

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on: 23.12.2020

Judgment Delivered on : 24.03.2021

Coram:

THE HONOURABLE MR.JUSTICE R.SUBBIAH  
and  
THE HONOURABLE MR.JUSTICE C.SARAVANAN

Original Side Appeal Nos.173 and 174 of 2020

and

Cross Objection Nos.36 and 37 of 2020

and

Civil Miscellaneous Petition Nos.8772, 8774, 8780 and 8782 of  
2020

(Heard through video-conferencing)

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M/s.Transtonelstroy-Afcons (JV),  
comprising of:

1. M/s.Transtonelstroy Ltd.,  
4/1, Lunganskaya Street,  
Moscow 115 583, Russia.
2. M/s.Afcons Infrastructure Ltd.,  
AFCON House, 16, Shah Industrial Estate,  
Veera Desai Road, Azad Nagar (P.O),  
Post Box No.11978, Andheri (W),  
Mumbai-400 053,  
Rep. by Mr.S.Sivamani .. Appellants in both the appeals

Versus

1. M/s.Chennai Metro Rail Ltd.,  
Administrative Building,  
Chennai Metro Rail Depot,  
Poonamallee High Road,  
Koyambedu, Chennai-600 107  
.. First respondent in both appeals
2. Union Bank of India,  
Industrial Finance Branch,  
First Floor, Union Bank Bhavan,  
239, Vidhan Bhavan Marg,  
Nariman Point  
Mumbai-400 021 .. Second respondent in OSA No.173 of 2020

2. IDBI Bank,  
Specialised Corporate Branch,  
IDBI Building, Ground Floor,  
Plot No.39, Sector 11, CBD Belapur,  
Navi Mumbai-400 614.

.. Second respondent in OSA No.174 of 2020

Chennai Metro Rail Limited,  
Administrative Building,  
Chennai Metro Rail Depot,  
Poonamallee High Road,  
Koyambedu  
Chennai-600 107

.. Cross Objector/ Respondent1 in  
Cross.Obj.No.36 of 2020

Versus

1. M/s.Transtunnelstroy-Afcons (JV),  
comprising of:

1. M/s.Transtunnelstroy Ltd.,  
4/1, Lunganskaya Street,  
Moscow, 115583, Russia.

2. M/s.Afcons Infrastructure Ltd.,  
Afcons House, 16, Shah Industrial Estate,  
Veera Desai Road, Azad Nagar (P.O),  
Post Box No.11978, Andheri (W),  
Mumbai-4--053  
Represented by Mr.S.Sivamani

.. Respondent/ Appellant

2. Union Bank of India,  
Industrial Finance Branch,  
First Floor Union Bank Bhavan,  
239, Vihan Bhavan Marg,  
Nariman Point, Mumbai-400 021.

..2<sup>nd</sup> Respondent/2<sup>nd</sup> Respondent in Cross Obj.36 of 2020

Chennai Metro Rail Limited,  
Administrative Building,  
Chennai Metro Rail Depot,  
Poonamallee High Road,  
Koyambedu, Chennai-600 107.

.. Cross Objector/ Respondent1 in Cross.Obj.No.37 of 2020

Versus

1. M/s.Transtunnelstroy-Afcons (JV),  
comprising of:

1. M/s.Transtunnelstroy Ltd.,  
4/1, Lunganskaya Street,  
Moscow, 115583, Russia. .. Respondent1/ Appellant

2. M/s.Afcons Infrastructure Ltd.,  
Afcons House, 16, Shah Industrial Estate,  
Veera Desai Road, Azad Nagar (P.O),  
Post Box No.11978, Andheri (W),  
Mumbai-4--053  
Represented by Mr.S.Sivamani .. Respondent 2/ Respondent2

2. IDBI Bank Limited,  
Specialised Corporate Branch,  
IDBI Building Ground Floor,  
Plot No.39- 41, Sector 11, CBD Belapur,  
Navi Mumbai-400 614.  
. Respondent in Cross Obj.37 of 2020

Original Side Appeal (O.S.A) No.173 of 2020, filed under  
Clause 15 of the Letters Patent of the High Court of Madras and  
Order XXXVII Rule 1 of the Original Side Rules of the High Court  
of Madras, 1956, against the order and decretal order dated  
14.08.2020 passed by the learned Single Judge in O.A.No.246 of  
2020 on the file of the Ordinary Original Civil Jurisdiction of  
this Court.

Original Side Appeal (O.S.A) No.174 of 2020, filed under  
Clause 15 of the Letters Patent of the High Court of Madras and  
Order XXXVII Rule 1 of the Original Side Rules of the High Court  
of Madras, 1956, against the order and decretal order dated  
14.08.2020 passed by the learned Single Judge in O.A.No.247 of  
2020 on the file of the Ordinary Original Civil Jurisdiction of  
this Court.

Cross Objection No.36 of 2020 filed under Order XLI Rule 22  
of the Code of Civil Procedure and Order XXXVI Rule 2 of the  
Original Side Rules of this Court, against the order dated  
14.08.2020 on the file of the Original Jurisdiction of this  
Court, and made in O.A.No.246 of 2020, and praying to allow the  
Cross Objection by setting aside the common order dated  
14.08.2020 made in O.A.No.246 of 2020, limited to the findings  
in Paragraph 22.2 with regard to the maintainability of the  
Original Application and consequently to hold that Original  
Application was not maintainable.

Cross Objection No.37 of 2020 filed under Order XLI Rule 22 of the Code of Civil Procedure and Order XXXVI Rule 2 of the Original Side Rules of this Court, against the order dated 14.08.2020 on the file of the Original Jurisdiction of this Court, and made in O.A.No.247 of 2020, and praying to allow the Cross Objection by setting aside the common order dated 14.08.2020 made in O.A.No.247 of 2020, limited to the findings in Paragraph 22.2 with regard to the maintainability of the Original Application and consequently to hold that Original Application was not maintainable.

