

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on : 18.08.2015

Order delivered on : 08.09.2015

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

O.A.Nos.731, 732 and 734 of 2015
and A.Nos.4685 and 4686 of 2015
and A.Nos.5258 & 5259 of 2015

O.A.No.731 of 2015

M/s.Gammon -OJSC Mosmetrostroy JV,
represented by its Authorised Signatory,
J.L.Ashar,
Gammon House, Veer Savarkar Marg,
Prabhadevi, Mumbai - 400 025

Also at

ASV Adarsh, Door No.719,
Block - C, 3rd Floor,
Pathari Road, Thousand Lights,
Chennai-2.

.. Applicant.

vs.

1. M/s. Chennai Metro Rail Limited
represented by tis Chief General Manager
(Construction),
No.11/6, Seethammal Road, Alwarpet,
Chennai-18
Presently at
CMRL Depot, Admin Building,
Poonamallee High Road,
Opposite to Denial Thomas School,
Koyambedu,
Chennai - 107.

2. M/s. ICCI Bank Ltd.
ICCI Centre,
No.163, H.T. Parekh Marg,
Backbay Reclamation,
Churchgate, Mumbai - 400 020

..Respondents

Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(d) of the Arbitration and Conciliation Act,1996 to pass an order of interim injunction restraining the 1st respondent from invoking or encashing or receiving any amounts under Bank Guarantee Nos. 0393BG00071211/ 0393BG00071011 dated 15.03.2011 from the 2nd respondent pending disposal of the arbitration proceedings.

O.A.No.732 of 2015

M/s.Gammon -OJSC Mosmetrostroy JV,
represented by its Authorised Signatory,
J.L.Ashar,
Gammon House, Veer Savarkar Marg,
Prabhadevi, Mumbai - 400 025
Also at
ASV Adarsh, Door No.719,
Block - C, 3rd Floor,
Pathari Road, Thousand Lights,
Chennai-2.

.. Applicant.

vs.

1. M/s. Chennai Metro Rail Limited
represented by tis Chief General Manager
(Construction),
No.11/6, Seethammal Road, Alwarpet,
Chennai-18
Presently at
CMRL Depot, Admin Building,
Poonamallee High Road,
Opposite to Denial Thomas School,
Koyambedu,
Chennai - 107.

2. M/s. Bank of Baroda,
Corporate Financial Branch
1st Floor, No.3, Walchand Hirachand Marg,
Ballard Pier,
Mumbai - 400 001

..Respondents

Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(a)&(d) of the Arbitration and Conciliation Act,1996 to pass an order of interim injunction restraining the 1st respondent from invoking or encashing or receiving any amounts under Bank Guarantee No.2910IGPER014911 dated 07.09.2011 from the 2nd respondent pending disposal of the arbitration proceedings.

O.A.No.734 of 2015

M/s.Gammon -OJSC Mosmetrostroy JV,
represented by its Authorised Signatory,
J.L.Ashar,Gammon House, Veer Savarkar Marg,
Prabhadevi, Mumbai - 400 025

Also at
ASV Adarsh, Door No.719,
Block - C, 3rd Floor,
Pathari Road, Thousand Lights,
Chennai-2.

.. Applicant.

vs.

1. M/s. Chennai Metro Rail Limited
represented by tis Chief General Manager
(Construction),
No.11/6, Seethammal Road, Alwarpet,
Chennai-18
Presently at
CMRL Depot, Admin Building,
Poonamallee High Road,
Opposite to Denial Thomas School,
Koyambedu,
Chennai - 107.

2. M/s. ICCI Bank Ltd.
 ICCI Centre,
 No.163, H.T. Parekh Marg,
 Backbay Reclamation,
 Churchgate, Mumbai - 400 020

..Respondents

Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(d) of the Arbitration and Conciliation Act,1996 to pass an order of interim injunction restraining the 1st respondent from invoking or encashing or receiving any amounts under Bank Guarantee Nos. (a) 0393BG00071111/ 0393BG00070911 dated 15.03.2011 (b) 0393BG00068314 dated 26.07.2013 (c) 0393BG00068014 dated 26.07.2013 and (d) 393BG00072611 dated 16.03.2011 from the 2nd respondent pending disposal of the arbitration proceedings .

A.No.4685 of 2015

M/s.Gammon -OJSC Mosmetrostroy JV,
 represented by its Authorised Signatory,
 J.L.Ashar,Gammon House, Veer Savarkar Marg,
 Prabhadevi, Mumbai - 400 025

Also at
 ASV Adarsh, Door No.719,
 Block - C, 3rd Floor,
 Pathari Road, Thousand Lights,
 Chennai-2.

.. Applicant.

vs.

M/s. Chennai Metro Rail Limited
 represented by tis Chief General Manager
 (Construction),No.11/6, Seethammal Road, Alwarpet,
 Chennai-18
 Presently at
 CMRL Depot, Admin Building,
 Poonamallee High Road,
 Opposite to Denial Thomas School,
 Koyambedu, Chennai - 107.

.. Respondent

Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(d) of the Arbitration and Conciliation Act,1996 to stay the operation of Order of Termination dated 13.07.2015 passed by the Respondent-Employer with respect to Contract Agreement dated 18.03.2011 pertaining to “Contract UAA-02, design and construction of underground stations at Government Estate, LIC Building and Thousand Lights and Associated tunnels” until disposal of the Arbitral proceedings.

A.No.4686 of 2015

M/s.Gammon -OJSC Mosmetrostroy JV,
represented by its Authorised Signatory,
J.L.Ashar,Gammon House, Veer Savarkar Marg,
Prabhadevi, Mumbai - 400 025

Also at

ASV Adarsh, Door No.719,
Block - C, 3rd Floor,
Pathari Road, Thousand Lights,
Chennai-2.

.. Applicant.

vs.

M/s. Chennai Metro Rail Limited
represented by tis Chief General Manager
(Construction),
No.11/6, Seethammal Road, Alwarpet,
Chennai-18
Presently at
CMRL Depot, Admin Building,
Poonamallee High Road,
Opposite to Denial Thomas School,
Koyambedu, Chennai - 107.

.. Respondent

Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(a) &(d) of the Arbitration and Conciliation Act,1996 to stay the operation of Order of Termination dated 13.07.2015 passed by the Respondent-Employer with respect to Contract Agreement dated 18.03.2011 pertaining to “Contract UA-

003, Underground Stations at Gemini, Teynampet, Chamiers road and Saidapet and Associated Tunnels” until disposal of the Arbitral proceedings.

A.No.5258 of 2015

M/s. URMILLA Enterprises Pvt. Ltd.,
Represented by its Managing Director,
4-A, Urmilla House, No.15, A.R.K. Colony,
Eldams Road, Alwarpet,
Chennai - 600 018.

..Applicant

vs.

1. M/s. Gammon - OJSC Mosmetrostroy JV
Represented by tis Authorised Signatory
J.L.Ashar,
Gammon House, Veer Savarkar Marg,
Prabha Devi, Mumbai - 400 025
Also at
ASV Adarsh, Door No.719, Block No.C,
3rd floor, Patheri Road, Thousand Lights,
Chennai -2.

2. M/s. Chennai Metro Rail Limited
Represented by its Chief General Manager
(Construction),
No.11/6, Seethammal Road, Alwarpet,
Chennai - 18
Presently at
CMRL Depot, Admin Building,
Poonamallee High Road,
Opposite to Daniel Thomas School,
Koyambedu, Chennai -107

..Respondents.

Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(a)(e) of the Arbitration and Conciliation Act, 1996, to implead the applicant herein as 2nd respondent in Application No.4686 of 2015

A.No.5259 of 2015

M/s. URMILLA Enterprises Pvt. Ltd.,
 Represented by its Managing Director,
 4-A, Urmilla House, No.15, A.R.K. Colony,
 Eldams Road, Alwarpet,
 Chennai - 600 018.

..Applicant

vs.

1. M/s. Gammon - OJSC Mosmetrostroy JV
 Represented by its Authorised Signatory
 J.L.Ashar,
 Gammon House, Veer Savarkar Marg,
 Prabha Devi, Mumbai - 400 025
 Also at
 ASV Adarsh, Door No.719, Block No.C,
 3rd Floor, Patheri Road, Thousand Lights,
 Chennai -2.
2. M/s. Chennai Metro Rail Limited
 Represented by its Chief General Manager
 (Construction),
 No.11/6, Seethammal Road, Alwarpet,
 Chennai - 18
 Presently at
 CMRL Depot, Admin Building,
 Poonamallee High Road,
 Opposite to Daniel Thomas School,
 Koyambedu, Chennai -107

..Respondents.

Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(a)(e) of the Arbitration and Conciliation Act, 1996, to implead the applicant herein as 2nd respondent in Application No.4685 of 2015

For Applicant in
O.A.Nos.731, 732 & 734/2015
A.Nos.4685 & 4686/2015

: Mr.P.S.Raman, Senior Counsel
Mr.T.R.Rajagopalan, Senior Counsel
Mr.Sathish Parasaran
for M/s.P.J.Rishikesh

For 1st Respondent
in O.A.Nos.731,732/2015
& A.4686/2015

: Mr.R.Thiyagarajan, Senior Counsel
for Jayesh B.Dolia

For 1st respondent in
O.A.No.734/2015
& A.4685/2015

: Mr.A.L.Somayaji, Senior Counsel
for Mr.Abdul Saleem

For 2nd respondent in
O.A.Nos.731 & 734/2015

: M/s.Shivakumar & Suresh
for ICICI Bank

For applicant in
A.No.5258 & 5259/2015

: M/s.Sanjay Ramaswami

COMMON ORDER

O.A.Nos.731, 732 and 734 of 2015 are filed to pass an order of interim injunction restraining the Chennai Metro Rail Limited from invoking or negotiating or receiving any amounts under the Bank guarantee referred to in the respective applications from the respective second respondent Bank, pending disposal of the arbitration proceedings.

2. Application Nos.4685 & 4686 of 2015 are filed to stay the operation of the order of termination dated 13.07.2015 passed by the Chennai Metro Rail Limited/Employer with respect to the contract agreement dated 18.03.2011 pertaining to Contract UAA-02 and Contract UAA-03 respectively until disposal of arbitral proceedings.

3. The applicant in all these applications are one and the same viz., M/s. GAMMON-OJSC Mosmetrostroy JV. Since the issues involved in all these applications are common, the facts and circumstances as narrated in all these applications are also common, they are extracted hereunder as follows:

3(i). The Chennai Metro Rail Limited (hereinafter called CMRL) called for bids for works related to Contract UAA-02, design and construction of Underground Stations of Government Estate, LIC Building and Thousand Lights and Associated Tunnels relating to Package-II and Contract UAA-03, Underground Stations at Gemini, Teynampet, Chamiers Road, Saidapet, and Associated Tunnels relating to Package-III.

3(ii) M/s. GAMMON India Limited (hereinafter called as GAMMON) and M/s. OJSC Mosmetrostroy (hereinafter called as MMS) entered into a Joint Venture, namely M/s. GAMMON OJSC Mosmetrostroy JV, for executing the said works. The said Joint Venture Company is the applicant herein. The Joint Venture Agreement was approved by the CMRL. The applicant participated in

the bids and emerged successfully. Ultimately, the parties namely, CMRL and JV entered into a contract dated 18.03.2011. The said Contract is hereinafter called as 'Contract Agreement'. Pursuant to the Contract Agreement , the applicant furnished Bank Guarantees that are alive as on today, as follows:

Bank Guarantee No.ICCI Bank	Value of the BG in Rs.	Date of Expiry
0393BG00071211/ 0393BG00071011	68,86,45,320.00	30.04.2017

Bank Guarantee No.(Bank of Baroda)	Value of the BG in Rs.	Date of Expiry
291011GPER014911	9,32,88,100	30.06.2017

Bank Guarantee No.ICCI Bank	Value of the BG in Rs.	Date of Expiry
039BG00071111/ 039BG00070911	62,20,62,230	31.07.2017
0393BG00068314	2,00,00,000	01.12.2016
0393BG00068014	2,00,00,000	01.12.2016
0393BG00072611	31,10,31,115	30.06.2017

3(iii). The schedule duration for completion of the project was originally fixed as 1521 days from the date of commencement, which is on 02.04.2011.

