the appellant was within its rights and entitled to an extension of the term of the agreement for a further period of two years from 30 September, 2022, on the same terms and conditions as originally agreed in the agreement.

iv. It is submitted that respondent No.1's reading of the *force majeure* clause conferring a right in respondent No.1 to terminate the conducting agreement is misconceived as the parties had changed their position due to the event of *force majeure* and more particularly by virtue of the the appellant invoking the *force majeure* clause, which was to operate till the *force majeure* ceased in March, 2022.

v. There is no consideration of the appellant's case in the impugned order on exclusion of the period of *force majeure* from the agreed contractual period of five years. There is no application of mind to the consequence as brought about by the letter dated 23 March, 2020 of the appellants invoking the *force majeure* clause and its acceptance by respondent no.1 by its letter dated 9 April, 2020 as addressed to the appellant namely the legal effect that the period of the contract stood extended by exclusion of the *force majeure* period. Once a modified contract of such nature as contained in the exchange of the said letters between the parties is created the parties cannot go behind such modified terms of the contract. It is well established that by correspondence between the parties a written contract can be novated. This proposition is supported by placing reliance on the decision in ***Perry Vs. Suffields, Limited***[1]**.**

vi. In rejecting the reliefs as prayed in the notice of motion by the impugned order the trial Court has in fact non-suited the appellant at the interim stage of the suit. In the facts of the case, certainly it was not a situation, that the agreement had expired by efflux of time. The Appeal on such submissions is required to be allowed.

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1 *1916. 2 CH 187*

18. On the other hand Mr. Kamdar learned Senior Counsel for the Respondent No.1 has made the following submissions:-

i. At the outset, it is submitted that the response of respondent No.1 dated 9 April, 2020, to the appellant's letter dated 23 March, 2020 invoking the f*orce majeure* clause does not indicate any exclusion/extension of the contract period by two years,with effect from 30 September, 2022. In fact such letter of Respondent No.1 not only recognizes but reiterates respondent No.1's right under Article 19 to terminate the agreement.

ii. There is no concluded contract between the parties as alleged by the appellant for extension of the contract period by two years and/or by exclusion of the alleged two years of the *force majeure* period.

iii. **In fact the appellant was** running business after a small initial period of the pandemic and hence the appellant's contention that by invoking article 19 the *force majeure* clause would bring an effect of exclusion of the period of two years is not only contrary to the said contractual clause but also not supported by the record.

iv. In any event even if some disturbance during the pandemic period is to be presumed, the case of the appellant that agreement has remained in a suspended animation for two years cannot be accepted in the

absence of any *prima faice* material that the appellant was totally closed for a period of two years. The correspondence in that regard is infact contrary to such contention of the Appellant.

v. The record is replete with continuous assertion of respondent no.1 asserting its right to terminate the agreement, independent of the fact that the appellant was not making payments under the conducting agreement for the period the appellant was infact running the restaurant after invoking the *force majeure* clause.

vi. The learned trial judge has examined the contentions as urged by the parties and on an appropriate consideration of the terms of the contract and the facts has passed an appropriate order which does not deserve interference of this Court.

vii. The appellant had failed to make out any *prima facie* case for an order to be passed on the notice of motion.

viii. In supporting such contentions reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***Energy Watchdog Vs. Central ectricity Regulatory Commission and Others***[2].

19. Mr. Naphade learned counsel for the Respondent Nos.2 and 3 has made the following submissions:

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2 *(2017) 14 SCC 80*

i. The contentions as urged on behalf of the appellant of any novatio brought about by virtue of its letter dated 23 March, 2020 and the response of respondent No.1 in its letter dated 9 April, 2020 is untenable in view of Article 32 of the agreement specifically providing that the agreement cannot be changed, modified or supplemented in any manner except by an instrument in writing, duly executed by the parties, and further, that any amendment, addition or variation to the agreement shall be valid and binding only if the same are mutually agreed upon by the parties and executed in writing and signed by the owners/namely Respondent Nos.2 and 3 and Respondent No.1 and the Appellant.

ii. It is submitted that the exchange of the said letters between the appellant and respondent no. 1 in no manner would amount to an instrument in writing this more particularly that the very foundation of the appellant's case in the plaint as seen from the prayers (prayer–D) of the plaint is a relief of a declaration being sought that the term of the conducting agreement has stood extended from 30 September, 2022 upto 8 October, 2024. The relief as prayed for plaint can never be granted as respondent no.1 himself was a beneficiary of the leave and license agreement dated 18 October, 2017 executed between respondent Nos.2 and 3 the owners and respondent No.1 who is only the licensee.