For appellants : Mr.V.Raghavachari  
for Mr.D.Balaraman in O.S.A.No.173 of 2020  
Mr. G. Masilamani, Senior Counsel  
for Mr. D. Balaraman in O.S.A.No.174 of 2020

For respondents: Mr. P.H.Arvinth Pandiyan, Senior Counsel/  
Addl. Advocate General,  
assisted by Mr.S. Arjun Suresh for R-1  
in O.S.A.No.173 of 2020

Mr.Yashod Vardhan, Senior Counsel for R-1  
for Mr.S.Arjun Suresh in O.S.A.No.174 of 2020

Mr.Srinath Sridevan for R2  
in both the Original Side Appeals

For Cross Objector : Mr.P.H.Arvind Pandian, Senior Counsel/  
Addl. Advocate General,  
assisted by Mr.S.Arjun Suresh in Cross obj.36/2020

Mr.Yashod Vardhan, Senior Counsel, for  
Mr.S.Arjun Suresh in Cross Obj.37 of 2020

Mr.V.Raghavachari  
for Mr.D.Balaraman for R1 in Cross.Obj.36 of 2020

Mr.G.Masilamani, Senior Counsel  
for Mr. D. Balaraman for R1 in  
Cross.Obj.37 of 2020

Mr. Srinath Sridevan for R2  
in both Cross Objections

## COMMON JUDGMENT

R.SUBBIAH, J

Chennai Metro Rail has become one of the iconic symbols of the City of Chennai. It connects and/or transports people to various nerve-centres of the City. It is also considered as one of the important and convenient modes of transportation to ease traffic congestion in the City. It heralded a new mode of convenient transportation to the masses of City. Though it is operational for the past more than two years, the dispute between the contractor, who was awarded the contract for tunnelling, design and construction of Metro Railway Stations and Chennai Metro Rail, is yet to be settled. There were several arbitration proceedings pending between the contractor and Metro Rail. During the pendency of such arbitration proceedings, the present appeals and cross-objections are filed before us.

2. These Original Side Appeals have been filed as against the common order of dismissal, dated 14.08.2020 passed by the learned Single Judge in two separate applications filed by the appellants herein in O.A.Nos.246 and 247 of 2020 under Section 9(ii)(d) of the Arbitration and Conciliation Act, for restraining the first respondent-M/s.Chennai Metro Rail Limited, from invoking and receiving the amounts from Bank Guarantee No.49580IGL0074018, dated 16.10.2018 issued by the Union Bank of India for Rs.25,77,48,750/- and Bank Guarantee No.1000041BGP00943, dated 29.12.2010 issued by the IDBI Bank Limited, for Rs.117,51,07,500/- or any part thereof, pending disposal of the Arbitration Proceedings under UAA-05 and UAA-01 Contracts, respectively.

3. The learned Single Judge, while dismissing O.A. Nos. 246 and 247 of 2020, had rejected the contention of the first respondent-Metro rail stating that the Original Applications filed by the appellants herein are not maintainable. As against such finding, Metro Rail Limited had filed Cross Objection Nos.36 and 37 of 2020 respectively.

4. The brief facts which are necessary for disposal of the present appeals are as follows:

(a) The appellant-M/s.Transtonnelstroy Afcons is a Joint Venture Company comprising M/s.Transtonnelstroy Limited, Moscow, Russia and M/s.Afcons Infrastructure Limited, Mumbai.

(b) The first respondent-M/s.Chennai Metro Rail Limited (hereinafter called as "CMRL"), awarded the work of design and construction of underground stations at Shenoy Nagar, Anna Nagar East, Anna Nagar Tower, Thirumangalam and associated tunnels - Contract No.UAE-05 to the appellant for a contract price of Rs.1030,99,50,000/-. Pursuant to the same, a formal contract was entered into between the appellant and first respondent-CMRL on

31.01.2011 (hereinafter referred to UAA-05, for brevity), which relates to O.A. No. 246 of 2020, pertaining to O.S.A.No.173 of 2020 had been filed.

(c) Similarly, the first respondent-CMRL awarded another work of Design and construction of underground station work at Washermenpet, Mannadi, High Court, Chennai Central and Egmore and Associated tunnels - Contract No.UAA-01, to the appellant for a contract price of Rs.1566,81,00,000/- and pursuant to the same, a formal contract was entered into between the appellant and the first respondent-CMRL on 31.01.2011 (for short, "Contract No.UAA-01), which relates to O.A.No.247 of 2020, pertaining to O.S.A.No.174 of 2020 had been filed.

(d) As per Clause 4.2 of the General Conditions of Contract (GCC) read with Clause 7 of Conditions of Particular Application (CPA), the appellant-Company had furnished performance security by way of Bank Guarantee (BG). Insofar as Contract UAA-05 is concerned, the appellant-Company had furnished Bank Guarantee dated 30.12.2010 for Rs.77,32,46,250/- (7.5% of underlying contract) from Union Bank of India, the second respondent in O.S.A.No.173 of 2020. Similarly, insofar as Contract UAA-01 is concerned, the appellant-Company had furnished Bank Guarantee dated 29.12.2010 for Rs.117,51,07,500/- (7.5% of underlying contract) from IDBI Bank Limited, the second respondent in O.S.A.No.174 of 2020.

(e) So far as UAA-05 contract (O.S.A.No.173 of 2020) is concerned, subsequent to the issuance of Taking Over Certificate, dated 27.08.2018, as per Clause 4.2 of GCC read with CPA.7 of the underlying contract, and Clause 6-b of Bank Guarantee (BG), the first respondent-CMRL reduced the BG from 7.5% to 2.5% and hence, the appellant-Company had furnished a revised BG dated 16.10.2018 for Rs.25,77,48,750/- (2.5 % of the contract price) from Union Bank of India in favour of the first respondent-CMRL with validity till 26.08.2020.

(f) So far as UAA-01 contract (OSA.No.174 of 2020) is concerned, despite issuance of Taking Over Certificate, dated 30.11.2019, (third Taking Over Certificate), the first respondent-CMRL insisted to extend the whole BG amount of 7.5% of the contract price instead of reducing the BG to 2.5% of the contract price (as done in UAA-05 contract) from the IDBI Bank in favour of the first respondent-CMRL with validity till 30.11.2021.

(g) While so, the first respondent-CMRL in both the contracts, sent letters through E-mail, dated 06.07.2020 at 3.06 pm for contract UAA-05 to Union Bank of India and another e-mail on the same day at 3.03 pm for contract UAA-01 to IDBI Bank to encash the BG and credit the amount to the first respondent-CMRL's account. Afterwards, the first respondent sent letters through E-mail dated 06.07.2020 at 4.56 pm for contract UAA-05 and another communication at 4.54 pm on the same day in respect of contract UAA-01 to the appellant-Company informing about the

invocation of the BG furnished by them.

(h) It is the case of the appellant-Company that as per the contract, no prior notice had been issued before invocation of the BG. A few hours after invocation of the Bank Guarantee, intimation was served to the appellant by way of e-mail. Thus, without any prior notice as required under Clause 4.2 of the GCC notifying the defects, the Bank Guarantee had been invoked and it is contrary to the terms of the contracts.

(i) Aggrieved by the unceremonious manner in which the Bank Guarantees were invoked by CMRL, the appellant-Company filed O.A.Nos.246 and 247 of 2020 under Section 9(ii)(d) of the Arbitration and Conciliation Act, challenging the invocation and encashment of the said BGs. The appellant(s) also sought for an injunction restraining the first respondent-CMRL from invoking the BG. By order dated 08.07.2020, the learned Single Judge granted an order of status-quo till 17.07.2020. The order of this Court had been communicated to both the Banks, but, so far as Union Bank of India is concerned, they have immediately released the amount after invocation of the BG in respect of contract UAA-05. So far as the IDBI Bank is concerned, in adherence to the order passed by this Court, they have restrained themselves from making the payment to CMRL in respect of the contract UAA-01.