The applicant had mobilised all the required resources and were progressing with the work. However, during the execution of the said works, there were several delays and hindrance that the applicant Company had to face which are as follows:

- a. Delay in handing over of work site*
- b. Delay in approval of traffic management plan*
- c. Delay in utility diversion works*
- d. Delay in getting permission for barricading from traffic department.*
- e. Delays due to permission for work in stages by the Traffic Department.*
- f. Delay in pre-condition survey.*
- g. Delay in approval of designs.*
- h. Delay in approval of lead designer.*
- i. Delays/ additional time needed due to change in geology.*
- j. Delays on account of re-designing necessitated due to change in alignment.*
- k. Delays due to withdrawal of consent to M/s. AGCF*
- l. Delays on account of Extra/ Additional items of work in utility diversions.*

Therefore, there was a delay in project execution due to the above major

impediments, hindrances. Thus, the applicant has sought for interim extension of time for about 208 days through their letter dated 01.06.2012. The CMRL , by their letter dated 09.06.2012 did not consider the request. However, the work continued. The applicant made a second interim extension request through letter dated 10.04.2013 requesting the CMRL to grant cumulative extension of time for 419 days for completion of the project and extend the project completion upto 23.07.2016. After several meetings and persuasion CMRL agreed to tentatively revise the milestone dates and accordingly, the addendum No.I to the Contract Agreement was entered into between the parties wherein the applicant was to substantially complete the works for all the three stations as follows:

- a. Gemini - 21.09.2015
- b. Teynampet - 30.06.2015
- c. Chamiers Road - 27.08.2015
- d. Saidapet - 03.08.2015
- e. The intermediate mile stones were also accordingly extended.
- f. The actual issuance of taking over certificate was determined as 22.12.2015
- g. Government Estate - 16.08.2015
- h. LIC - 31.10.2015
- i. Thousand Lights - 15.11.2015

j. Achieve issuance of Taking Over Certificate - 31.03.2016

k. Achieve issuance of Performance Certificate - 31.03.2018

3(iv). Even after the extension of time as granted supra, the applicant had to again face several hindrances which disturbed the work. The hindrances faced were as follows:

- a. delay in handing over of work areas.
- b. additional time required for diverting the unchartered utilities.
- c. Delay due to restriction on working night shifts by the traffic authorities.
- d. Delay due to change in thickness of entry/ exist D walls by GC
- e. Delay due to suspension of Government estate station excavation works by GC.
- f. Delay due to transporters strike.
- g. delay due to unforeseeable sub- surface conditions
(Extremely hard rock strata) at TL Station.
- h. Delay due to approval of drawing by GC
- i. Delay due to additional rock excavation.
- j. Delay due to restriction on long column works in day time by GC
- k. Delay due to increase in dimensions of stations by GC.
- l. Delay in approvals for various proposals by GC.
- m. Additional time needed on account of additional monsoon seasons due to prolongation of works.

Therefore, the applicant had no other option but to seek further extension of time through their letter dated 26.09.2014. However, the CMRL by its letter

dated 15.10.2014 refused to consider the request for extension. In the meantime, the applicant invoked Clause 20.3 of the Contract Agreement and sought for consideration of the Dispute Adjudication Board, as per the provisions of the contract so as to settle and resolve the dispute smoothly. First of the letter with such request was addressed on 06.12.2012 and there was no response from the CMRL and reminders were sent on 01.04.2013 and 10.09.2013. Only on 07.11.2013, the CMRL responded by saying that there are impediment in forming the Dispute Adjudication Board and requested to offer the willingness of the applicant to nominate Adjudicator from the panel of Arbitrators from Indian Council for Arbitration. By letter dated 20.11.2013 followed by another letter dated 21.08.2014, the applicant gave consent for the same. Thereafter, the CMRL, by letter dated 15.09.2014 nominated their own employee as sole member of the said Board. This was opposed by the applicant and the respondent was requested to proceed to the next stage of referring the matter to arbitration.

3(v). In such a scenario, the JV partner namely MMS created various problems and unilaterally suspended their portions of the work. The GAMMON which is a lead partner had issued a default notice to MMS by letter dated 15.11.2014. The applicant informed the CMRL about its intention of step in proposal in case JV partner fails to perform its obligations. The JV partner

once again, deserted and abandoned the work and has also vacated the office premises. The Directors of the said partner are all Russians and they traveled back to their home country leaving the applicant and the CMRL in lurch. At this juncture, the CMRL instead of lending its helping hand, has chosen to issue notice seeking to terminate the Contract. At this juncture, the General Consultant of CMRL through letter dated 11.05.2015 directed the applicant to show cause as to why the CMRL should not terminate the Contract. Similar letter was sent again on 15.05.2015. The applicant in response to those letters, informed through their letter dated 18.05.2015 informed that the tunneling works for Package III was started on 14.05.2015 which establishes willingness of GAMMON to step in expertise to resume the tunnel work. GAMMON through letter dated 23.05.2015 requested the CMRL to expedite the step in proposal. The General Consultant of the CMRL through letter dated 28.05.2015 called upon the GAMMON to respond before 29.05.2015 to the notice to correct issued by the CMRL. It was also indicated therein that until a satisfactory response is given, the permission for step in would not be given. The GAMMON through letter dated 28.05.2015 indicated a way forward. Similar letter was sent on 5.6.2015 reiterating the earlier stand including the non-payments from the respondent for the tunnel works to the applicant. The General Consultant through their letter dated 08.06.2015 informed that the GAMMON has not demonstrated the technical and financial competence to complete the full

scope of works and therefore, informed that CMRL will not consent GAMMON to step in to complete the tunnel works. The GAMMON issued a detail reply on 16.06.2015 reiterating the earlier stand and requested the CMRL to release substantial payments against the commitments made by the applicant to the tune of Rs.100 crores. The CMRL has not paid the certified amount by the General Consultant.

3(vi). The work could not be completed as per the original schedule and the reasons are not attributable to the applicant as it is evident from the extension of time proposal submitted by the applicant. The respondent has extended the issuance of take over certificate upto 31.03.2016 from the original contract period, viz., 01.06.2015. However, the respondent recovered the entire mobilising advance sanctioned from the bills which was disproportionate to the value of works completed. This being so, the CMRL had in great haste and without considering the GAMMON offer of stepping in rights, issued show cause notice dated 20.06.2015 to terminate the contract. This was replied by the applicant by letter dated 03.07.2015. The applicant also submitted a revised programme through their letter dated 10.07.2015. However, without considering all the above facts and circumstances, the CMRL has terminated the Contract, by letter dated 13.07.2015. The applicant has already completed 63% of the work and termination of contract. At this stage, if the contract is handed over to the third party, the same would cause further

delay and also damage to the property. The applicant would be put to irreparable hardship and injury.

3(vii). The CMRL, without making the payments of lawful dues payable to the applicant, terminated the contract and are initiating steps for invocation of the Bank Guarantees furnished by the applicant. Therefore, these applications are filed, one set against the invocation of bank guarantees and another set , against the termination of the contract.

4. The Chennai Metro Rail Limited filed a common counter affidavit in all the above applications. The sum and substance of the contentions of CMRL are as follows:

4(i) The CMRL had entered into contract with the Joint Venture consortium of Gammon India Ltd., and Mosmetrostroy. The contract was based on the pre-qualification criteria met by the JV. The applicant as an individual organization did not meet the pre-qualification criteria. Therefore, CMRL recognized only the Joint Venture as the contractor and would continue to recognize only the Joint Venture. As per Clause 8.5(g) of the JV Agreement, only the Supervisory Board (SB) of the JV should take a decision regarding initiation of legal action or Arbitration. No documentary proof is filed before this Court to show the decision taken by the Supervisory Board to file the

present application. Therefore, the Application is not maintainable and the same is liable to be dismissed in limini. The Government of Tamil Nadu created a Special Purpose Vehicle (SPV) for implementing the Chennai Metro Rail Project. This SPV named as "Chennai Metro Rail Limited" was incorporated on 03.12.2007 under the Companies Act. It has now been converted into a Joint Venture of Government of India and Government of Tamil Nadu with 49/51 equity holding. Only firms and joint ventures pre-qualified under the procedure were allowed to bid for the works in July 2010. Finally, based on combination analysis, lowest tender price was selected. In the least cost combination analysis, the Applicant was found to be the lowest bidder for two packages namely UAA-02 and UAA-03. Accordingly, Contract UAA-02 "Design and Construction of Underground Stations at Government Estate, LIC Building and Thousand Lights and Associated Tunnels" at a cost of Rs.918.22 Crores and Contract UAA-03, "Design and Construction of Underground Stations at Gemini, Teynampet, Chamiers Road and Saidapet and Associated Tunnels" at cost of Rs.1014.42 crores were awarded to the applicant. The agreement for the work was signed on 18th March 2011 and work commenced on 2nd April 2011.

4(ii). The JV had been time and again warned about their slow progress and have been advised to improve their productivity by mobilizing additional resources. Though, the JV committed to make improvements, actual mobilization at site never happened as committed.

4(iii). There was a slow progress of work in the part of the applicant in executing of the project and the same is also a factor noted while issuing show cause notice and subsequent termination as per FIDIC terms.

4(iv). Considering the slow progress of work by the applicant in executing certain work, the Supervisory Board of the JV itself decided to entrust the scope of work for structural works to two of the bottom-up stations namely Government Estate and Saidapet to their JV partner, Mosmetrostroy to directly execute the work under their control. This shows that the applicant (the present surviving JV partner who claims step-in right) itself had failed to execute its own scope of work in the initial stage.

4(v). On 21.08.2012, a Resolution was passed by the Supervisory Board, the Board itself recognized the failure on the part of the applicant to produce atleast 140 rings per week with due quality falling within its own scope of work and therefore, decided that this work should be entrusted to Mosmetrostroy. After having thorough consideration, the board, though initially decided to terminate the contract, has however decided to constitute a sub-committee of the board members for detail review of the matters and suggest way forward. Sub-Committee held detailed deliberations with CMRL officials and the JV top management. After discussions, JV top management agreed on following actions;

a) It has been jointly agreed by JV to entrust the

scope of work for structural works of two of the bottom-up stations namely Government estate and Saidapet to their JV partner MMS to directly execute the work under their control.

b) JV further agreed to engage other sub-contracting agencies to entrust the structural work of remaining five stations.

However, M/s. Gammon - Mosmetrostroy JV again failed to meet with their own commitments and the progress of works continued to suffer.

4(vi). During April 2013, JV sought interim extension of time. Extension of time of 304 days and 295 days respectively were awarded on 16.08.2013 to UAA-02 and UAA-03 packages and the key dates were accordingly revised. Despite the same, the applicant did not show any progress in the works. It has been noticed that JV was consistently failing to adhere to the revised work programmes. The applicant addressed a letter to this respondent seeking for further extension of time for the third time with regard to contract UAA-03. After considering the request of the applicant by the letter dated 20.10.2014, this respondent already granted extension of time upto 31.03.2016 vide letter dated 16.08.2013 and thus this request was not considered. The JV inspite of being given chances to devise an adoptable strategy to recover all delays accrued, was unable to demonstrate its ability to complete the works even as per the revised schedule.

4(vii). Having regard to the time left over, it is highly impossible for the applicant to complete atleast the station work on or before 31.03.2016. So far, the applicant has completed the station work to an extent of 45%. By the letter dated 07.11.2013, the applicant was called upon to convey its willingness to appoint adjudicator from the panel of Arbitrators maintained by Indian Council of Arbitration for want of Adjudicators in the Indian Council for arbitration. This respondent nominated its member and the same was communicated to the applicant on 15.09.2014. Having agreed that the dispute can be referred for arbitration, the applicant did not accept the member nominated by this respondent. The major expertise in Tunneling works and technical know-how for this contract was provided by M/s. OJSC Mosmetrostroy. M/s. Mosmetrostroy ceased all operations in site for three months between September and December 2014. The highlight of all these failures came on 30.04.2015 when the JV partner, M/s. Mosmetrostroy abandoned the Contracts without fully discharging their duties. The applicant ought to have completed the works under the contract by March 2015. On 27.01.2015, the applicant addressed a letter to this respondent undertaking to complete the work under Package UAA-03 by June, 2016. While sending the reply on 03.07.2015 to the show cause notice dated 20.06.2015, the applicant came forward with a new case that it will complete the construction under the packages UAA-03 and UAA-04 by December 2017. Since the applicant did not have the where withal

to proceed with the works, and more particularly, in the absence of any expertise in tunneling works and coupled with the fact of abandonment of the project by M/s.Mosmetrostroy, this respondent was compelled to act in accordance with the contract Provisions. On 20.06.2015, a detailed show cause notice was issued to the applicant to show cause as to why the contract should not be terminated on the expiry of 14 days. On 03.07.2015, the applicant sent a reply to the show cause notice. The reply was duly considered by this respondent and by the proceedings dated 13.07.2015, order of termination was issued terminating the contract.