Thus no interference is called for in the Appeal which deserves to be rejected.

20. Mr. Ravi Kadam has made submissions in rejoinder. He submits that there is a concluded *novatio,* which is brought about in writing, by exchange of the said two letters between the parties, namely, appellant's letter dated 23 March, 2020 and respondent No.1's reply to its dated 9 April, 2020. It is his contention that once the *force majeure* clause is invoked, the time period as agreed under the agreement would stand freezed and the appellant would be released from his obligations under the conducting agreement. According to him necessarily the *force majeure* amounted to suspension of the term of the contract. According to him the reference to 60 days in the penultimate paragraph of the appellant's letter dated 23 March, 2020 is only in the context of the penal charges. It is hence submitted that the appeal deserves to be allowed.

REASONS AND CONCLUSION

21. It would not require any emphasis that the entire controversy in the present proceedings revolves around the *force majeure* clause being Article 19 of the Contract in question. At the outset, as to what is the concept under the doctrine of *force majeure*, would be required to be examined.

22. The **Black's Law Dictionary** (8th Edition) defines *force majeure* to mean an event or effect that can be neither anticipated nor controlled which would include both, the acts of nature and acts of people. It also defines *force majeure* clause, being a contractual provision allocating risk performance became impossible or impracticable. It would be relevant to note these definitions which are as follows:-

> *"**force majeure** (fors ma-zhar). [Law French "a superior force"] An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g. floods and hurricanes) and acts of people (e.g. riots, strikes, and wars) – Also termed force majesture, viz majour; superior force. Cf. ACT OF GOD; vis MAJOR.*
>
> ***Force-majeure clause**. A contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled. [Cases: Contracts – 309(1). C.J.S. Contracts – 520-522, 524]"*

23. Advanced Law Lexicon 'P Ramanatha Aiyar' describes "force majeure" as under:

> *"Force majeure. Events outside the control of the parties and which prevent one or both of the parties from performing their contractual obligations.*
> *A contract provision that stipulates the unforeseen events-wars, Acts of God, certain strikes- that will excuse a party from its duty to perform the contract.*
>
> *Standard clause in a contract that absolves either of the parties of blame for non-fulfillment of obligations caused by events beyond their control (such as earthquakes, floods or acts of war).*
> *Irresistible force or compulsion; circumstance beyond one's control. (See 48 Mad. 538: 87 IC 68 : AIR 1925 Mad 626 : 48 MLJ 374)*
> *… …*
> *A contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled. (Black, 7th Edn., 1999)"*

24. In **Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.**[3], the Supreme Court considered as to what would be meant by *force majeure*. On analysis of the rulings on the subject it was observed that where reference is made to

3 AIR 1961 SC 1285

"*force majeure*", the intention is to save the performing party from the consequences of anything over which he has no control. Mr. Justice M. Hidayatullah speaking for the Bench observed thus:

> *"17. McCardie J. in Lebeaupin v. Crispin ([1920] 2 K.B. 714), has given an account of what is meant by "force majeure" with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties."*

25. Having noted the jurisprudential concept of *force majeure,* the question which has arisen in the present proceedings is whether the *force majeure,* even assuming prevented the appellant from performing its contractual obligations for some period, whether such invocation would take within its ambit an automatic extension to the agreement/licence period which under the agreement was to expire on 30 September, 2022.

26. To answer the issue the first and foremost endeavour would be to examine as to what the parties have agreed under the *force majeure* clause (Article 19). In the *force majeure* clause it was agreed between the parties that in the event either party is unable to perform its obligation under the agreement for a period greater than 60 days as a result of any failure or delay

which is due to any cause or causes beyond its control, including but not limited to flood, damages by the elements, act of God, strike, lock out or other labour disorders, act of foreign or domestic de jure or de facto Government, whether by law, order, legislation, decree, rule, regulation or otherwise revolution, civil disturbance, breach of the peace, declared or undeclared war, act of interference or action by civil or military authorities, terrorist acts, or due to any other clause beyond the party's control, notwithstanding what is stated in the prior clauses of the contract, the other party shall be entitled to forthwith terminate the agreement. Thus, under the *force majeure* clause the clear understanding between the parties is that if one of the parties is unable to perform its obligation under the contract for a period greater than 60 days for such reasons which are beyond the control of the party, then notwithstanding as to what has been agreed between the parties in Articles 1 to 18, the other party shall be entitled to forthwith terminate the agreement. Thus, the consequence of such situation is the entitlement to terminate the agreement. The period of non performance of the obligation being categorically agreed in the said clause to be 60 days.