5. Before the learned Single Judge, the appellant(s) vehemently contended that the Bank Guarantees were invoked without following due procedures or by complying with the conditions agreed under the BG Contracts. Thus, it was contended that there is a violation of the terms and conditions of the BG on the part of the first respondent-CMRL. It was also contended that the invocation of BG by the first respondent-CMRL is not in compliance with the specific and relevant clauses of the underlying contract. Further, the terms and conditions of the BG were drafted by the first respondent-CMRL themselves and therefore, when two interpretations are possible, the one in favour of the appellant(s) had to be adopted, applying the principle of 'contra-proferentem'.

6. The submissions of the appellant(s) were countered by both the respondents, inter-alia, contending that there was a delay in execution of both the contract works and they were only partially completed. According to the respondents, the works were completed by the appellant(s) beyond the date of completion prescribed under the contract(s) as well as the revised completion date. Even after the issuance of Taking Over Certificate(s), major portions of the works have been left incomplete. When the appellant(s) failed to complete the contract within the period prescribed, the respondents are wholly justified in invoking the Bank Guarantees. Therefore, the first respondent-CMRL prayed for dismissal of the Original Applications filed by the appellant.

7. The learned Single Judge, after elaborate discussion,

dismissed the Original Applications in O.A.Nos.246 and 247 of 2020 on the ground that Clause 4 of the Bank Guarantee in both the contracts, makes it clear that the Bank has agreed to pay the full amount covered under the Bank Guarantee. Further, as per the conditions stipulated in the Bank Guarantee, the Banks are bound to pay the amount covered under the Bank Guarantees. It was also further observed that if the liability comes lesser than B.G. in the event of encashment of entire Bank Guarantee, it is always open to applicant(s) to recover the differential amount from the respondent(s). The learned single Judge also rendered a finding that whether or not the applicant(s) had received a lesser amount, is not a dispute raised anywhere, except while advancing argument before this Court. Thus, it was held by the learned Single Judge that the appellant(s) has not made out a prima-facie case for grant of injunction and the balance of convenience is not in their favour.

8. Mr.G.Masilamani, learned Senior Counsel appearing for the appellant(s) in O.S.A.No.174 of 2020, submitted that invocation of BG should be strictly in accordance with the contract agreement. If it is not in consonance with the contract agreement, the invocation itself is bad. In this regard, the learned Senior Counsel invited the attention of this Court to Clause 5 of the BG, wherein it had been clearly stated as follows:

"After the Contractor has signed the aforementioned Contract with the Employer, the Bank is engaged to pay the employer, any (BG) 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. ...."

9. By referring to the above Clause, the learned Senior Counsel appearing for the appellant(s) submitted that the core or essence of the BG is to indemnify the employer towards any liability or damages, resulting from any defect or shortcomings of the work undertaken by the contractor. Therefore, to "indemnify" is a condition to compensate or to make good the loss. While so, the employer must indicate a specific amount, either actual or estimated or expected loss/damages, as referred to in the BG, which is one of the conditions precedent for invocation of the Bank Guarantees. The first respondent/CMRL is forbidden from making any demand for invocation of the entire Bank Guarantee amount(s), without specifying the actual amount of loss. In the instant case, in the invocation letter sent by the first respondent-CMRL, dated 06.07.2020 to the Bank, no

specific amount was mentioned and therefore, invocation of BG itself is bad in law. For invocation of the BGs, the sine-qua-non shall be the first respondent/CMRL sustaining any liability out of damage resulting from any defects or any shortcomings of the work done by the appellant(s). The first respondent-CMRL, without even mentioning or asserting it, had sustained any liabilities of the damage, resulting from any defect or shortcomings of the contractor, invoked the BGs. Thus, the invocation of the BG is not in terms of the conditions stipulated in the BG itself. In fact, the letter of invocation dated 06.07.2020 sent by the first respondent-CMRL is totally silent about the breach or non-compliance of the terms of the underlying contract. In the absence of allegation of defect or shortcomings committed by the contractor (TTA-JV), the invocation of BG itself is not warranted.

10. The learned Senior Counsel appearing for the appellants in O.S.A.No.174 of 2020, further submitted that, the Bank ought not to have paid the entire BG amount to the first respondent-CMRL. In this regard, the learned Senior Counsel appearing for the appellant(s) relied upon a judgment of the Supreme Court in the case of Hindustan Construction Company Vs. State of Bihar reported in 1998 (8) SCC 436, wherein, the Apex Court has held that Bank Guarantee furnished by a contractor is, in itself, an independent contract. The relevant portion of the judgment is as follows:

"9. .... The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."

11. The learned Senior Counsel appearing for the appellant (s) further submitted that in an identical case, reported in 2015 SCC Online Madras 8193 (M/s.Gammon OJSC Mosmetrostroy JV Vs. CMRL), this Court held that JV agreement, the contract agreement and BG, are inter-linked with each other and therefore, it cannot be said that such BG furnished by the respective Banks is to be treated as an independent contract. Though, in the case on hand, the learned Single Judge had relied on the above said judgment of this Court in M/s.Gammon OJSC Mosmetrostroy JV case, with a generalised statement, had come to the conclusion that the BG is an independent contract, failed to test the letter of BG invocation in the light of the terms and conditions in the BG contract.

12. The next fold of submission of the learned Senior Counsel appearing for the appellant(s) in O.S.A.No.174 of 2020,

is that the invocation of BG is not in accordance with the specific clauses of the underlying contract, relied in the BG contract, and therefore, invocation of BG is unsustainable in law. In this regard, the learned Senior Counsel appearing for the appellant invited our attention to Clause 6 of the BG, which reads as follows:

"Clause 6 (a): This Guarantee is valid until 10/04/2015 (The initial period for which this guarantee will be valid must be for at least twenty eight (28) days longer than the anticipated date of issue of the Taking-Over Certificate as stated in Sub-Clause 10.1 of the "Conditions of Contract Part I).

Clause 6(b) : In accordance with CPA Clause 7 of Volume 2, a new Guarantee may be issued for 2.5% of the Contract Price after issuance of Taking-Over Certificate, and this Guarantee shall be valid at least twenty eight (28) days longer than the anticipated date of issue of the Performance Certificate, unless the Tenderer decides to extend the Guarantee required under item 6(a), for the same period."