4(viii). After the contract was terminated, on 14.07.2015, the applicant made a mention as to the receipt of the copy of letter of intent issued by M/s. SELI OVERSEAS, a Italy based company for the purpose of carrying out the tunneling works. Even in the communication dated 16.06.2015, issued by the applicant, there was no mention by the applicant expressing its intention to execute the balance tunneling works through the Italian company. Further, in view of the fact that the termination of contract has been given effect to, the same is no longer available to the applicant.

4(ix). This respondent has extended funds in the form of special advances to the tune of Rs. 80 crores to the JV to fund their site operations and these payments have been made even though there is no provision in the contract. Some payments were released directly to the vendors whose list was

furnished by the JV. As adequate resources were not pumped in by the JV, even after provision of special advances, the works did not gain adequate momentum required to complete the works as per revised schedule.

4(x). The fact remains that the contract has been terminated by the letter dated 13.07.2015 and the same was given effect to. Whereas, the application invoking Section 9 of the Arbitration and Conciliation Act, 1996 was filed only on 15.07.2015. In those circumstances, the question of staying the order of termination does not arise. Thus, the reliefs sought for in Application Nos. 4685 and 4686 of 2015 has become infructuous.

4(xi). The contract is independent of the Bank Guarantee. Further, the Bank Guarantees are not conditional. With regard to the Bank Guarantee issued by Bank of Baroda, which is the subject matter of O.A. No. 732 of 2015, the same was given against the Mobilisation Advance in the year 2011 and not as stated in Para 37 of the affidavit. The validity of the Bank Guarantee has expired and hence, this respondent did not take any action to invoke the Bank Guarantee. Hence the allegations to the contrary are denied.

4(xii). Already, there has been substantial delays in the commissioning of Corridor 1 on account of the UAA-02 and 03 contracts which has led CMRL to schedule the revenue operations as late as August 2016 against the planned completion by mid 2015. By delaying the project further, the date of restoration of roads and handing over to the highways department would be

delayed further.

4(xiii). The balance of convenience lies in favour of this respondent because the relief sought for by the applicant can be compensated by way of money if the Arbitrator holds that the termination is not valid.

5. The applicant filed a common rejoinder affidavit and a common rejoinder additional affidavit wherein they have reiterated the contentions already raised in the affidavit filed in support of the applications. Both sides have also filed their written submissions.

6. Based on the above pleadings of the respective parties and submissions made on behalf of them, the following issues arise for consideration in these applications:

(a) Whether the applications filed for interim injunction restraining the Chennai Metro Rail Limited from invoking the respective Bank Guarantees are maintainable under Section 9 of the Arbitration and Conciliation Act.

(b) If the answer to the above question(a) is in affirmative, whether under the facts and circumstances of the case, the Chennai Metro Rail Limited is to be restrained from invoking or negotiating or receiving any amount in the respect of the subject matter Bank

Guarantees, pending disposal of the arbitral proceedings.

(c) Whether the applicants in Application Nos. 4685 and 4686 of 2015 are entitled for stay of the operation of the order of termination dated 13.07.2015 passed by the Chennai Metro Rail Limited.

7. I have heard both sides at length. I have given careful consideration to the pleadings, submissions and case laws made, submitted and relied on by the respective parties.

8. O.A.Nos.731, 732 and 734 of 2015 are filed for an order of interim injunction restraining the Chennai Metro Rail Limited from invoking the Bank Guarantees referred to in the respective applications. Insofar as these applications are concerned, the respondents have raised a preliminary objection with regard to the maintainability of these applications under Section 9 of the Arbitration and Conciliation Act.

9. The sum and substance of the objections against the maintainability of these applications are as follows:

The subject matter of Bank Guarantees are independent contracts and unless a specific arbitration clause is mentioned in the bank guarantee or a clear reference to the Arbitration clause contained in other supplementary

contract between the parties is made therein, Section 9 of the said Act cannot be invoked by the parties to the Bank Guarantees. It is their case that the subject matter of Bank Guarantees, not containing the arbitration clause, cannot be called for in question before this Court by invoking Section 9 of the above said Act. It is their further case that apart from not reflecting any arbitration clause, the subject matter Bank Guarantees also do not refer to any arbitration clause in any contract between the parties.

10. In support of the above said submission, the learned Advocate General appearing for the Chennai Metro Rail Ltd. strongly relied on a decision of the learned Single Judge reported in **2013(3) CTC 414 Befesa Agua v. IVRCL Infrastructure and Project Ltd.** Further reliance is made on a decision of the learned single Judge reported in MANU/TN/0235/2013 in support of the above contentions.

11. It is their further case that the GAMMON India Limited is not authorised to file these applications independently when the contract was entered by CMRL on one side and GAMMON and OJSC Mosmetrostory JV on the other side. Thus, it is contended by them that either GAMMON or MMS severally be construed and recognised as parties to the said Contract independently. It is their further case that the above applications could have been filed only with

the approval and consent of MMS which is mandatory in terms of Clause 8.5(g) of the Joint Venture Agreement and in the absence of the same, these applications are not maintainable.

12. It is their further contention that even to initiate process of arbitration against the employer namely CMRL, the presence of both parties, namely GAMMON and MMS is essential.

13. Further, it is contended that the Contract between the parties is determinable in nature, as both parties can terminate the Contract at their instance, as per Section 14(1) of the Specific Relief Act. Such contract which is in nature determinable, cannot be specifically enforced and as per Section 41 of the Specific Relief Act and consequently, no injunction can be granted in such matters. Therefore, on this ground also, the applications are not maintainable.

14. Per contra, the sum and substance of the submissions made by the learned senior counsels appearing on behalf of the applicants, insofar as the issue with regard to the maintainability is concerned, are as follows:

14(i) There is no dispute that the documents referred under Clause 2 of the Contract Agreement shall be deemed to be read and construed as part of

the said agreement. One of such document is the “guarantee with the system” and format of the Bank Guarantee is also given by the CMRL. The Bank Guarantee also specifically recites about the contract in it. Therefore, the Bank Guarantee cannot be separated from the main contract and it has to be treated as part and parcel of the main Contract. The Bank Guarantees are independent only to the extent that it is given by the Bank in favour of the beneficiaries. However, it is linked to the performance of the work and contract. The decision of the learned single Judge reported in **2013(3) CTC 414 Befesa Agua v. IVRCL Infrastructure and Project Ltd.** are factually distinguishable and cannot be applied to the facts and circumstances of the present case. Reliance of the Hon'ble Supreme Court decision reported in **2009(7) SCC 696 (M.R.Engineers and Contracts Pvt.Ltd. v. Som Datt Builders Ltd.,)** also came to be rendered based on different set of facts and circumstances of that case. Therefore, the said decision will not help the CMRL in any manner. In any event, the decision made in **2013(3) CTC 414 (Befesa Agua v. IVRCL Infrastructure and Project Ltd.)** appealed against and pending before the Division Bench of this Court in O.S.A.Nos.174 to 177 of 2013 and 211 to 214 of 2013 dated 16.04.2013 with an interim order of injunction which is extended until further orders by subsequent order dated 2.4.2014.

14(ii) As per the Joint Venture Agreement, GAMMON is the lead party. MMS was deemed to be in material breach under clause 19.1 of JV Agreement.

The supervisory Board consists of two members, one member from each party and the member appointed by lead party is the Chairman of the Board. The Supervisory Board is mainly for deciding all the matters of primary importance and such exercise is not required, when one party commits material breach as the supervisory board is *inter se* between the parties. Clause 19.4 (a) of JV Agreement permits removal of defaulting party. The intention of getting approval of CMRL for removal of default party and step in rights is related to only for carrying out the defaulting parties work by competent agency. Clause 19.5 stipulates that defaulting party shall cease to have any further decision making authority. The JV Agreement provides for removal of defaulting party and hence, JV agreement subsists even without the non defaulting party. Consequently, the contract between CMRL and JV also subsists. Clause 8.5(a) of JV agreement is not operational, since MMS abandoned the work and committed material breach. Clause 20.2 of JV agreement deals with termination of JV agreement. Such termination will take effect only on certain events to happen. As per the above said clause, JV agreement stands to be terminated only when all of the events mentioned therein had taken place. There is no prohibition in the JV agreement against non-defaulting party in approaching the remedy available in the main contract.

15. Based on the above submissions and pleadings made by the

respective parties, let me consider the maintainable issue first.

16. On 17.03.2011, GAMMON India Limited (GAMMON) and OJSC Mosmetrostroy (MMS) entered into Joint Venture Agreement at Chennai. These parties, thus, formed an unincorporate Joint Venture and submitted tender for the project in respect of the Contract UAA 02 and UAA 03. The tenders submitted by the JV was accepted by Chennai Metro Rail Limited by issuing a letter of acceptance dated 17.02.2011. Though the said Joint Venture Agreement contains several clauses, for the purpose of considering these applications, the relevant clauses in the JV Agreement are extracted hereunder:

4.3. The Lead Party shall be entitled to represent the Joint Venture before the Employer in day-to-day issues. Provided however, for (a) any major decision/commitment concerning or affecting the interests of the Joint Venture; or (b) any decision/commitment concerning or affecting the interests, works or responsibilities/liabilities of MOSMETROSTROY, the Lead Party shall have the prior written approval of MOSMETROSTROY.

....

8.1 The Supervisory Board ("SB") shall be the supreme body of the Joint Venture and as the

highest decision making body of the Joint Venture, it will be responsible for the policy, management, coordination and overall control of the Joint Venture and shall take all major decisions on matters concerning the performance of the Contract(s). In such capacity, it shall exercise overall supervision of the performance of the Contract(s)/s and of the activities of the Joint Venture.

8.2 The SB will consist of 2 (Two) members, one member to be appointed by each Party. The member appointed by Lead Party shall act as the Chairman of the SB.

....

8.5 The SB shall decide on all matters of primary importance such as:

..(g) general policy of submission of claims to the Employer and the recourse to arbitration or litigation with regard to claims against the Employer or third parties on the basis of the Contract;

...

9.1 GAMMON is hereby appointed as Lead Party ("LP") to the Joint Venture and in its status as a Lead Party it shall act in the interest of the Joint Venture and with the objective of ensuring

expeditious completion of the Project Works as per the Contract.

.....

Clause 13-BONDS AND GUARANTEES

13.1 The Joint Venture shall provide guarantees, bonds, securities, etc., in connection with the Contract.

.....

Clause 19-DEFAULT OF A PARTY

19.1

(f) Any unreasonable stoppage of Work by a Party for more than 30 (Thirty) continuous days or deserting the place of Work for continuous period of 15 (Fifteen) days.

19.2 Each Party who has committed a default/breach which is not cured as above, and if such breach is a material breach in terms of the said Clause 19.1 then the Defaulting Party shall fully indemnify the other Party for and all losses or expenses incurred as a result of its failure to comply with this Agreement and the Contract or as a result of any other default which may materially adversely affect its participation in the Joint Venture.

.....

19.4 In case of a material breach by a Defaulting Party, the other Party, apart from its rights under

Clause 19.2 above shall have one or more of the following rights to be exercised at its sole discretion and after getting consent of the Employer.

a) To act according to the provisions hereof by removing the Defaulting Party as a member of the Joint Venture after getting due approval from the Employer.

b) To permit the Defaulting Party to continue as a member of the Joint Venture after getting Employer's concurrence, in which event the Participating Interest of the Defaulting Party, in the assets, receivables and the profits of the Joint Venture shall be reduced to that percentage which reflects the actual contribution of the Defaulting Party.

The Other Party shall make up such deficiencies and its respective Participatory Interest shall be proportionately increased.

In addition the Defaulting Party shall be liable to bear the full percentage share based on the initial Participatory Interests for any risk, cost or loss to the Joint Venture up to such date till the Defaulting Party remains a Member of the Joint Venture, which the Defaulting Party has not otherwise paid or discharged in relation to under its indemnity obligations.

19.5 A Defaulting Party shall bear all the expense, cost, damage arising out of or in connection with the termination, including penalties. The Defaulting Party (and/or its receiver, trustee, liquidator, administrator or administrative receiver) shall cease to have any further decision making authority or vote under the Agreement and the vote approval or authority of such Party as otherwise may have been available under the Agreement shall not be available.

19.6 In case that the other Party exercise its right to take over and complete the Defaulting Party's Scope of Work in accordance with this Agreement, the other Party shall automatically have the right to receive any and all payments or accounts receivable which would otherwise be due to the Defaulting Party under the Contract (including dues in respect of past works of the Defaulting Party) and to apply the proceeds thereof (i) to cover all expenses incurred by the other Party in taking over and completing (by subcontracting or themselves) the Defaulting Party's Scope of Work; (ii) to establish a contingency fund to cover any and all outstanding warranties or other obligations of the Defaulting Party and (iii) apply the surplus money

(if any, after provision of sub-Clause (i) and (ii) hereinabove) towards the other liabilities and obligations, including indemnity obligation of the Defaulting Party. This shall be in addition to the other rights and remedies that the other Party may have in law and as per the Contract.