27. In the present case, the appellant due to outbreak of COVID-19 pandemic by its letter dated 23 March 2020 invoked the *force majeure* clause. The invocation was not strictly in terms of what was provided for in the *force*

majeure clause namely inability to perform for a period of 60 days as article 19 of the agreement would provide as the appellant apprehended an inability to perform its obligation under the agreement. In the peculiar situation, it was certainly an anticipatory inability which was canvassed by the appellant in its notice dated 23 March 2020 addressed to respondent no.1 invoking the *force majeure* clause. Be it so, there is no dispute that there was an outbreak of pandemic and considering the situation as on 23 March 2020 it was felt by the appellant that the appellant would be unable to perform its obligation under the agreement. However, what is relevant is that a notice of *force majeure* would at the most save the performance of the contractual obligations by a party invoking the *force majeure* clause namely by the appellant so as to avoid any liability of damages being faced/foiested. The performance of obligations would take within its ambit various obligations that the parties have agreed in the several performance clause of the agreement. This would *inter alia* include obligations on the appellant for payment of compensation, fixed fees, additional fee, as agreed in Article 6 and other amounts payable as agreed in Article 6A and all other incidental obligations towards respondent No.1 and the like which are ascertainable to be the obligations under the different clauses of the agreement.

28. However, looking at the prayers in the plaint which are noted above, it

is clear that assertion of the appellant is in relation to the extension of the five year term of the agreement, according to the appellant, has stood extended from 30 September 2022 upto 8 October 2024 by invoking of the *force majeure* clause. This is the relief as prayed for in prayer clause (d) of the plaint along with the incidental relief of a permanent injunction as prayed for. For such relief to be granted, there can be no two opinions that the same would amount to modification by the Court on what the appellant would term by application of the principle of *force majeure* in substitution of what has been expressly agreed between the parties in the terms of the contract. As set out in Clause 16.1 of the agreement the parties have agreed that the agreement shall be deemed to have been come into effect on 1 November 2017 and shall be valid for a period of 59 months from 1 November 2017 and would expired 30 September 2022, unless terminated earlier as per the terms of the agreement with further understanding that the agreement shall be extended with the mutual consent of the parties on mutually agreed terms and conditions. Further understanding being when the parties mutually agree to extend the agreement, the terms of the Leave and Licence Agreement between respondent Nos.2 & 3 and Respondent No.1 shall also be required to be extended accordingly. In fact, the termination clause itself is an exhaustive clause providing for variety of situations reserving rights of the parties to terminate and it requires to be noted which reads thus:-

"Article 16. TERM AND TERMINATION

16.1 This Agreement shall be deemed to have come into effect from 01 November 2017 and shall be valid for a period of 59 (fifty nine) months from 01 November 2017 and expiring on 30 September 2022, unless terminated earlier as per the provisions hereof (the "Term").

This Agreement may be extended with the mutual consent of the parties on mutually agreed terms and conditions; where the parties mutually agree to extend this Agreement; the term of the L&L Agreement shall also be required to be extended accordingly.

16.2 The Agreement can be terminated by either Party by mutual consent of Parties on such terms and conditions as may be agreed upon by the parties in writing. The Conductor shall have right to terminate this Agreement any time during the Term by giving 3 (three) months written notice to Narayani for cause or convenience.

For avoidance of doubt, it is clarified that save for any Material Breach hereunder caused and not remedied by the Conductor after receipt of notice of Cure (as mentioned hereinbelow), Narayani shall not terminate this Agreement during the Term.

16.3 Notwithstanding anything to the contrary contained herein, either Party (""Non-defaulting Party"), shall have the right to terminate this Agreement in the event of breach of any of the terms and conditions of this Agreement by the other Party ("Defaulting Party"). The Non-Defaulting Party shall give a 60 (sixty) days written "notice of cure" to the Defaulting Party specifying the default / the breach. If after the expiry of the said period of 60 (sixty) days, the breach / the default remains to be rectified / remedied, this Agreement shall stand terminated. Provided however, that, the Non-Defaulting Party may extend the said period of 60 (sixty) days by such number of days, on a written request received from the Defaulting Party, as it may deem fit, if despite the Defaulting Party promptly taking all necessary steps it is likely to take some more time for the breach to be cured. Failure to get the breach cured within such extended notice period shall entitle the Non-Defaulting Party to terminate this Agreement with immediate effect.

16.4 At the end of the Term or earlier determination thereof, the Conductor, subject to fifteen (15) days period, shall stop using and accessing the Said Premises and remove all its articles and belongings from the Said Premises against simultaneous refund of the Security Deposit to the Conductor subject to deductions there from as provided in this Agreement. It is clarified that at no point of time after termination or earlier determination of the Agreement, the Conductor shall have or claim any right, title or interest in the Said Premises or any part thereof.