13. By relying upon the above said Clause 6, the learned Senior Counsel appearing for the appellant(s) in O.S.A.No.174 of 2020 contended that the validity of the BG must be for at least 28 days longer than the anticipated date of issue of the Taking-Over Certificate mentioned in sub-clause 10.1 of GCC. The first respondent-CMRL also agreed to reduce the BG amount from 7.5% to 2.5% of the contract price, by replacing the BG after issuance of Taking Over Certificate under UAA-05 Contract (O.S.A.No.173 of 2020). So far as UAA-01 contract (O.S.A.No.174 of 2020) is concerned, even after issuance of Taking-Over Certificate, CMRL insisted the appellant to extend the BG of 7.5% of the contract price despite substantial completion of works. Therefore, the demand of the first respondent-CMRL for extending the total BG amount of 7.5% of contract price under UAA-01 contract, without reducing it to 2.5% as had been done in the case of UAA-05 contract, is neither tenable nor justifiable.

14. The learned Senior Counsel appearing for the appellants further submitted that Clause 6(b) of the BG refers to Taking Over Certificate under Clause 10.1 of GCC and the relevant Clause 10.1 and also Clause 10.2, read as follows:

"Clause 10: Employer's Taking Over:

10.1: Taking-Over Certificate: Except as stated in sub-clause 9.4, the Works shall be taken over by the Employer when they have been completed in accordance with the Contract (except as described in sub-paragraph (a) below), have passed the Tests on

Completion and a Taking-Over Certificate for the Works has been issued, or has deemed to have been issued in accordance with this Sub-Clause. If the Works are divided into Sections, the Contractor shall be entitled to apply for a Taking-Over Certificate for each Section.

The Contractor may apply by notice to the Employer's Representative for a Taking-Over Certificate not earlier than 14 days before the Works or Section (as the case may be) will, in the Contractor's opinion, be complete and ready for taking over. The Employer's Representative shall, within 28 days after the receipt of the Contractor's application:

(a) issue the Taking-Over Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract (except for minor outstanding work that does not affect the use of the Works or Section for their intended purpose) including passing the Tests on Completion; or

(b) reject the application, giving his reasons and specifying the work required to be done by the Contractor to enable the Taking-Over Certificate to be issued; the Contractor shall then complete such work before issuing a further notice under this Sub-Clause. If the Employer's Representative fails either to issue the Taking-Over Certificate or to reject the Contractor's application within the period of 28 days, and if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Taking-Over Certificate shall be deemed to have been issued on the last day of that period.

10.2: Use by the Employer: The Employer shall not use any part of the Works unless the Employer's Representative has issued a Taking-Over Certificate for such part. If a Taking-Over Certificate has been issued for any part of the Works (other than a Section), the liquidated damages for delay in completion of the remainder of the Works (and of the Section of which it forms part) shall, for any period of delay after the date stated in such Taking-Over Certificate, be reduced in the proportion which the value of the part so certified bears to the value of the Works or Section (as the case may be); such values shall be determined by the Employer's Representative in accordance with the provisions of Sub-Clause 3.5. The provisions of this paragraph shall only apply to the rate of liquidated damages under Sub-Clause 8.6, and shall not affect the limit of such damages.

If the Employer does use any part of the Works before the Taking-Over Certificate is issued:

(a) the part which is used shall be deemed to have been taken over at the date on which it is used,

(b) the Employer's Representative shall, when requested by the Contractor, issue a Taking-Over Certificate accordingly, and

(c) the Contractor shall cease to be liable for the care of such part from such date, when responsibility shall pass to the Employer.

After the Employer's Representative has issued a Taking-Over Certificate for a part of the Works, the Contractor shall be given the earliest opportunity to take such steps as may be necessary to carry out any outstanding Tests on completion, and the Contractor shall carry out such Tests on Completion as soon as practicable, before the expiry of the Contract Period."

15. By relying upon the above Clauses, the learned Senior Counsel appearing for the appellants in O.S.A.No.174 of 2020 submitted that after having issued the Taking Over Certificate, the first respondent-CMRL cannot dilute or render this Clause ineffective, by qualifying the Taking Over Certificate as 'part'. The word 'part' should mean the completed work, which could be put to use for the intended purpose as stated in Clause 10.1 of GCC. There are minor works to be completed, but, when compared to the major part of the work completed by the appellant, what remains to be done is only minuscule. Such non-completion of minor works, is a negligible portion for the work, which cannot be a ground to prevent or stop the use of the work that were already completed. In fact, Clause 7 of the CPA and Clause 6(b) of the BG are only referring to Taking Over Certificate. The BG contract nowhere specify that the taking over must be either full Taking Over Certificate or part Taking Over Certificate.

16. Be that as it may. According to the learned Senior Counsel appearing for the appellants, as on date, the works had been substantially completed which could stand testimony to the fact that Metro Rail had commenced its operations for public use. In other words, the intended object was achieved by the first respondent-CMRL, by heralding the Metro Rail to public use. In such circumstances, the invocation of BG does not arise.

17. The learned Senior Counsel appearing for the appellants further proceeded to contend that BG is not an unconditional and independent contract, as it contains conditions and refer to clauses in the underlying contract. In this regard, the learned Senior Counsel appearing for the appellants referred to Clause 5 of the Performance BG contract, relevant portion of which reads as follows:

"5. .... 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. ...."

18. Thus, it is submitted by the learned Senior Counsel appearing for the appellants in O.S.A.No.174 of 2020 that, Clause 5 indicates that invocation of the BG is warranted only in the event of any liability of damage as a consequence of the works undertaken or in the event of shortcomings on the part of the appellant(s)/contractor(s). In other words, invocation of the BG totally depends upon the fulfilment of conditions of the contract. The learned Senior Counsel also invited the attention of this Court to Clause 4.2 of the contract relating to performance security, wherein it has been stated that as under:-

"... 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 made."

19. Therefore, it is submitted that prior to making a claim under the performance security, the first respondent-CMRL shall put the appellant on notice indicating the nature of defect for making a claim. In the instant case, no such notice was sent to the appellant(s), but the first respondent invoked the Bank Guarantee. Therefore, the attempt on the part of the first respondent-CMRL to invoke Bank Guarantee is in violation of the terms and conditions of the contract. After invoking the Bank Guarantee, the first respondent sent a notice to the appellant. Even in the notice, it was not mentioned about the nature of default committed by the appellant for which the first respondent-CMRL has invoked the Bank Guarantee. Therefore, the entire action of the first respondent in invoking the performance guarantee, is in violation of the terms and conditions of the Bank Guarantee.

20. It is the further submission of the learned Senior Counsel appearing for the appellant(s) that, though the learned counsel for the first respondent-CMRL relied on number of decisions before the learned Single Judge, in support of his contention that the Courts seldom interfere with invocation of Bank Guarantee, all those judgments are factually distinguishable. In this context, the learned Senior Counsel appearing for the appellant(s) relied on the judgment in the case of Padmasundara Rao vs. State of Tamil Nadu and others, reported in 2006 (3) SCC 533, wherein the Constitutional Bench has held 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.