19.7 The other Party shall have the right to retain for the completion of the Works all assets of the Joint Venture and all plants, equipment and material provided by the Joint Venture whether hired, purchased or acquired by the Joint Venture at the time of exclusion of the Defaulting Party until completion and handing over of the Works. The Defaulting Party and its successor, receiver or other legal representative shall execute and do all deeds, documents and things necessary or expedient to facilitate the exercise of such rights and the completion of the Contract by the other Party after getting clearance from the Employer.

....

19.11 Step-in Rights of the LP: In the event of a default by the other Party due to which Employer expressly indicates its intention to suspend or terminate the Contract or levy liquidated damages or penalties for the breach or default under the Contract of an amount mutually agreed by parties

hereto and no reasonable action to remedy such breach or default is initiated by the other Party within fourteen (14) days of the service of such notice, then the LP shall have the right to take over and complete the other Party's Scope of Work for the account and at the risk and cost of such Party subject to the approval of the Employer.

LP may exercise its discretion to invoke the Step-in Rights at any time as indicated in this clause above. The discretion of the LP not to exercise its step-in rights shall not be deemed to be a waiver of its rights at any time. In any case the other Party shall remain liable as a Defaulting Party as indicated in this Agreement.

....

....

Clause 20-Effective Date and Duration

20.2 This Agreement shall stand terminated when all of the following events have occurred:

- i) all the Works have been completed and all obligations under the terms of the Contract have been performed or the Contract has been terminated;*
- ii) all bonds and guarantees including counter guarantees have been returned or have expired and all accounts have been closed without reserves;*
- iii) all pending issues, disputes or differences*

arising out of or in connection with the Joint Venture's activities have been settled; and
iv) all tax assessments have been completed and settled.

17. Thereafter, the contract agreement was entered into on 18.03.2011 between the JV and Chennai Metro Rail Limited. Under the said contract agreement the CMRL is called as "employer" and JV is called as "contractor". Clause 1 and 2 of the said agreement reads as follows:

1. In this Agreement words and expression shall have the same meanings as are respectively assigned to them in the Conditions of Contract Parts I and II hereinafter referred to.

2. The following documents shall be deemed to form and be read and construed as part of this Agreement and the order of priority is as follows:

(a) Contract Agreement

(b) Letter of Acceptance (LoA) (vide Lr.No.1006/CMRL/2009 dt 17.02.2011) and minutes of the Pre-Contract Negotiation meetings.

(c) Letters of Clarification on the submitted tender (LoC)

(d) Addenda to the Tender document (Addendum No 1 to 7).

(e) Contract Documents

- i. Notice of Invitation to Tender (NIT)*
- ii. Instructions to Tenderers (ITT) (Including Annexure)*
- iii. Conditions of Contract for Design-Build and Turnkey Part II- Conditions of Particular Application.*
- iv. Conditions of Contract for Design-Build and Turnkey Part I- General Conditions (FDIC-1995)*
- v. Employer's Requirements*
- vi. Outline Design Specifications*
- vii. Outline Construction Specifications*
- viii. Occupational Health, Safety & Environmental Management Plan*
- ix. Quality Assurance Requirements*
- x. Tender Drawings and subsequent minor modifications issued.*
- xi. Pricing Document including Form of Tender, Appendix FT-1, FT-2 & Annexure 10B.*
- xii. Environmental Impact Assessment (EIA) Report*
- xiii. Geotechnical Report*
- xiv. Guarantee for the system*
- xv. Contractor's Proposal*
- xvi. Joint Venture Agreement*
- xvii Any other items as applicable.*

(emphasis supplied)

18. The General Conditions of the Contract Agreement entered into between the parties are furnished separately and it is an admitted fact that

those General Conditions form part and parcel of the Contract Agreement entered on 18.03.2011. The following are the relevant clauses of the General Conditions of the Contract.

1.14 Joint and Several Liability

If the Contractor is a joint venture (or consortium) of two or more persons, all such persons shall be jointly and severally liable to the Employer for the fulfilment of the terms of the Contract. Such persons shall designate one of them to act as leader with authority to bind the joint venture (or consortium) and each of its members. The composition or the constitution of the joint venture (or consortium) shall not be altered without the prior consent of the Employer.

4.2 Performance Security:

The Contractor shall obtain, at his cost, a performance security from a third party , in the amount and currencies specified in the Appendix to Tender, and deliver it to the Employer by the date 28 days after the Effective Date. The performance security shall be provided by an entity approved by the Employer.

The performance security shall be valid until the Contractor has executed and completed the Works and remedied any defects. It shall be returned to

the Contractor within 14 days of the issue of the Performance Certificate. Prior to making a claim under the performance security, the Employer shall, in every case, notify the Contractor stating the nature of the default for which the claim is to be made.

4.11 Unforeseeable Sub-Surface Conditions

If sub-surface conditions are encountered by the Contractor which in his opinion were not foreseeable by an experienced contractor, the Contractor shall give notice to the Employer's Representative so that the Employer's Representative can inspect such conditions. After receipt of such notice and after his inspection and investigation, the Employer's Representative shall, if such conditions were not (by the Base Date) foreseeable by an experienced contractor, proceed in accordance with Sub-Clause 3.5 to agree or determine:

(a) any extension of time to which the Contractor is entitled under Sub-Clause 8.3, and

(b) the additional Cost due to such conditions, which shall be added to the Contract Price, and shall notify the Contractor accordingly.

15 Default of Contractor

15.2 Termination

If the Contractor:

(a) fails to comply with a notice under Sub-Clause 15.1

(b) abandons or repudiates the Contract,

(c) without reasonable excuse fails:

(i) to commence the Works in accordance with Sub-Clause 8.1.

(ii) to proceed with the Works in accordance with Clause 8, or

(iii) to demonstrate that sufficient design capability is employed in the design of the Works to achieve completion within the Time for Completion.

(d) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under any applicable law) has a similar effect to any of these acts or events.

(e) fails to comply with a notice issued under Sub-Clause 7.5 within 28 days after having received it, or

(f) assigns the Contract or subcontracts the Works without the required consent.

then the Employer may, after having given 14 days' notice to the Contractor, terminate the Contractor's

employment under the Contract and expel him from the Site. The Contractor shall then deliver all Construction Documents and other design documents made by or for him, to the Employer's Representative. The Contractor shall not be released from any of his obligations or liabilities under the Contract. The rights and authorities conferred on the Employer and the Employer's Representative by the Contract shall not be affected.

The Employer may upon such termination complete the Works himself and/or by any other contractor. The Employer or such other contractor may use for such completion so much of the Construction Documents, other design documents made by or on behalf of the Contractor, Contractor's Equipment, Temporary Works, Plant and Materials as he or they may think proper. Upon completion of the Works, or at such earlier date as the Employer's Representative thinks appropriate the Employer's Representative shall give notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall remove or arrange removal of the same from such place without delay and at his cost.

16.2 Termination

If the Employer:

(a) fails to pay the Contractor the amount due under any certificate of the Employer's Representative within 42 days after the expiry of the time stated in Sub-Clause 13.7 within which payment is to be made (except for any deduction that the Employer is entitled to make under the Contract),

(b) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under any applicable law) has a similar effect to any of these acts or events,

(c) consistently fails to meet the Employer's obligations under the Contract, or

(d) assigns the Contract without the Contractor's consent,

or, if a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.10,

then the Contractor may terminate his employment under the Contract by giving notice to the Employer, with a copy to the Employer's Representative. Such notice shall take effect 14 days after the giving of the notice.

20.6.1 Arbitration

Any dispute in respect of which:

(a) the decision, if any, of the Dispute Adjudication Board has not become final and binding pursuant to Sub-clause 20.4 and

(b) amicable settlement has not been reached, shall be finally settled by arbitration. The arbitration rules under which the arbitration is conducted, the institution to administer the arbitration rules conducted, the institution to administer the arbitration rules (unless named therein), the number of arbitrators, and the language and place of such arbitration shall be as set out in the Appendix to Tender. The arbitrator(s) shall have full power to open up, review and revise any decision of the Dispute Adjudication Board, relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the Dispute Adjudication Board to obtain its decision. Any decision of the Dispute Adjudication Board shall be admissible in evidence in the arbitration.

Arbitration may commence during the construction of the Works or after completion of the Works. The obligations of the Parties and the Dispute Adjudication Board shall not be altered by

reason of any arbitration being conducted during the progress of the Works.

20.6.2 Settlement of Disputes

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works, including any dispute as to any decision, notice of no objection, opinion, instruction, direction, determination, certificate or valuation of the Employer's Representative (whether during the progress of the Works or after their completion and whether before or after the determination, abandonment or breach of the Contract) it shall be settled in accordance with clause 20.4.

20.6.3 Application for Arbitration

Subject to the dispute having been already subject to adjudication in accordance with Clause 20.4 or the parties have agreed to waive adjudication, and a notice having been served pursuant to Clauses 20.4 and 20.5, either party shall be entitled to apply for arbitration to resolve the dispute described in the notice.

However, save for steps to proceed with the arbitration necessary to avoid any time bar, no further steps shall be taken in the arbitration of any dispute until the earlier of any of the

following:

(a) Subject to the dispute having been already subject to adjudication in accordance with clause 20.4, or

(b) The parties have agreed to waive adjudication , or

(c) Alleged substantial completion of the whole of the Works, or

(d) Termination pursuant to Clause 15 or Clause 16, or

(e) A declaration of the Indian courts that the findings of the Dispute Adjudication Board on the dispute were procured by fraud or dishonesty, or

(f) In the case of a dispute arising from the exercise by the Employer of any of the rights under Clause 12,

(g) within 90 days, either party may apply for arbitration, pay the arbitration fee if required, and nominate his proposed Arbitrator in writing to the other party.

19. Insofar as the present applications concerning the bank guarantees are concerned, two banks are involved, namely, ICICI Bank and Bank of Baroda. In Application No.731 and 734 of 2015, the relevant Bank Guarantees involved therein were issued by ICICI Bank, whereas in Application

No.732/2015, the Bank guarantee was issued by Bank of Baroda. For the purpose of appreciation, the relevant paragraphs of the bank guarantee are hereby extracted, issued by ICICI bank dated 15.3.2011. It is seen that similar Clauses are there in the Bank Guarantees issued by Bank of Baroda.

20. Paragraph Nos.1 to 6 of the Bank Guarantees reads as follows:

1. This deed of Guarantee made this 15th day of March, 2011 between ICICI Bank Ltd., 163, H.T.Parekh Marg, Backbay Reclamation, Churchgate, Mumbai 400 020, (hereinafter called the "Bank") of the one part, and Chennai Metro Rail Limited, No.11/6, Seethammal Road, Alwarpet, Chennai 600 018 (hereinafter called "the Employer") of the other part.

2. Whereas Chennai Metro Rail Limited, has awarded the contract for Design and Construction of underground stations at Gemini, Teynampet, Chamiers Road And Saidapet and Associated Tunnels- (Contract UAA-03) (hereinafter called the "Contract") to M/s GAMMON-OJSC MOSMETROSTROY JV (hereinafter called the "Contractor") each of which will be jointly and severally liable to the Employer for all the Contractor's obligations as undertaken in pursuance of the Contract.

3. AND WHEREAS the Contractor is bound by

the said Contract to submit to the Employer a performance Security for a total amount of INR 688,645,320/- (Rupees Sixty Eight Crores Eighty Six Lacs Forty Five Thousand Three hundred Twenty Only) and Euro 1,216,510/- (Euro One Million Two Hundred Sixteen Thousand Five Hundred and Ten Only).

4. Now we the Undersigned ICICI BANK LIMITED, A BODY CORPORATE REGISTERED/ CONSTITUTED UNDER THE LAWS OF INDIA, HAVING ITS REGISTERED OFFICE AT LANDMARK, RACE COURSE CIRCLE, ALKAPURI, VADODARA 390 007, INDIA AND ONE OF ITS BRANCH AT ICICI Bank Ltd. 163, H.T.Parekh Marg, Backbay Reclamation, Churchgate, Mumbai-400 020, being fully authorized to sign and to incur obligations for and on behalf of and in the name of ICICI Bank Ltd., 163, H.T.Parekh Marg, Backbay Reclamation, Churchgate, Mumbai-400 020, hereby declare that the said Bank will guarantee the Employer the full amount of INR 688,645,320/- (Rupees Sixty Eight Crores Eighty Six Lacs Forty Five Thousand Three hundred Twenty Only) and Euro 1,216,510/- (Euro One Million Two Hundred Sixteen Thousand Five Hundred and Ten Only).