16.5 In the event, Narayani fails to return the Security Deposit to the Conductor simultaneously against receiving the vacant and peaceful possession of the Said Premises, notwithstanding any clauses/articles mentioned herein above in this Agreement, the Conductor shall be entitled to charge interest @ 18% per annum on the Security Deposit till the same is returned to the Conductor. In addition, the Conductor shall also be entitled to retain the permissive use and

occupation of the Said Premises without paying any compensation or any other charges and expenses. However, this is without prejudice to the other rights of the Conductor, including recovery of Security Deposit, under the law. Whereas if the Conductor fails to vacate the Said Premises on expiry of the Term, or termination or earlier determination of Agreement, and inspite of readiness of Narayani to refund the Security Deposit, the Conductor hereby unconditionally agrees to pay not only the Fixed Conducting Fees and additional fees prevailing as on that date along with LIQUIDATED DAMAGES mutually quantified at 2 (two) times of the Fixed Conducting Fees prevailing as on that date as applicable at the time of expiry or termination or earlier determination of Agreement.

16.6 On termination of this Agreement the Conductor shall be entitled to remove all the movables, articles, equipment, furniture and fixtures which it may have brought in for conducting the Business without causing any damage or destruction to the Said Premises (reasonable wear and tear excepted) at the time of removal.

16.7 On termination of this Agreement, the Conductor shall not have access to any part of the Said Premises except to remove all the movables, articles and fixtures which it may have brought in for conducting the Business, without causing any damage or destruction to the Said Premises etc. at the time of removal (reasonable wear and tear excepted)."

29. From the holistic reading of the said clauses of the agreement, it is clearly seen that the termination clause stands independent of the *force majeure* clause. In fact, it is implicit in the *force majeure* clause that it recognizes the right of a party to terminate the agreement. Thus, it would be no argument as canvassed by the appellant that merely because a *force majeure* notice dated 23 March 2020 was issued to respondent No.1, it would prima facie amount to respondent No.1 agreeing to extend the term of the contract for a further period of two years with effect from 30 September 2022. This would amount to reading something into the contract which the parties have expressly not agreed.

30. In any event, as agreed between the parties under the terms of the

agreemnt, if the parties intended to have a modified agreement in relation to what was agreed between the parties in Article 16 providing for 'Term and Termination', in that event necessarily as agreed in Clause No.32, they were required to alter/modify the agreement only by an instrument in writing. The exchange of letters between the parties namely letter dated 23 March 2020 of the appellant addressed to respondent No.1 and the response of respondent No.1 dated 9 April 2020 even on the plain reading of the said letters would neither amount to any modification of the term of the agreement as agreed in Article 16 of the agreement nor can it be called to be an instrument in terms of Article 32 of the agreement. If such meaning is attributed to the exchange of letters as canvased by the appellant it would amount to doing violence to the express terms of the agreement. Thus, the answer to the question would obviously be that the invocation of *force majeure* clause namely Article 19 of the agreement and the qualified acceptance of the same by respondent No.1 in its letter dated 9 April 2020 would not amount to any modification or alteration of Article 16 of the contract, whereunder the parties agreed to the term of the agreement to come to an end by efflux of time on 30 September 2022. For these reasons Mr. Kadam's contentions assailing the impugned order neither on the interpretation of the clauses of the agreement in question nor on merits and even referring to the decision in ***Perry Vs. Suffields, Limited*** are tenable.

31. In the present context a useful reference can be made to the celebrated commentary of **Pollock & Mulla**. In discussing the heading "Hardship", the learned authors observed that in the performance of contract, hardship occurs where the occurrence of events fundamentally alters the equilibrium of the contract, either because the cost of the disadvantaged party's performance has increased, or because the value of what it has to receive has decreased, provided the events meet the following requirements:

(i) the events occur or become known to it after the conclusion of the contract;
(ii) the events could not reasonably have been taken into account at the time of the conclusion of the contract;
(iii) **the events are beyond its control**; and
(iv) the risk of the events were not assumed by it.