21. The learned Senior Counsel appearing for the appellant (s) in O.S.A.No.174 of 2020, relied on yet another decision of the Apex Court, in the case of Oriental Insurance Co., Ltd., vs. Smt. Raj Kumari & others reported in 2007 (12) SCC 768, wherein, it was observed that reliance on a decision without looking into the factual background of the case before the Court, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. Each case depends on its own facts and a close similarity between one case and another, is not enough, because a single significant detail may alter the entire aspect.

22. Therefore, according to the learned Senior Counsel appearing for the appellant(s), the judgment relied on by the learned counsel for first respondent-CMRL before the learned Single Judge will not apply to the facts of the present case with reference to the conditions of Bank Guarantee, which are not similar in the cases relied on. This is more so that, in the present case, the Bank Guarantee offered by the appellant was conditional Bank Guarantee and not unconditional Bank Guarantee in view of Clauses 5, 6 and 7 of the terms and conditions of the Bank Guarantee. The Bank Guarantees have to be read along with the underlying contract and the Bank Guarantees depends on the underlying contract. Further, Clauses 5, 6 and 7 of the Bank Guarantee depends on Clause 7 of underlying contract for the purpose of furnishing the performance security as Bank Guarantees and the value of such Bank Guarantees corresponds to the contract price. The validity and value of the Bank Guarantee of 7.5% of the contract price, is enforceable, until the issuance of the Taking Over Certificate. Similarly, the value of the 2.5% of the Bank Guarantee of the contract price is valid and enforceable at least 28 days longer than the anticipated date of issue of performance certificate described under Clause 12.9 of the contract.

23. Similarly, Clause 7 of the Bank Guarantee refers to an extension of time contemplated under sub-clause 8.3 of the GCC and CPA 28 and other clauses of underlying contracts for extending the validity of Bank Guarantee by the bankers. Therefore, Clauses 2, 3, 5, 6 and 7 of the Bank Guarantees refers to and depends on the conditions of the underlying contract. Clause 7 of the Bank Guarantee specifically states that if the contractor fails to discharge himself of the liability or damages or debts, as stated in Clause 5 of the Bank Guarantee for extending the validity of the Bank Guarantee by the banker, shows that the revocation of the BG totally depends upon the conditions in the underlying contract. Thus, the performance security Bank Guarantees were furnished only as a requirement under sub-Clause 4.2 of the contract. Further, under Clause 6(a) of the Bank Guarantee, the validity is interlinked with issue of Taking Over Certificate under sub-clause 10.1. Thus, the enforceability of

the Bank Guarantees offered by the appellant(s) totally depends upon the clauses in the underlying contract.

24. As last submission, the learned Senior Counsel appearing for the appellants in O.S.A.No.174 of 2020 submitted that the invocation of the BG by the first respondent-CMRL is not tenable due to special equities and when Covid-19 Pandemic had severely crippled all activities in India. On 22.03.2020, the Government of India called for Janata Curfew for the closure of all activities to prevent the spread of Covid-19 by invoking the Disaster Management Act, 2006, whereby a nation-wide lock-down was announced. On account of this extraordinary situation, business houses including appellants' , stood paralysed and financially stressed beyond all proportions and the appellants requested the Court to take judicial notice of the same. Thus, the learned Senior counsel for the appellants prayed for setting aside the order passed by the learned Single Judge and to allow these appeals.

25. Mr.V.Raghavachari, learned counsel appearing for the appellant(s) in O.S.A. No.173 of 2020 submitted that, the two Bank Guarantees furnished by the appellant(s) are subject to certain conditions, whereas, the learned Single Judge applied the principle of unconditional Bank Guarantee and rendered a finding that the Bank Guarantee is an "independent contract". It is his contention that Clause 4.2 of GCC indicates that, prior to invoking the Bank Guarantee, the contractor must be put on notice regarding the default committed, which prompted the first respondent-CMRL to enforce the Bank Guarantee with utmost haste. In this regard, the learned counsel relied on the judgment in Radhakrishnan Raghavan Nair vs. M/s. Consul Consolidated Private Limited and others reported in 2015 (3) Law Weekly 882, wherein, this Court, while interpreting a similar clause in enforcing the Bank Guarantee, held that the Bank Guarantee was conditional. It was also held that, when arbitration proceedings have been initiated and it is pending and the alleged loss suffered is yet to be determined, an injunction was granted from enforcing the Bank Guarantee. For the same proposition, the learned counsel also relied on the decision in Punjab National Bank Limited vs. Sri Bikram Cotton Mills Limited and another, reported in AIR 1970 SC 1973, in which, it has been observed by the Apex Court that a "guarantee" is towards "indemnity". To stake the claim, the first respondent-CMRL must have suffered loss. The alleged losses have been disputed by the appellants, and the same can only be decided by an Arbitrator after looking into evidence recorded. The invocation of Bank Guarantee was before 30 days of claim and therefore, it was held that such invocation is not proper.

26. It is the further submission of the learned counsel for the appellant(s) in O.S.A.No.173 of 2020 that, in the instant case also, the alleged loss is disputed by the appellants. Therefore, even in this case also, a direction may be issued to

keep the Bank Guarantee alive, pending the Arbitration proceedings, especially when the project has been implemented and it was put to public use.

27. The learned counsel for the appellant(s) in O.S.A.No.173 of 2020 also invited our attention to two Taking Over Certificates in respect of Contract UAA-05 and three Taking Over Certificates relating to UAA-01 and submitted that, subsequent to the issuance of Taking Over Certificates, the first contract was put to public use on 14.05.2017 and the second contract was put to use on 25.05.2018 (Corridor II) and 10.02.2019 (Corridor I). Having issued the Taking Over Certificates, the first respondent is estopped from invoking or enforcing the Bank Guarantee. In the instant case, the employer has two options under Clause 10.1 of the GCC, to issue a "Taking Over Certificate", subject to satisfactory completion of work or to reject the application of the contractor for issuing Taking Over Certificate. In the instant case, the application of the appellants was accepted without being rejected. Now, the entire Metro Rail has been put to public use. Therefore, even if the Taking Over Certificate is not explicitly issued for a portion of work, if it is put to use, then it is deemed to be taken over. Even otherwise, the fundamental dispute involved in this case is the invocation of Bank Guarantee, after conceding satisfactory completion of the work and issuance of Taking Over Certificate. To strengthen this submission, the learned counsel for the appellants relied on the decision of the Supreme Court in the case of Larsen & Toubro Limited vs. Maharashtra State Electricity Board and others, reported in 1995 (6) SCC 68, wherein, it has been observed that encashment of Bank Guarantee is to be restrained once trial and performance test is complete and the plant was taken over. Therefore, according to the learned counsel for the appellants, when Taking Over Certificate had been issued in this case, the employer is deemed to have been satisfied with the performance of work by the appellants. In this case, absolutely, there is no justification in invoking the Bank Guarantee after issuing the Taking Over Certificates. In this context, reliance was placed on a decision of the Delhi High Court in the case of Crest Communication vs. State Bank of India, reported in 2000 Arb.L.R 352, wherein, it has been held in similar circumstance that invocation of Bank Guarantee is unjust and arbitrary.