5. After the Contractor has signed the aforementioned Contract with the Employer, the

Bank is engaged to pay the Employer, any amount up to and inclusive of the aforementioned full amount upon written order from the Employer to indemnify the Employer for any liability of damage resulting from any defects or shortcomings of the Contractor or the debts he may have incurred to any parties involved in the Works under the Contract mentioned above, whether these defects or shortcomings or debts are actual or estimated or expected. The Bank will deliver the money required by the Employer immediately on demand without delay and demur and without reference to the Contractor and without the necessity of a previous notice or of judicial or administrative procedures and without it being necessary to prove to the Bank the liability or damages resulting from any defects or shortcomings or debts of the Contractor. The Bank shall pay to the Employer any money so demanded notwithstanding any dispute/disputes raised by the Contractor in any suit or proceedings pending before any Court, Tribunal or Arbitrator/s relating thereto and the liability under the guarantee shall be absolute and unequivocal.

6.(a) This Guarantee is valid until 30/04/2017

21. Likewise, the Bank of Baroda issued Bank guarantee involved in

A.No.732/2015 dated 8.9.2011 and the relevant paragraph reads as follows.

1.This deed of Guarantee made this day of August 2011 between Bank of Baroda, Corporate Financial Services (CFS), 1st Floor, 3-Walchand Hirachand Marg, Ballard Pier, Mumbai 400 001 (hereinafter called the "Bank") of the one part and Chennai Metro Rail Limited, No.11/6, Seethammal Road, Alwarpet, Chennai 600 018 (hereinafter called "the Employer") of the other part.

2.Whereas Chennai Metro Rail Limited has awarded the contract for Contract:UAA-02: Design and Construction of Underground Stations at Government Estate, LIC Building and Thousand Lights and associated Tunnels (hereinafter called the Contract) to M/s.GAMMON -OJSC MOSMETROSTROY JV having office at Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai 400 025 (hereinafter called the "Contractor") where each party is jointly and severally responsible for execution of the Contract.

3.The Employer has agreed to pay the Contractor a Mobilization Advance of 7.5% of the Contract value in two installments totalling the sum of INR 622,062,230/- (Rupees Sixty Two Crores Twenty Lacks Sixty Two Thousand Two Hundred Thirty Only) and Euro 1,307,970/- (Euro One Million Three Hundred Seven Thousand Nine Hundred Seventy Only) payable by the Employer in two equal installments as a Mobilization advance payment under the Clause 13.2.1 of the Contract ("Advance

payment-Mobilization Advance") of which the above mentioned amount is the full amount.

4.Now we the undersigned BANK OF BARODA, A BODY CORPORATE REGISTERED/CONSTITUTED UNDER THE LAWS OF INDIA, HAVING ITS REGISTERED OFFICE AT MANDVI, BARODA, GUJARAT, INDIA AND ONE OF ITS BRANCH AT Bank of Baroda, Corporate Financial Services (CFS), 1st Floor, 3-Walchand Hirachand Marg, Ballard Pier, Mumbai 400 001, being fully authorized to sign and to incur obligations for and on behalf of and in the name of Bank of Baroda, Corporate Financial Services (CFS), 3-Walchand Hirachand Marg, Ballard Pier, Mumbai 400 001, hereby declare that the said Bank will guarantee the Employer the full amount of INR 9,32,88,100/- (Rupees Nine Crores Thirty Two Lacs Eighty Eight Thousand One Hundred Only) as stated above being part of 2nd installment of Mobilisation advance.

5.After the Employer has made a Mobilization Advance Payment to the Contractor, the Bank is engaged to pay the Employer, any amount up to and inclusive of the aforementioned full amount upon written order from the Employer to indemnify the Employer for any liability of damage resulting from non-recovery from the Contractor of the so paid Mobilisation Advance Amount by the Employer, the Bank will deliver the money required by the Employer immediately on demand without delay and demur and without reference to the Contractor and

without the necessity of a previous notice or of judicial or administrative procedures and without it being necessary to prove to the Bank the liability or damages resulting from any defects or shortcomings or debts of the Contractor. The Bank shall pay to the Employer any money so demanded notwithstanding any dispute/disputes raised by the Contractor in any suit or proceeds pending before any Court, Tribunal or Arbitrator/s relating thereto and the liability under this guarantee shall be absolute and unequivocal.

6.(a) This Guarantee is valid until 30/06/2015.

22. It is seen that the above said Bank guarantee issued by the Bank of Baroda was subsequently extended upto 30.06.2007 by the letter of extension dated 22.06.2015.

23. It is a fact that all other Bank Guarantees involved in these applications are also similar in nature with the very same Clauses.

24. Based on these factual aspects of the matter, let me now consider the maintainability issue.

25. Indisputably, the Joint Venture Agreement entered into between the

GAMMON and MMS forms part of the contract agreement dated 18.03.2011 entered between the Joint Venture and Chennai Metro Rail Limited. This is evident from Clause 2 of the Contract Agreement which states that several documents referred to therein including the Joint Venture Agreement shall be deemed to form and be read and construed as part of the Contract Agreement. Apart from showing Joint Venture Agreement as part of the Contract Agreement, the "Guarantee for the system" is also shown as one of the documents as referred to as the documents deemed to form and be read and construed as part of the Contract Agreement. Therefore, it is evident that neither this Joint Venture agreement nor the document given as Guarantee for the system can be treated as independent document without having any connection whatsoever with the Contract Agreement. By specifically referring those documents as part of the Contract Agreement, it is evident that the parties to the agreement are fully conscious of their intention in making those documents also as part and parcel of the Contract Agreement.

26. Clause 13 of the Joint Venture agreement deals with bonds and guarantees wherein it is contemplated that the Joint Venture shall provide with Guarantees, bonds and securities, etc., in connection with the Contract. Therefore, it is evident that the Bank Guarantee executed by the Joint Venture, admittedly, in respect of the Contract which is the subject matter

of Contract Agreement dated 18.03.2011, has emerged as per the terms of the Joint Venture, namely, Clause 13.1 followed by the Contract Agreement.

27. A perusal of the terms and conditions of the Bank Guarantee furnished by the respective Banks, which are referred to supra, would establish the fact that they were furnished only in connection with the contract awarded by the CMRL in favour of the Joint Venture, more particularly, in respect of the specific work of the Contract. It cannot be, therefore, said that those Bank Guarantees are furnished as an independent act by the bank or by the guarantor as an action totally unconnected with the Contract Agreement.

28. Thus, I am of the considered view that the JV Agreement, the Contract Agreement and Bank Guarantee, are interlinked with each other and therefore, it cannot be said that such Bank Guarantee furnished by the respective Banks is to be treated as an independent Contract.

29. Admittedly, when furnishing of such Bank Guarantee is a mandatory obligation under or in respect of the Contract entered into between the parties, it goes without saying they are not independent Contracts as contended by the CMRL. Once, it is found that they are not independent Contracts, it follows that the guarantor/ contractor to the Contract

Agreement is entitled to seek interim relief against invocation of the Bank Guarantee by invoking Section 9 of the Arbitration and Conciliation Act before this Court, in case of any dispute that has arisen between the parties which has to be settled by the Arbitral Tribunal.

30. In fact, the Bank Guarantees are meant to safeguard the interest of the person in whose favour such guarantee is issued at the instance of a person in whose favour the work is assigned. In other words, in these type of cases, the Bank Guarantee is issued at the instance of the Guarantor/ Contractor to the beneficiary/ employer. The invocation of the Bank Guarantee so furnished, depends upon various facts and circumstances of each case and the terms and conditions stipulated in the Contract between the parties. Therefore, in pursuant to any dispute, if the employer has chosen to invoke the bank guarantee, certainly, the other party is entitled to question the same before the Court by invoking Section 9 of the Arbitration and Conciliation Act when it is an admitted fact that such Contract Agreement between the parties contains the Arbitration Clause. No doubt, whether the guarantor is entitled to get any protection under section 9 of the said Act is to be considered and decided based upon facts and circumstances of each case. In this case, I have already extracted the relevant arbitration clause referred to in the Contract Agreement. When such being the position, the employer, namely CMRL, after

terminating the contract, if makes an attempt to invoke the Bank Guarantee, certainly, the JV can maintain an application under Section 9 of the said Act to restrain the CMRL from invoking those bank guarantees.

31. In fact the above clauses referred in the Bank guarantee would only indicate that the Bank cannot refuse to perform its part of the obligations under the Bank Guarantee when it is sought to be invoked by citing a reason that any suit or other legal proceedings including the arbitral proceedings are pending between the guarantor and the beneficiary. However, in my considered view, such Clause will not debar or prohibit the guarantor from seeking a protection order from the Court by invoking the jurisdiction under section 9 of the said Act restraining the employer from invoking the bank guarantee, provided if he can able to establish that such invocation either before or during or after the arbitral proceedings would cause "irretrievable injury or injustice" to him. In other words, the prohibition contained in the said clause is only against the Bank and not against the Guarantor. Whether the CMRL is entitled to invoke the Bank guarantee or not is another question which has to be decided on merits, which I will deal in the latter part of this order.

32. The decision reported in **2013(3) CTC 414 Befesa Agua v. IVRCL**

Infrastructure and Project Ltd. (R.S.Ramanathan,J) is strongly relied on by the learned Advocate General appearing for the CMRL in support of his contention that in the absence of Arbitration clause in the Bank Guarantee, the arbitration clause mentioned in the Contract Agreement cannot be read into the bank guarantee so as to invoke the jurisdiction of this Court under Section 9 of the said Act. First of all, it is seen that the said decision of the learned Single Judge is now the subject matter of challenge before the Division Bench of this Court in O.S.A.No.177 of 2013 etc. and the Division Bench of this Court by its order dated 16.04.2013 granted interim injunction restraining the 3rd respondent therein from remitting any money pursuant to the demand notice in reference to the subject matter of the bank guarantee therein and the said interim order is extended until further orders and is said to be in force. Even otherwise, from the perusal of the facts and circumstances of the above case, it is seen that they are totally different and distinguishable. It is seen in that case that the first respondent and the first applicant therein jointly formed a Joint Venture and consequently, they incorporated the second respondent therein as a special purpose vehicle to undertake the project from the Chennai Metropolitan Water Supply and Sewerage Board. It is further seen that the 2nd respondent therein consequently, entered into an agreement with CMWSSB and entered a bulk water purchase agreement. In pursuant to entering into such bulk water

purchase agreement, the second respondent therein sub-contracted the work to 2nd and 3rd applicants therein by way of entering into separate agreement. Under the project contracts, the applicants therein were obliged to submit the bank guarantee in favour of the 2nd respondent and accordingly, they submitted the bank guarantee. Under those circumstances, it was contended therein that the bank guarantees furnished are distinct and separate agreement entered into between the applicants and the respondents 1 and 2 therein as they do not contain any arbitration clause and consequently, the application under section 9 of the Arbitration and Conciliation Act, 1996 cannot be maintained for the purpose of determining the dispute arising under such Bank Guarantee. Based on the above stated facts and circumstances and by following the decision of the Apex Court reported in **2009(7) SCC 696 (M.R.Engineers and Contracts Pvt.Ltd. v. Som Datt Builders Ltd.,)** the learned Judge found that the arbitration clauses cannot be incorporated with the Bank Guarantees therein since mere reference to the original contract will not make the arbitration clause be read into Bank Guarantees.

33. Thus, from a perusal of the discussion made by the learned Judge and the facts and circumstances of the above case would show that they are not similar to the facts of the present case. I have already discussed about Clause 2 of the Contract Agreement specifically stating that document of

"guarantee for the system" and "Joint Venture Agreement" along with other documents referred to therein are deemed to form part of the Contract Agreement. I do not think that any similar Clause was there in the Contract Agreement in the above referred *Befesa's* case.