The learned authors observe that hardship entitles the disadvantaged party to request the other side to enter into renegotiation of the original terms of the contract with a view to adopting them to the changed circumstances. It must make a request for renegotiations without undue delay, indicating the grounds on which the request is sought. It is when one of the attributes of hardship is an event beyond the parties control, it is the situation of *force majeure*. The learned authors in the context of Section 56 describe the consequences of "*force majeure*" as also what would be "Choice of the Party" as under:

Force Majeure

> *A party is excused of non-performance, if it proves that non-performance was due to an impediment beyond its control, and it could not have reasonably been foreseen by it at the time of making of the contract, nor could it have avoided or overcome it or its consequences." If the impediment is temporary, the excuse will be had for the reasonable period, during which it has an effect on the performance of the contract. It is necessary that the party failing to perform must give notice to the other party of the impediment and its effect on its ability to perform, failing which, there may be liability for damages for non-receipt of notice.*
>
> *Choice of the Party*
> *Where the factual situation can be considered as hardship and of force majeure, the affected party may decide which remedy to pursue. The remedy for hardship will enable it to renegotiate the contract and keep it alive, and the remedy for the latter—to have its non-performance excused.*

32. It is thus clear that even by applicability of Section 56 in a situation of impossibility of performance, the contract changes its character to become a void contract and the consequences under the law in relation to void contract necessarily would follow. This is clear from the reading of Section 56, which is extracted hereunder:

> *"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 contact 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.*

33. Even otherwise, impossibility of performance is a situation which would

fall under the provisions of the second part of Section 56 of the Indian Contract Act,1872, which in the present context would be relevant. This considering the appellant's case that after the agreement was entered between the parties, the performance had become impossible by reason of outbreak of Covid 19 pandemic. The second part of Section 56 ordains that the agreement in this situation is impossibility of performance and is rendered void. In such context, Mr.Kamdar's reliance on the decision in ***Energy Watchdog vs Central Electricity Regulatory*** (supra) cannot be said to be misplaced, wherein the Court has observed that in the circumstances when 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 would take place de hors the contract, it will be governed by Section 56 which provides that a contract would become void when the act itself becomes impossible of performance. The Supreme Court in this case referring to the decisions in **Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310; M/s Alopi Parshad & Sons Ltd. v. Union of India, 1960 (2) SCR 793** and **Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath AIR 1968 SC 522**, in paragraphs 36 to 38 has observed thus:-

> *"36. The law in India has been laid down in the seminal decision of Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310. 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 de hors the contract, it will be governed by Section 56.***
>
> *37. In M/s Alopi Parshad & Sons Ltd. v. Union of India, 1960 (2) SCR 793, 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, this Court wen into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose V. Mugneeram Bangur & Co.* ***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."***
>
> ***(emphasis added)***

34. Thus, look from any angle firstly by virtue of what has been agreed between the parties under the *force majeure* clause and even assuming that there is an absence of any such clause in the agreement, it will be unacceptable that the term of contract as sought to be canvassed by the appellant would stand extended by such *force majeure*.

35. It is thus clear that the agreement having being expired by efflux of time,

there was no legal right whatsoever in the appellant to seek a relief of temporary injucntion, so as to continue to remain in possession and occupation of the premises. The rights being espoused by the appellant strinctly are contractual rights which itself stood extinguished after the period of the contract had come to an end. Thus, to presume that there was any legal right in the appellant by invoking the *force majeure* is certainly an untenable proposition as discussed above. The appellant had miserably failed to make out any prima facie case for temporary injunction. The balance of convenience was also overwhelmingly in favour of the respondent, as also considering the substantial price variation the prejudice was being caused to the respondents in the appellant retaining the premises. Thus, the view taken by the learned Trial Judge on all these counts cannot be faulted. It is in any event a possible view and would not call for any interference of this Court applying the well settled principle of law in exercise of the appellate jurisdiction.

36. The appellants thus have failed to make out any case for interference in the impugned order pased by the City Civil Court. The Appeal accordingly stands dismissed. No costs.

37. At this stage, learned counsel for the appellant would request that the interim arrangement which operates under the order dated 30 September, 2022 and as modified by a further order dated 25 November, 2022 be

continued for a reasonable period.

38. The request is opposed by Mr. Panicker, learned counsel for respondent no. 1. He submits that in terms of the undertaking dated 22 November, 2022 of the appellant as placed on record of the present proceedings in pursuance of the order dated 30 September, 2022, an additional amount of about Rs.12 lakhs per month is required to be paid by the appellant to respondent no. 1 with effect from October, 2022.

39. Having considered the orders dated 30 September, 2022 and 25 November, 2022 passed by the co-ordinate Bench of this Court, in my opinion, it will be appropriate that subject to the said amounts being deposited by the appellant with respondent No.1 as per the said undertaking furnished to the Court on or before 20 February, 2023, the interim arrangement under the order dated 30 September 2022 shall enure to the benefit of the appellant for a period of two weeks from today.

40. In view of disposal of the appeal, pending Interim Application would not survive, the same is disposed of.

G. S. KULKARNI, J