28. As next fold of his submission, it is contended that the first respondent-CMRL is a party to the agreement. When the first respondent alleges that there is a breach of contract, the Bank Guarantee furnished by the appellants cannot be unilaterally invoked by the first respondent, without any adjudication as regards the nature and extent of default alleged is adjudicated by an independent authority. It is his contention that the first respondent-CMRL, on its own concluded that default was committed by the appellant(s) and without quantification or assessing the default, invoked the Bank

Guarantee even without a prior notice as required under the contract. The right of the first respondent-CMRL to invoke the Bank Guarantee is subject to certain conditions. When there is an arbitration proceeding pending for determination of the dispute as to who has caused delay or breached the terms and conditions of the contract, the first respondent-CMRL, which is a party to the agreement, cannot arbitrarily invoke the Bank Guarantee. In this context, the learned counsel for the appellants in O.S.A.No.173 of 2020 placed reliance on a decision of the Supreme Court in the case of State of Karnataka vs. Shree Rameshwara Rice Mills, reported in 1987 (2) SCC 160, wherein, it has been held that a party to the agreement cannot be an "arbiter" in his own cause and assessment of damages has to be made by an independent authority as per the contract. Thus, he contended that invocation of Bank Guarantee by the first respondent is unjust and arbitrary. In such event, the invocation of Bank Guarantee by the first respondent-CMRL is unconscionable and lacks bona-fide. For the same proposition, he also relied on the judgment of the Supreme Court in the case of JC India Limited vs. Union of India, reported in 2011 (5) SCC 758.

29. Further, the learned counsel for the appellants in O.S.A.No.173 of 2020 proceeded to contend that to invoke the Bank Guarantee, there should be an admitted claim or a sum that has been adjudicated by the Arbitral Tribunal. In the instant case, both are absent. Therefore, the question of invocation of Bank Guarantee does not arise, especially when the appellant(s) are disputing the alleged defects. In this context, the learned counsel for the appellant(s) in O.S.A.No.173 of 2020 relied on a decision in the case of Gangotri Enterprises Limited vs. Union of India reported in 2016 (11) SCC 720, wherein injunction was granted by the Supreme Court for invocation of Bank Guarantee, since the claims are disputed and pending for adjudication.

30. As next submission, the learned counsel for the appellant(s) in O.S.A.No.173 of 2020 submitted that, "unconscionability" is a ground to restrain invocation of Bank Guarantee and it is an internationally recognised principle for grant of injunction. In this regard, he placed reliance on a decision of a foreign judgment of Court of Appeal of Singapore in the case of BS Mount Sophia Pte Ltd., vs. Join-Aim Pte Ltd., (2012) 3 SLR 352, wherein it was held that "unconscionability" is a recognised principle to grant injunction restraining invocation of Bank Guarantee in order to protect the integrity of the contractor. Relying on this judgment, it is submitted that in the present case, invocation of Bank Guarantee is improper, especially when arbitration proceedings are yet to be initiated in this case.

31. The learned counsel for the appellants in O.S.A.No.173 of 2020 invited our attention to the invocation letter dated 06.07.2020 and submitted that it did not satisfy the pre-

requisites of a valid call and hence it lacks bona-fide. He further submitted that Clause 5 of the Performance Guarantee provides that it could be invoked only for liability of damage resulting from any defects or shortcomings or the debts the contractor may have incurred to any parties involved in the works under the contract. Therefore, it is his contention that existence of an admitted defects or shortcomings, is a pre-requisite for invocation of Bank Guarantee, which is conspicuously absent in this case. Further, as per Clause 4.2 of GCC, notice of default is to be made prior to invocation of Bank Guarantee. The letter dated 06.07.2020 suffers from vagueness, inasmuch as there is no clear specification of defects made by the appellants, nor the loss allegedly suffered by the first respondent-CMRL. The letter merely states that "certain obligations were not fulfilled". According to the learned counsel for the appellants, such a reference made in the letter will not satisfy the terms and conditions of Clause 4.2 of GCC and in such event, the invocation of Bank Guarantee itself is not proper. There is also no quantification of damage made in the invocation of letter. For the minuscule work allegedly unperformed, there is no need to encash the Bank Guarantee. In this context, the learned counsel for the appellant(s) relied on a decision of the Delhi High Court in the case of M/s.Rawal Construction Co., vs. Union of India and another, reported in AIR 1977 Delhi 205, wherein, it has been held that invocation letter does not fulfil the requirements of the Bank Guarantee for invoking the same. Therefore, the performance guarantee had not been validly invoked.

32. In effect, the learned counsel for the appellants in O.S.A.No.173 of 2020 submitted that the invocation is not justified and therefore, the Bank Guarantee may be directed to be kept alive in terms of Clause 7 of the Bank Guarantee and thus he sought for allowing the appeal.

33. Countering the above submissions of the learned counsels appearing for the appellants, Mr.Yashod Vardhan, learned Senior Counsel appearing for the first respondent-CMRL submitted that, in respect of UAA-05 contract, the works were only partially completed on 11.05.2017 as against the revised completion date of 05.07.2015. Therefore, only a Partial Completion Certificate was issued for the portion of works that were completed. The final Taking Over Certificate with effect from 15.07.2018 was subsequently issued on 27.08.2018 along with the list of minor outstanding works and snags that were to be completed during the defect liability period. After issuance of the final Taking Over Certificate, as per CPA 7, GCC 4.2, the performance Bank Guarantee (BG) which was originally furnished for 7.5% of the contract value, was revised to 2.5%. This BG is valid upto 26.08.2020.

34. Similarly, as far as Contract UAA-01 (in O.S.A.No.174 of 2020) is concerned, the learned Senior Counsel appearing for the

first respondent-CMRL submitted that inspite of several outstanding works, a partial Taking Over Certificate was issued on 09.02.2019 with a list of balance works and snags. The balance works are required to be completed within reasonable time, but the appellant/companies have not completed the works by adhering to the time schedule. Therefore, the first respondent-CMRL had decided to complete the work by engaging third parties at the risk and costs of the appellant /companies. Since the appellant(s) was relieved from executing the work in UAA-01, the performance BG value was not reduced to 2.5% in UAA-1 contract. In fact, their request for reducing the performance BG value was also rejected. The learned Senior Counsel appearing for the first respondent-CMRL further stated that it is incorrect to state that the defects in the work were not notified by the first respondent-CMRL to the appellant(s)/companies before invoking the BG. The delay in balance works, snags and defects were notified by the first respondent-CMRL during the period 2018 to 2020. Despite pointing out the defects and rectification works, the appellant refused to accept the same. The defects in both the contract works are recurring in nature. In fact, there were leakages in the tunnels and station area, which are serious defects with long term concerns for safety and structural stability. The life span of the constructions is 120 years, and therefore, the first respondent-CMRL incurred not less than Rs.900 crores on remedial works in each contract. Therefore, the first respondent-CMRL is left with no other alternative except to invoke the Performance BG to recover the costs incurred and expected to be incurred on account of the various defects and shortcomings including poor workmanship in execution of the contracts by the appellants.