34. I have also referred to Clause 13 of the Joint Venture Agreement dealing with furnishing of Bank Guarantee by the Joint Venture. I have also referred to the relevant Bank Guarantees issued by the Bank specifically referring the subject matter Contract Agreement entered into between the parties. When that being the factual position in the present case, it cannot be said that merely because the Bank Guarantee does not contain the arbitration clause, the same cannot be prevented from getting invoked by invoking the jurisdiction under Section 9 of the said Act. Once, the parties have specifically agreed that the Joint Venture Agreement and the guarantee for the system apart from the other documents referred to therein under Clause 2 of the Contract Agreement is to form part of the contract agreement and to be read and construed as part of the said agreement, it automatically follows that the arbitration clause contained in the contract agreement has to read into the Bank Guarantee and hence, they cannot be heard to say that the Bank Guarantee is an independent contract and cannot be put to challenge against its invocation as there is no specific arbitration clause therein. When these are

all distinct and different facts of the present case, I do not think that the above decision of the learned single Judge (R.S.Ramanathan, J) is helping the respondents in any manner as the facts of that case followed by such decision are on different footing.

35. The Honourable Supreme Court as well as the High Court in very many decisions have considered as to what constitutes precedent and observed that a decision is a precedent on its own fact and each case presents its own feature and relying on such decision without looking into the factual background of the case before the Court is clearly impermissible. It is also well settled that even one additional or different fact may make a world of difference between the conclusions arrived at in two cases. The following decisions are relevant to be quoted for the above said proposition.

(a) In *(2008) 1 MLJ 501 (SC), Oriental Insurance Co. Ltd. v. Raj Kumari*, the Honourable Supreme Court has held in paragraph Nos.12, 13 and 15 as follows:

Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. The only

thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: " (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment.

.....

.....

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorms nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been

stated.

.....

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Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

(b) In **2004(4) MLJ 147 (S.C) (Bharat Petroleum Corporation Limited v. N.R.Vairamani)**, the Honourable Supreme Court has observed in paragraph No.9 as follows:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too take out of their context. These observations must be read in the context in which they appear to have been stated.

(c) In **(2003) 1 MLJ 302 (M/s.Sekar Jewellers v. The Tamil Nadu Taxation Special Tribunal rep. by its Registrar)**, the Division Bench of this Court has observed in paragraph Nos. 20 and 21 as follows:

20. It is now well settled that Courts should not place reliance on decisions without discussing as

to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. (vide HARYANA FINANCIAL CORPORATION & ANR. VS. M/S. JAGDAMBA OILS MILLS & ANR.)

21. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases (vide PADMASUNDARA RAO & OTHERS VS. STATE OF TAMIL NADU AND OTHERS 2002 AIR SCW 1156)

(d) In (2005) 1 M.L.J. 559 (The Member Secretary, National Council for Teachers Education New Delhi v. Pauls Teachers Training Institute,

Pondicherry), another Division Bench of this Court observed in paragraph No.10 as follows:

Decisions should not be applied mechanically without looking into the context and the object of the statute. The same phrase may have one meaning in one statute and may have a different meaning in another statute. As held by the Supreme Court, the words in a judgment should not be treated as legislative enactment: vide 2002 AIR SCW 4271.

The context in which the judgment was delivered, the object and the nature of the statute regarding which the judgment was delivered and applying a judgment as a precedent, otherwise the law will become artificial.

(f). I myself considered the very same issue in a decision reported in 2012(3) MWN(C) 79 wherein after following the decision of the Honourable Supreme Court, it has been observed in paragraph Nos.16 and 18 as follows:

16. No doubt there are two decisions of the Hon'ble Supreme Court Court one reported in 2008 (13) SCC 658 (Bharat Karasondas Thakkar Vs. Kiran Construction Co., and others), and another reported in Sumtibai & Others Vs. Paras Finance Co., Mankanwar and others (2007 (10)

SCC 82) expressing two different views. In this aspect, my considered view is that for the application of binding precedents, the facts of each case has to be seen and only after considering and satisfying with the similarity of those facts with that of the facts of the case on hand, the ratio laid down in such decision can be applied as a binding precedent. In fact the Hon'ble Apex Court in a decision reported in 2003 (2) SCC 111 (Bhavnagar University Vs. Palitana Sugar Mills Pvt. Ltd.,) has held that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. Further, the Hon'ble Supreme Court in a decision reported in 2006 (3) SCC 434 (Bombay Dyeing & Mfg. Co. Ltd.,(3) Vs.Bombay Environmental Actin Group and Others) has observed at para 312 as follows:-

"312. ".... An order of this Court, it is well known, must be construed having regard to the text and context in which the same was passed. For the said purpose, the orders of this Court were required to be read in their entirety. A judgment, it is well settled, cannot be read as a statute. (See Sarat Chandra Mishra Vs. State of Orissa (2006 SCC (L&S) 182 and State of Karnataka Vs.C.Lalitha (2006 (2) SCC 747). Construction of a judgment, it is well settled should be made in the light of the factual matrix involved therein.

What is more important is to see the issues involved therein and the context wherein the observations were made. Any observation made in a judgment, it is trite, should not be read in isolation and out of context. "

18. On consideration of the law laid down by the Hon'ble Supreme Court in the above said decisions reported in 2003 (2) SCC 111 (Bhavnagar University Vs. Palitana Sugar Mills Pvt. Ltd.,) as well as 2006 (3) SCC 434 (Bombay Dyeing & Mfg. Co. Ltd.,(3) Vs.Bombay Environmental Actin Group and Others), what follows is that to apply the precedential value of a particular decision, one has to see the facts and circumstances of the particular case and only when the said facts and circumstances of that particular case are identically similar to that of the facts and circumstances of the case on hand, the decision made in the said case can be considered as a binding precedent. By applying the said principle, I find the decision rendered in 2007 (10) SCC 82 in the case of Sumtibai & Others Vs. Paras Finance Co., Mankanwar and others is not applicable to the facts and circumstances of this case.

36. Thus, it is clear that a decision can become a binding precedent only

when the facts and circumstances of such case are similar to and identical with that of the case on hand. On the other hand, if it is found that there is an additional or different fact, it would certainly make a world of difference between conclusion arrived in the case cited as a precedent and the decision to be arrived at in the case on hand.

37. Further perusal of the said decision made in Befesa's case would show that the learned single Judge relied on the decision of the Apex Court reported in **2009(7) SCC 696 (M.R.Engineers and Contracts Pvt.Ltd. v. Som Datt Builders Ltd.,)** in support of his conclusion. A perusal of the above said decision of the Apex Court would show once again that the facts and circumstances of that case are totally different and distinguishable. In that case, before the Honourable Supreme Court, it is seen that PWD of Kerala Government entrusted works to one Som Datt Builders, the respondent before the Apex Court. The agreement between the PWD and Som Datt Builders had arbitration clause. However, Som Datt Builders sub-contracted certain works to M.R. Engineers which contained a clause that sub-contract shall be carried out on terms and conditions as applicable in the main contract. When dispute has arisen between Som Datt Builders and the sub-contractor, an Application under Section 11 of the Arbitration Act came to be filed by the sub-contractor relying upon the principal contract between PWD and Som Datt Builders. In

that scenerio, the Honourable Supreme Court has found that the working of the sub-contract disclose only the intention to incorporate by reference to the terms of the main contract and the arbitration clause in the main contract did not form part of the sub-contract between the parties. But, in the case on hand, presence of clause 2 of Contract Agreement makes a world of difference and hence, the above decision of the Apex Court followed by the learned single Judge in *Befesa's* case, also does not help the respondents in any manner.

38. The other decision relied on by the respondent reported in MANU/TN0235/2013 rendered by the learned single Judge of this Court does not deal with the issue with regard to the maintainability of application under section 9 of the said Act. On the other hand, the said decision came to be rendered considering the merits of the case to reject the application filed under 39 Rule 1 of C.P.C. read with Section 9 of the said Act seeking for injunction restraining the respondents therein from invoking the Bank Guarantee. Therefore, in my considered view the said decision is not helping the respondents in any manner to decide the issue of maintainability

39. On the other hand an unreported decision of a learned Single Judge of this Court made in O.A.No.221 of 2014 dated 30.04.2015 is cited on behalf of the applicant to contend that for the purpose of deciding as to whether the

terms of the main contract including the arbitration clause are applicable to the bank guarantee, it is necessary to refer to the main contract. The learned Judge held at Paragraph No.13 and 21 as follows:

"13.It cannot be disputed that the bank guarantee is a separate and distinct contract. When the bank guarantee is invoked, the banker has no option, but to disburse the amount. However, it is to be noted that the origin of the bank guarantee is based on the contract between the two parties, to which bank is not a party. For the purpose of deciding as to whether the terms of the main contract including the arbitration clause are applicable to the bank guarantee, it is necessary to refer to the main contract, that is the Letter of Intent entered into between the parties and the bank guarantees..

..21. As held by the Honourable Supreme Court, the Section empowers the court to grant such interim measures of protection, by use of the words Just and Convenient. It is to be noted here that the courts, while hearing an application under Section 9 of the Arbitration and Conciliation Act, are empowered to grant prohibitory orders against a garnishee, even though the third party, against whom the relief is sought for, is not a party to the arbitration agreement, as the relief is in the nature of securing the claim of the applicants, if the requirements under Civil Procedure Code for grant of interim orders are satisfied. It is also pertinent to mention here that the applicant has approached this Court before the invocation."

40. After relying on the above said decision, the learned counsel appearing for the applicant submitted that the above said decision being the latest one, the same has to be relied on in preference to the decision made by R.S.Ramanathan,J. in Befesa Ajua case. For that proposition, they relied on ***AIR 2003 Karnataka 456, Karnataka State Road Transport Corporation, Bangalore vs R.Maheswari***, wherein the Full Bench of Karnataka High Court held at paragraph No.22 as follows:

"22.The argument of learned counsel M.R.A.Achar is that in the later decision, the earlier decision was not followed. The controversy is not acceptable as it is well settled law of precedent that where there are two judgments rendered by the Benches consisting of equal number of Judges as in this case, the later in time would prevail and hence we are bound by the decision of the Supreme Court in R.Venkatesham Chetty's case referred to above. In the light of the said decision, we answer the question referred to us as follows:

It is not permissible to grant variation of the conditions of a stage carriage permit held by a saved operator under the Kolar Pocket Scheme or Bellary Pocket Scheme by increasing the number of trips or number of vehicles unless the reciprocal agreement between the States so permits as held by the Supreme Court in R.Venkatesham Chetty's case.

The writ appeals and writ petitions shall now be posted before appropriate Bench for disposal on merits."

41. Another contention raised by CMRL against the maintainability of the applications against invoking of Bank guarantee, is that the GAMMON cannot maintain the applications individually as admittedly, MMS is not in the picture and abandoned the contract. Therefore, it is their contention that in the absence of MMS, joint venture does not exist and consequently, GAMMON cannot maintain these applications. I am not able to accept the above contention. First of all, it is to be seen that these applications are not filed by GAMMON in its individual capacity but by the joint venture itself. In other words, these applications are filed not by GAMMON alone but by joint venture. Whether joint venture exists even after MMS abandoned the contract is not a simple question to be answered in negative simply by considering the above stated position alone. On the other hand, existence of joint venture, even after exist of MMS need to be considered and decided by considering clause 19 which deals with default of a party; Clause 19.7 which gives the right to other party to retain all assets of plants, equipments and material provided by the joint venture for the completion of the works; Clause 19.11 which deals with step-in rights of the lead party; Clause 20.2 contemplating as to at what point of time the joint venture agreement stands terminated. Therefore, all these clauses in the joint venture agreement are very much crucial and essential clauses for deciding whether the joint venture exists even after one party abandons. A perusal of those clauses, *prima facie* indicate that the contention

of the CMRL is not correct. Therefore, the above clauses certainly, have to be construed as showing *prima facie* case in favour of the applicant for grant of interim order against invoking of Bank Guarantee. Therefore, the above contention raised by CMRL cannot be sustained.

42. Another objection raised by CMRL against maintainability is that there is no resolution passed by the Supervisory Board of the Joint Venture to file the case before this Court. It is their contention that when the Board consists of both GAMMON and MMS, the GAMMON alone cannot take a decision and file these applications in the absence of MMS. I am not able to appreciate the said contention since the Supervisory Board as contemplated under Clause 8 of the Joint Venture Agreement consists of two members, one appointed by each party and the member appointed by lead party shall act as a chairman of the Supervisory Board. Further, Clause 8.7 contemplates that if quorum is not achieved or if a quorum again in the adjourned meeting is not achieved, the decision shall be taken by the Chairman of the Supervisory Board in a bonafide manner. Therefore, in view of the above said Clause dealing with the Supervisory Board, it cannot be said that the GAMMON being the lead party and also the Chairman of the Supervisory Board is powerless to question against any action of the employer in respect of the contract entered into between the parties.

43. Therefore, I answer the first issue in affirmative by holding that these applications seeking for injunction to restrain the CMRL from invoking the Bank Guarantee are maintainable under Section 9 of the Arbitration and Conciliation Act.

44. As I have found the first question regarding the maintainability of the applications in affirmative holding that they are maintainable, now I need to examine the other two questions which are on merits.

44. Before answering these questions, let me first consider the scope of Section 9 of the Arbitration and Conciliation Act, 1996 which reads as follows:

9. Interim measures, etc., by Court - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court :-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale

of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute of arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

45. A perusal of the above said provision of law would show that it is intended only for the purpose of providing some interim relief or measures by Court to a party before or during or after arbitral proceedings but before the

award is enforced in accordance with Section 36. In other words, it could be seen that the Court which exercise the power under section 9 is not deciding the main dispute between the parties in any manner and on the other hand, it is only to provide an interim measure of protection as may appear to the Court to be just and convenient apart from other purposes as stipulated under sub-clause 1 and 2 of Section 9. Needless to say that a party who comes to the Court to invoke its jurisdiction under Section 9, undoubtedly, comes with a hue and cry seeking for interim protection either before or during or after arbitral proceedings. When the main dispute between the parties has to be decided only in the arbitral proceedings and the scope of interference with such award by the Court is contemplated only when an application is filed under Section 34 of the said Act, exercise of power under Section 9 for providing some interim relief or measures, is to be construed only as a balancing act and not as a a damaging or decisive act on merits. In other words, the approach of the Court while exercising the power under Section 9 must be in the form of first-aid, provided, the party who seeks such interim measure has made out a *prima facie* case for getting such treatment. As the party who approaches the Court under Section 9 has already suffered some injury at the hands of the other side and the merits of which has to be decided ultimately under the arbitral proceedings, the Court should, in a given facts and circumstances of the case, at this stage, find out a via media between both parties so that

interest of both parties is protected. Especially, in cases where the arbitral proceedings is yet to commence, the role of the Court, as far as possible, is only to preserve the subject matter of Arbitration Agreement and protect the interest of both parties by way of passing a balancing order, as the merits of the dispute arising out of the arbitration agreement yet is to be considered and decided by the arbitral proceedings. At the same time, it should not be taken to mean that in all cases under Section 9, such exercise need to be done. As I have already stated the facts and circumstances the case should satisfy the Court that exercise need to be made in the interest of both parties. Keeping this principle in mind, let me consider the facts and circumstances of the present case to find out as to whether the applicant is entitled to the interim orders.

46. Admittedly, the subject matter of Bank Guarantees are sought to be invoked as a consequential action resulting out of the order of termination dated 13.07.2015 passed by the CMRL against the applicant. It is also not in dispute that as against the order of termination, the aggrieved party can raise a dispute before the Arbitral Tribunal, in view of the fact that the Contract Agreement entered into between the parties provides an arbitration clause, which I have already extracted supra. Though both sides have elaborately made their respective pleadings and submissions on merits for and against the

termination of Contract by inviting this Court's attention to various facts and circumstances as well as various clauses contained in the Joint Venture Agreement as well as in the Contract Agreement, I am not inclined to go into those aspects and give a finding as to whether the termination is valid or not, since such issue is for the Arbitral Tribunal to consider and decide on merits. Therefore, if any observation or finding, even by way of passing reference, is made in this order on the merits of the order of termination, the same would not only prejudice the mind of Arbitral Tribunal and also virtually result in the Arbitral Proceedings an empty formality. Therefore, I find that all the points raised before this Court by both the parties regarding the merits of the termination of Contract are to be raised and agitated only before the Arbitral Tribunal.

47. Application Nos.4685 and 4686 of 2015 are filed seeking for stay of termination order. It is seen from the order of termination dated 13.07.2015 that the termination takes effect from the date of the said order, which means that the termination has already taken place from 13.07.2015 onwards. I have already pointed out as to whether the termination of the contract is valid or not is the question that has to be considered and decided only in the arbitral proceedings and this Court, at this stage, that too, while considering the application under Section 9 of the said Act, cannot go into the validity or

otherwise of the order of termination and give its finding on the same. Therefore, the question of staying the termination order also does not arise, more particularly, when the order of termination has already given effect to. On the other hand, if the termination is stayed, it would amount to revival of the contract between the parties. In effect, even before the Arbitral Tribunal decides the dispute, granting of stay of termination would indirectly result in deciding the matter in favour of the applicant, even though if it is sought for as an interim measure. Hence, I do not propose to do such exercise as I consider that the validity of termination is the main dispute which to be agitated before the Arbitration Tribunal.

48. The learned Advocate General Mr.A.L.Somayaji appearing for the respondents relied on *AIR 2000 Delhi 450, Rajasthan Breweries Limited v. Stoh Brewery Company*, in support of his contention that the contract specifically determinable cannot be specifically enforced. In paragraph No.14 of the above decision, it has been observed as follows:

"14. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, the performance of which would not be

specifically enforced."

49. In the case on hand, the contract between the parties is already terminated. Whether such termination is valid or not has to be gone into and decided only in the arbitral proceedings. Therefore, the question as to whether the contract is specifically determinable and consequently, the same cannot be specifically enforced, is a question that would arise for consideration before the arbitral proceedings and therefore, this Court, at this stage, is not to decide such issue. Accordingly, I decide the question in respect of stay of termination of the contract against the applicant.

50. The next question is as to whether the respondents are entitled to invoke the Bank Guarantee in pursuant to the order of termination. No doubt, the bank guarantee sought to be invoked is a consequential action pursuant to the order of termination. It is also true that the Bank Guarantee furnished contains a clause that the Bank shall pay to the employer any money so demanded notwithstanding any dispute or disputes raised by the Contractor in any suit or proceedings pending before any Court or Tribunal or Arbitrator/s relating thereto and the liability under this guarantee shall be absolute and unequivocal. Therefore, it is contended by the respondent that they are entitled to invoke the bank guarantee.

51. Per contra, the learned senior counsels appearing on the side of the applicant contended that while the applicant is entitled to challenge the termination of contract before the Arbitral Tribunal by raising very many grounds on merits as contended herein, they are entitled to get protection from this Court, in the meantime, as contemplated under Section 9 of the said Act to preserve the subject matter of dispute during the pendency of the Arbitral proceedings. Therefore, it is contended by the learned senior counsel, staying the termination order and passing an order of injunction preventing the CMRL from invoking the Bank guarantee is essential and imminent, so as to preserve the subject matter of dispute during the pendency of the arbitral proceedings. I have already found that staying of termination cannot be granted as it has already been given effect to and if stay is granted, it would amount to reviving the contract itself. Preserving the subject matter does not mean restoring the parties to their original position that existed before the termination. Therefore, I am of the view that the applicants are not justified in seeking for the stay of termination order. However, insofar as the invocation of bank guarantee is concerned, it has to be seen as to whether the applicants are entitled to protection by way of passing an interim order of injunction.

52. In this case, the GAMMON and MMS became a Joint Venture and

entered into Contract Agreement with the CMRL. It is seen that while executing the work and after completion of considerable percentage of such work, one of the partner namely MMS abandoned the project and left the country, thereby leaving the GAMMON as well as CMRL in lurch. According to GAMMON, which is a lead party as per the Joint Venture Agreement, it is entitled to step in at the place of MMS and continue the contract work by bringing in any third party in the place of MMS. In this aspect, clause 19.11 JV agreement is relied on by the applicant which deals with step in right which reads as follows:

19.11 Step-in Rights of the LP: In the event of a default by the other Party due to which Employer expressly indicates its intention to suspend or terminate the Contract or levy liquidated damages or penalties for the breach or default under the Contract of an amount mutually agreed by parties hereto and no reasonable action to remedy such breach or default is initiated by the other Party within fourteen (14) days of the service of such notice, then the LP shall have the right to take over and complete the other Party's Scope of Work for the account and at the risk and cost of such Party subject to the approval of the Employer.

LP may exercise its discretion to invoke the Step-in

*Rights at any time as indicated in this clause above.
The discretion of the LP not to exercise its step-in rights shall not be deemed to be a waiver of its rights at any time. In any case the other Party shall remain liable as a Defaulting Party as indicated in this Agreement.*

53. It is the further case of the applicant that even though CMRL has extended the time for completion of the projection and when the time so granted has not expired, they should have waited till the completion of the extended period and permitted the applicant, in the meantime, to exercise the step in right and to bring in another party to complete the project. It is their case that they have made several request to CMRL for exercising the step in right and the same was not considered. Per contra, it is the contention of CMRL that the Joint Venture has delayed the project and sought for extension one after another. It is their further case that MMS which abandoned the project has in fact made complaint against GAMMON that they were slow in completing their work. It is the further case of the CMRL that the work undertaken under the Contract entered between JV and CMRL, cannot be permitted to be continued by another third party at the instance of GAMMON. It is also the contention of the CMRL that once the MMS abandoned the project, the JV automatically comes to an end and therefore, the GAMMON

cannot independently act as though the JV continues. To this submission, the applicant relies on Clause 20.2 of JV Agreement to contend that only when all the events referred to under the said clause have taken place, the Joint Venture Agreement can be said to have come to an end and till such time, it survives. Clause 20.2 of JV Agreement reads as follows:

20.2 This Agreement shall stand terminated when all of the following events have occurred:

- i) all the Works have been completed and all obligations under the terms of the Contract have been performed or the Contract has been terminated;*
- ii) all bonds and guarantees including counter guarantees have been returned or have expired and all accounts have been closed without reserves;*
- iii) all pending issues, disputes or differences arising out of or in connection with the Joint Venture's activities have been settled; and*
- iv) all tax assessments have been completed and settled.*

54. The learned Advocate General further relied on a decision of the Andhra Pradesh High Court reported in **2005(5) ALD 450, Gvprel-Mee(J.V.), vs Government of Andhra Pradesh** and **2007(6) M.L.J. 525, Bharat Petroleum Corporation Limited vs Rajarajeswari Agency** in support of his

submission that joint venture cannot survive, if one of the partner of joint venture goes out of the contract.

55. In my considered view, the observations made in the above decisions is not to be applied uniformly in all cases where there is a joint venture partners. Needless to say that the terms of the joint venture agreement place a major role to decide as to whether the other partner of joint venture can continue even if one of the joint venture goes out. In this case, I have already pointed out that there is a clause in joint venture agreement dealing with step in right under Clause No.19.11. Further Clause 20.2 of JV Agreement contemplates when the said agreement stands terminated. Therefore, I find the above decisions are also not helping the respondents in any manner. No doubt the issue as to whether the joint venture continues or not in view of clause 19.11 and clause 20.2 has also to be gone into and decided in the arbitral proceedings by considering the above said clause 19.11 and 20.2. When such issue is to be decided by the Arbitral Tribunal, this Court at this stage, is not required to go into such issue and give finding. However, existence of these distinct and different facts have to be considered as a strong *prima facie* case in favour of the applicant to decide the applications against invocation of Bank Guarantees.

56. Needless to say that the other contentions touching upon the merits of termination raised by both parties are to be considered and decided only by the Arbitral Tribunal and therefore, at this stage, I am not inclined to go into the same and give any finding. What is to be seen at this stage is as to whether the applicants have made out a prima facie case for an order of interim injunction against the invocation of Bank Guarantee. In other words, this Court has to see as to what would be the appropriate order which would protect the interest of both parties during the pendency of Arbitral Tribunal. Both sides relied on several decisions on this aspect touching upon the invocation of Bank Guarantees which are as follows:

57. Mr.Sathish Parasaran, learned counsel appearing for the applicant relied on *1975(1) SCC 199, The Godhra Electricity Co. Ltd., vs The State of Gujarat*, in support of his submission that even if there is any ambiguity in the written contract between the parties, subsequent conduct of the parties are relevant for consideration to find out as to what was the actual intention of the parties in respect of the contract. Paragraph No.11 of the above decision reads as follows:

"11.In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from

their conduct in rendering or in receiving performances under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidence by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation."

58. The learned counsel Mr.Sathish Parasaran for the applicant relied on **1988(1) SCC 174, UP Coop Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.**, in support of his submission that the bank guarantees cannot be permitted to be invoked in order to prevent irretrievable injustice between

the parties. Paragraph No.28 of the above decision reads as follows:

"I am, however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the decision that there should be a prima facie case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised."

59. Mr.R.Thiyagarajan, learned Senior Counsel appearing for Chennai Metro Rail Limited submitted that the beneficiary is the best Judge to decide as to when and for what reason the bank guarantee to be revoked. In support of such submission, he relied on the decision of the Apex Court reported in **2006(2) SCC 728, Bses Ltd (Now Reliance Energy Ltd) vs Fenner India Ltd and another**. However, perusal of the above said decision also shows that there are two exceptions to the Rule that the Bank must pay according to the tenure of the guarantee, on demand without proof or condition. The first exception is fraud which the Bank has noticed and the second exception is when there are special equities in favour of injunction viz., "irretrievable

injury" or "irretrievable injustice" . Paragraph No.10 of the said decision reads as follows:

"10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn v. Sumac International Ltd., (1997) 1 SCC 568, (hereinafter "U.P. State Sugar Corpn") this Court, correctly declared that the law was "settled"."