35. With regard to the submission made by the learned Senior Counsel/learned counsel for the appellants that, the BG was invoked without notifying the defects to the appellants as per Clause 4.2 of the GCC, it is replied by the learned Senior Counsel appearing for the first respondent-CMRL that, the first respondent, by letter dated 06.07.2020, informed to the appellants-JV that, it was constrained to make a claim against the "performance security" due to various defaults. Prior to letter dated 06.07.2020, numerous letters were sent to the appellants, notifying the nature of various defaults committed by the appellants. All those letters were referred to in the letter dated 06.07.2020. Absolutely, there was no response or objection to these letters by the appellants. The first respondent-CMRL presented the original BG to the respective Banks on 07.07.2020 for encashment. The original BG in respect of O.S.A.No.173 of 2020 relating to contract UAA-05 was acknowledged by the Union Bank of India. So far as O.S.A.No.174 of 2020 relating to contract in UAA-01 is concerned, when the original BG was submitted to the Bank, the same was acknowledged with endorsement "received after business hours will be

processed next working day". While so, in the meanwhile, the appellant(s) filed application under Section 9 of the Arbitration and Conciliation Act and obtained an order of status-quo before the learned Single Judge. Therefore, so far as the contract UAA-5 is concerned, even before the interim order was communicated, the amount was released and so far as the contract UAA-01 is concerned, since the order was received by the Bank prior to transferring the monies, the money was not released by the Bank. However, after hearing both sides, the learned Single Judge had dismissed the applications on the ground that, no case had been made out by the appellants to restrain the respondents from invoking the Bank Guarantee (BG).

36. With regard to the submission made by the learned Senior Counsel/learned counsel for the appellants that the invocation of the BG by the first respondent-CMRL, is not in compliance with the specific and relevant clauses of the underlying contract, it is replied by the learned Senior Counsel appearing for the first respondent-CMRL that the BG in both the contracts are unconditional and unequivocal. In this regard, the learned Senior Counsel appearing for the first respondent-CMRL invited the attention of this Court to Clause 5 of the GCC, which reads as follows:

"Clause 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 or 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 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 this guarantee shall be absolute and unequivocal."

37. On a reading of the above Clause, it clearly shows that

the BG does not incorporate the conditions in the underlying contract and it only refers to the contract for the aforementioned period, etc. In other words, no clause from the underlying contract was incorporated in the BG to make payment. Under such circumstances, there is no impediment for the employer to invoke the BG. In this regard, the learned Senior Counsel appearing for the first respondent-CMRL relied on a judgment of the Supreme Court reported in 2007 (6) SCC 470 (Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Cop. Ltd. and another), wherein it was held as follows:

"22. In our considered opinion, if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury."

38. Thus, it is submitted by the learned Senior Counsel appearing for the first respondent-CMRL that no case of egregious or irreparable injury had been made out by the appellants in the invocation of BG to warrant interference. In this regard, the learned Senior Counsel appearing for the first respondent-CMRL submitted that it is well settled legal principle that no order of injunction could be granted against invocation of unconditional BG, except in two exceptional circumstances:

- (i) where a party is able to establish egregious fraud and
- (ii) where there is irretrievable injury.

39. Thus, it is submitted by the learned Senior Counsel appearing for the first respondent-CMRL that the BG provides that the amount shall be paid by the Bank notwithstanding any dispute(s) raised by the appellants in any suit or proceedings pending before any Court, Tribunal or Arbitrator(s) and the liability under the BG shall be absolute and unequivocal.

40. In the above context, the learned Senior Counsel appearing for the first respondent-CMRL relied upon a decision of the Supreme Court reported in 2007 (8) SCC 110 (Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co.), wherein it is held that, while dealing with an application for injunction in the course of commercial dealings, when an unconditional Bank

Guarantee or Letter of Credit is given or accepted, the beneficiary is entitled to realise such a Bank Guarantee or a Letter of Credit in terms thereof, irrespective of any pending disputes relating to the terms of the contract. In the matter of invocation of a Bank Guarantee or a Letter of Credit, it is not open to the Bank to rely upon the terms of the underlying contract between the parties. It was further held by the Apex Court in that decision that, the Bank giving such Guarantee, is bound to honour it as per its terms irrespective of any dispute raised by its customer. Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letter of Credit. It was further held by the Supreme Court in that decision that the Courts should be slow in granting an order of injunction to restrain the realisation of a Bank Guarantee or a Letter of Credit. According to the learned Senior Counsel appearing for the first respondent-CMRL, in the instant case, the learned Single Judge had come to a categorical conclusion that there was no material to infer any fraud relating to the execution of the BG. The appellants have not raised any ground challenging the said finding. Therefore, the said finding had reached finality.

41. It is further stated by the learned Senior Counsel appearing for the first respondent-CMRL that the appellants have also failed to make out a case under the ground of irretrievable injury with regard to the invocation of BG. The only contention of the appellants is that they will be put to irretrievable injury, if the BG is invoked during the "pandemic". In this regard, the learned Senior Counsel appearing for the first respondent-CMRL relied upon a judgment of the Supreme Court reported in 1988 (1) SCC 174 (U.P. Co.op. Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.), wherein it was held that irretrievable injury means "special equities". The reasons stated by the appellant(s) do not qualify as an irretrievable injury. In fact, the Notification of the Government on 22.03.2020 for lock-down on account of the Covid-19 Corona pandemic, had been subsequently withdrawn on 18.05.2020, and therefore, the appellant(s) cannot place reliance on the said Notification.

42. With regard to the submission made by the learned counsels appearing for the appellants that on the ground of unconscionability, invocation of BG can be restrained, the learned Senior Counsels appearing for the first respondent-CMRL relied on a judgment of the Supreme Court reported in 2006 (2) SCC 728 (BSES Ltd. (now Reliance Energy Ltd.) Vs. Fenner India Ltd.), in which, the Apex Court had categorically held that the ground of unconscionability, would not be applicable, and the relevant portion of the said judgment reads as follows:

"13. Mr.Sorabjee finally contended that in Singapore, where commercial cases are expeditiously

disposed of, the Court of Appeal ... Singapore Court has gone so far as to say that the unconscionable calling of a bank guarantee was an exception independent of fraud.

14. We are afraid that in the face of the law succinctly laid down in U.P.Coop.Federation and reiterated in numerous judgments of this Court referred to earlier, we are unable to accept the wide proposition of law laid down in the foreign judgments cited by Mr.Sorabjee. Whatever may be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case law."