60. Therefore, it is clear that the court can always go into the question as to whether irretrievable injury or irretrievable injustice would occur, if such an injunction is not granted in favour of the guarantor. If the Court is satisfied that the application of such exception to the general Rule is warranted based on the facts and circumstances of the case, there cannot be any impediment for the court to grant such an order of injunction only for the purpose of preventing the "irretrievable injury" or "irretrievable injustice" to the parties concerned.

61. **2008 (1) SCC 544, Vinitec Electronics Private Ltd. vs HCL Infosystems Ltd.**, is relied on by the learned Senior Counsel for CMRL to contend that the bank is bound to honour the bank guarantee if it is unconditional. Paragraph No.22 reads as follows:

"22. In the present case the amended clause does not refer to any of the clauses specifically as such but on the other hand the Bank had undertaken responsibility to pay any sum or sums within the guaranteed limit upon receipt of written demand from the Company. The operative portion of the bank guarantee furnished by the Bank does not refer to any of the conditions for payment under the Bank guarantee. It is true that the bank guarantee furnished makes a reference to the principal agreement between the parties in its preamble. Mere fact that the bank guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the Bank to be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee."

62. In the case on hand, it is not only the bank guarantee refers to the principal agreement in the deed of guarantee but the contract agreement entered between the parties also refers to the joint venture agreement as well as the guarantee for the system as forming part of the contract agreement.

Therefore, the relevant terms and conditions referred to under the joint venture agreement followed by the contract agreement would certainly have to be read into the bank guarantee terms also so as to find out as to whether the beneficiary is entitled to invoke the same or not. In this case, the termination had taken place admittedly even before the expiry of the time granted by the CMRL to the applicant for completion of the project. It is seen from the Addendum No.1 to Contract UAA-02 entered on 16.08.2013 that the time schedule for completion of the work was extended as follows:

A	Government Estate	1597	16-Aug-2015
B	LIC	1673	31-Oct-2015
C	Thousand Lights	1688	15-Nov-2015
KD11	Achieve issuance of Taking Over Certificate	1825	31-Mar-2016
KD12	Achieve issuance of Performance Certificate	2555	31-Mar-2018

63. When that being the facts and circumstances of the present case, I am of the view that the invoking of the bank guarantee in pursuant to the termination of the contract even before the expiry of its time, would certainly cause irretrievable injury to the guarantor and if it is permitted, it would amount to irretrievable injustice done to them. Therefore, I find the above decision is not applicable to the facts and circumstances of the present case.

64. The following decisions are relied by the learned Senior Counsel Mr.R.Thiagarajan appearing for the CMRL strongly opposing to the injunction application against the invocation of the bank guarantee. **1999 (8) SCC 436, Hindustan Construction Co. Ltd vs State of Bihar**, wherein at paragraph No.8, it has been observed as follows:

"8.Now, a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, bank guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "advance", the guarantee is invoked and the amount is recovered from the Bank. It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the guarantor."

65. Perusal of the facts and circumstances of the case before the Apex Court would show that HCCL was awarded a contract by the State of Bihar and the period of contract was for 42 months and the work was to be completed by 24.10.1992. The HCCL had not adhered to the schedule of the work and on the

other hand, abandoned the same after it had received the mobilisation advance. Therefore, the subject matter bank guarantees therein were invoked. Considering the above stated facts, the Apex Court has held as supra. The facts of the present case are totally different as the abandonment was not by the joint venture in toto, apart from the fact that the extended period of contract has not come to an end on the date of issuing the order of termination. Moreover, the step in clause contained in the Joint Venture Agreement strongly relied on by the applicant plays a vital role in deciding the rights of the respective parties. Therefore, I find that the above decision is factually distinguishable.

66. 1991(4) SCC 230, *General Electric Technical Services Company Inc. vs Punj Sons (P) Ltd*, is relied on in support of the contention against the grant of injunction. In the above said decision, the Apex Court has held that the bank has committed honour it has to pay as per the undertaking. It is also observed that the bank cannot be interdicted by the court in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. Here again, perusal of the facts and circumstances of the above said case would show that the first respondent therein who was a contractor failed to complete the project within the stipulated time as per the contract inspite of repeated opportunities given to them. Thereafter the

employer therein terminated the contract and sought to invoke the bank guarantee. As the present case is on a different footing as discussed supra, this decision is also factually distinguishable and not helping the CMRL.

67. 1997(1) SCC 568, *U.P.State Sugar Corporation vs Sumac International Ltd.*, is relied to contend that injunction cannot be granted and the court should be slow in granting injunction to restrain the realisation of the bank guarantee. The facts of the above said case would also disclose that the contractor therein failed to complete the work therein within the time granted and further extended therein and consequently the employer therein terminated the contract thereafter and invoked the bank guarantees. Therefore, the facts of the present case are totally different one and hence, the above decision is not helping the respondents in any manner. Even otherwise, the Apex Court in the very same decision has also considered the exception for granting injunction at paragraph No.12 as follows:

"12.The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very

purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned."

Therefore, the Court has to necessarily see as to whether the invoking of the bank guarantee would result in irretrievable harm or injustice to any of the parties to the contract.

68. AIR 2007 Supreme Court 2716, Mahatma Gandhi Sahakara Sakkare Karkhane vs National Heavy Engg. Coop. Ltd. is further relied on to contend that bank guarantee without any demur is recoverable. Here again the facts of the above case would show that the respondents therein failed to perform his part of the contract within the stipulated time. He failed to commission the plan in terms of the agreement within the stipulated time in spite of repeated notice. Therefore, the above said case is also factually distinguishable.

69. An unreported decision of the learned Single Judge of this Court made in *O.A.Nos.656 to 659 of 2011* dated **29.06.2012** is cited once again to contend that invocation of bank guarantee cannot be stalled. Perusal of the said decision would show that the learned Judge has observed at paragraph No.26 that the Bank guarantee can be invoked unless fraud or irretrievable injury or irretrievable injustice is established. The learned Judge found therein that there was no allegation of fraud or irretrievable injury or injustice in that case. There also it appears that the contractor therein has not performed the contract work as per the stipulation and they have not made any progress in the work. The facts of the present case being a different one as discussed supra, the above case relied on is also not helping the respondent.

70. *AIR 1951 SC 280, Bishundeo Narain vs Seogeni Rai*, is relied on by the learned senior counsel for the CMRL to contend that the parties pleading fraud must file full particulars. In this case, I do not think that the applicant has made any specific allegation of fraud on the part of the CMRL. On the other hand, their contention is that the irretrievable injury and injustice would be caused to them, if the bank guarantee is invoked during the pendency of the arbitral proceedings. Therefore, the said decision is also not relevant for consideration for the present case.

71. The Courts have repeatedly held that the exception for refusing to grant injunction against invocation of Bank Guarantee is fraud and irretrievable injury. In my considered view, fraud and irretrievable injury need not necessarily go together. Once fraud is pleaded and proved that is the end of the matter for granting injunction. In such a scenerio, there need not be any irretrievable injury to exist. Fraud vitiates everything. Hence, I am of the view that both fraud and irretrievable injury need not necessarily co-exist for seeking injunction. If any one of the same exists, the Court can consider the same. Therefore, this Court has to see as to whether irretrievable injury and injustice would be caused to the applicants if the Bank Guarantees are invoked during the pendency of arbitral proceedings.

72. On careful consideration of all the facts and circumstances of the case, I find that irretrievable injury would be caused to the applicant if the injunction against the invocation of Bank Guarantee is refused and that it would lead to an irretrievable injustice to the applicant.

73. It is claimed that 60% of the work was already completed by Joint Venture and therefore, the remaining work to be completed is only 37%. Even to complete the said work, the lead party namely GAMMON sought permission

from CMRL to exercise the step in right as contemplated under Clause 19.11. The said request was not considered by CMRL for various reasons. Admittedly, the CMRL has extended the time for completion of the contract and the extended time has not admittedly expired on the date of issuing the termination order. The GAMMON has not simply sought for permission to bring in a third party by exercising the step in right without making any bonafide attempt. On the other hand, it is a matter of fact that GAMMON sought to bring in an Italian company for completing the remaining work. This was also not considered by CMRL. Such attempt of GAMMON certainly, show the bonafide on their part in completing the project. It is also claimed that the CMRL has not settled some bills in respect of the works already completed to the tune of Rs.100 crores. However, this claim is denied by CMRL by stating that the applicant cannot expect CMRL to pump in a sum of Rs.100 crores when the JV has admittedly failed and its JV partner had abandoned the project. Needless to say that this claim by the applicant and denial by the respondent is a matter to be gone into by the Arbitral Tribunal. These are all the facts prima facie indicate that termination of the contract followed by the attempt to invoke the bank Guarantee would certainly cause irretrievable injury to the applicant. In spite of all those facts, if injunction is refused, in my considered view, it would cause to the applicant not only an irretrievable injury but also irretrievable injustice. In fact, the very termination of contract, not stayed by

this Court, has already caused irretrievable injury. Whether termination is valid or not is to be decided by the Arbitral Tribunal. However, as the termination, not stayed by this Court has caused irretrievable injury to the applicant, pending disposal of the arbitral proceedings, further injury can be averted by granting the injunction against invoking Bank Guarantees. It should also be noted that not granting of stay of termination by this Court in this proceedings is not based on merits of the rival contentions of the parties, but on the reason that termination has already come into force and staying the same would revive the party to their original position. Further, it is a matter of fact that already the CMRL has invoked two bank guarantees which are the subject matter in other two applications in Application Nos.730 & 733 of 2015. As the Bank Guarantees have been invoked in those matters, those applications were dismissed by this Court on 07.08.2015.

74. Admittedly, the Bank Guarantees given by the applicant are alive and the CMRL can at any time, invoke the same. Therefore, the interest of the CMRL is well protected by the Bank Guarantees furnished by the applicant. If those Bank guarantees are continued to be alive during the arbitral proceedings and even thereafter, during the pendency of the proceedings under Section 34 of the said Act, the interest of the CMRL is in no way be

affected or prejudiced. On the other hand, if the Bank guarantees are invoked in the mean time, certainly, the applicant would be put to great financial strain as the concerned Banks which had given Bank Guarantee would ultimately, bounce upon the applicant to pay the money. In my considered view, this would certainly make the applicant to suffer even before the Arbitral Tribunal decides the main dispute between the parties.

75. At the same time, as this Court has not stayed the termination, it is open to the CMRL to go ahead with the project and complete the same by employing a new contractor for which, they have already taken steps by issuing paper publication inviting tenders. Since the project is an important project which cannot brook the delay any more, this Court cannot prevent the respondent from going ahead with the project and complete the same with the third party. Therefore, the interest of the CMRL, in this aspect, is also well protected.

76. In the result,

(a) Application Nos.731, 732 & 734 of 2015 are allowed subject to the following conditions:

(i) The applicants are directed to keep the subject matter of bank guarantees alive, till the disposal of the arbitral proceedings.

(ii) The applicants are directed to extend the Bank Guarantees wherever it expires, 15 days in advance of such expiry.

(iii) If the applicants fail to extend such Bank Guarantees within the time as stipulated supra, the respondent CMRL is at liberty to invoke the Bank Guarantees immediately without notice to the applicants.

(b) Application Nos.4685 and 4686 of 2015 seeking stay of the operation of the order of termination dated 13.07.2015 are dismissed.

(c) The CMRL is at liberty to proceed with the notification inviting fresh tenders for completion of the subject matter of the contract without prejudice to the contentions of the respective parties before the Arbitral Tribunal.

(d) Application Nos.5258 & 5259 of 2015 are closed as these applicants are not necessary parties in these proceedings.

(e) The parties are directed to take appropriate steps to initiate arbitral proceedings within a period of four weeks from the date of receipt of a copy of this order.

No costs.

08.09.2015

Index:Yes/No

Internet:Yes/No

vsi/vri

Note:

Issue order copy on 09.09.2015

K.RAVICHANDRABAABU,J.

vsi/vri

Pre-delivery order made in

**O.A.Nos.731, 732 & 734 of 2015
and
A.Nos.4685 & 4686 of 2015
and
A.Nos.5258 & 5259 of 2015**

Dated: 08.09.2015