43. Thus, the learned Senior Counsel appearing for the first respondent-CMRL submitted that under Indian Law, for grant of injunction, only two exceptions are provided which the appellants have to establish namely (i) a case of egregious fraud that vitiates the very foundation of the guarantee or the entire underlying transaction and (ii) the injustice or irreparable injury of a kind which would make it impossible for the appellants to recover the monies, should it be successful in the eventual outcome of the subject matter of dispute. In the instant case, the appellants have failed to establish these exceptions and thus, the learned Senior Counsel appearing for the first respondent-CMRL sought for dismissal of the O.S.As.

44. Mr.P.H.Arvind Pandian, learned Senior Counsel appearing for the first respondent-CMRL (Cross objector in Cross Objection Nos.36 and 37 of 2020) invited the attention of this Court to Section 9(2) and (3) of the Arbitration and Conciliation Act, which reads as follows:

"Section 9: Interim measures, etc., by Court:

.. ..

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."

45. Sub-section 9 (3) of the said Act opens with, "Once the Arbitral tribunal has been constituted". In the instant case, no

Arbitral Tribunal had been constituted so far. From a reading of Section 9(2), it is evident that the Court may pass an order as an interim measure of protection under Section 9(1) of the Act before the "commencement of arbitration proceedings", but the appellant(s) ought to have commenced the arbitral proceedings within 90 days from the date on which the Court grants an interim measure of protection. In the instant case, as an interim measure, status-quo was granted by the learned Single Judge on 08.07.2020, and the same continued from time to time until the order dated 14.08.2020 was pronounced. The learned Single Judge, while dismissing the applications, at the request of the appellants, instructed the counsel for the second respondent-Banks to maintain "status-quo" till 21.08.2020 and if the appeal is not filed within that time, it is open for the Bank to encash the amount. At the time of hearing the appeals on 20.08.2020, this Court recorded that the status-quo as on date to be maintained. Though the said order of status-quo granted by this Court still continues, the appellants had not taken any steps to commence the arbitral proceedings in the manner prescribed under the Contract, even after the lapse of 90 days from the date of the interim order passed by the learned Single Judge on 08.07.2020. Therefore, absolutely there is no intention to arbitrate and under such circumstances, the interim order had lapsed and the appeals are liable to be dismissed. In this regard, the learned Senior Counsel appearing for the cross-objectors relied on a decision of a Division Bench of this Court reported in 2018 (2) CTC 241 (DB) (Archer Power Systems Private Limited VS. Kohli Ventures Limited and others), wherein, it has been held as follows:

"8(o). ... Even after the contesting respondent, namely, Cascade Singapore, the second respondent, entered appearance and filed applications for vacating and suspending the interim order, Archer India did not do anything. Archer India had not triggered/invoked the arbitration clause even when the order came to be passed by the learned Single Judge. Archer India had done nothing towards triggering the arbitration thereafter too. Ultimately, Archer India has done so only on 28.06.2017 a day before filing the instant intra-court appeal. Therefore, we have no hesitation in holding that the learned single Judge was correct in coming to the conclusion that Archer India had not exhibited its intention to arbitrate, much less manifest intention to arbitrate. Manifest intention to arbitrate is a sine qua non for moving the Court under Section 9 of the A and C Act and obtaining the interim order when Section 9 application is moved before commencement of arbitral proceedings. The learned single Judge has drawn inspiration from the

ratio of the Supreme Court in Firm Ashok Traders Vs. Gurumukh Das Saluja reported in (2004) 3 SCC 155, we have no reason to disagree for reasons set out in the next paragraph.

8(p) With regard to Firm Ashok Traders, Mr.P.H.Arvind Pandian, learned Senior Counsel submitted before us that the ratio in Firm Ashok Traders is not of relevance any more in the light of sub-section (2) of Section 9 which was introduced on 23.10.2015 as part of large scale amendments to A and C Act. Unlike the part of large scale amendments to A and C Act, when Firm Ashok Traders was written, now the statute gives 90 days' time to a section 9 applicant to trigger the arbitration proceedings. In our view, this does not mean that a Section 9 applicant need not show any immediacy or imminence in triggering arbitration. In fact, the very prescription of a very short period like 90 days under sub-section (2) of Section 9 itself is to emphasis the intention of the statute makers that a section 9 applicant should be able to demonstrate immediacy and imminence, though the position that 90 days period is available to a section 9 applicant to trigger the arbitration under the statute itself is indisputable. With this observation, in the light of the core issues that fall for our consideration in the instant case, we are of the further view that it would suffice to say that we have noticed that the arbitration trigger notice has been sent only a day prior to filing of the instant appeal and leave the matter to rest at that in this case."

"11(u). .. In the instant case, we notice that Section 9 application was filed before commencement of arbitration proceedings. There is no difficulty in accepting the proposition that Section 9 application can be filed before commencement of arbitration. In fact, law is very well settled that it can be filed before, during and/or after arbitration proceedings. Having filed Section 9 application before commencement of arbitration proceedings, applicant in Section 9 application has to establish his manifest intention to arbitrate by commencing arbitral proceedings at the earliest. Be that as it may, in the instant case, as set out supra, the arbitration trigger notice has been issued only a day before the filing of the appeal. However, as this is within 90 days period prescribed by Section 9(2), we do not delve much on this aspect of the matter in the light of the factual matrix in the instant case."

(emphasis supplied by us)

46. Thus, by relying upon the above judgment, learned Senior Counsel appearing for the first respondent-CMRL submitted that the decision of the Division Bench is not "obiter-dictum", but it is a "Rule of Law". Hence, by applying the above proposition of law, the present O.S.As. are liable to be dismissed, since the appellants are squatting on the interim order of protection granted earlier, without taking any steps to initiate arbitration.

47. Further, the learned Senior Counsel appearing for the cross objector/CMRL submitted that the Original Application and the Appeals are executed by one S.Sivamani claiming that he is the authorised representative of the appellants. His authority to file application was seriously disputed by the first respondent-CMRL. The first respondent also sent a letter dated 15.07.2020, to furnish certain particulars/documents inter-alia the documentary proof provided by M/s.Transtonnelstroy Limited, authorising Ms.Disha Sharma to sign the Power of Attorney, dated 24.07.2017 on behalf of M/s.Transtonnelstroy Limited. In response, the appellant(s) had filed a copy of three Power of Attorneys, viz, dated 15.01.2013, 21.01.2013 and 31.08.2015, purportedly issued by the Lead Partner namely, M./s.Transtonnelstroy Limited. But none of these Power of Attorneys give authorisation to Ms.Disha Sharma to initiate or conduct legal proceedings or to file vakalats, affidavits, applications or appeals. Therefore, the Power of Attorney, dated 24.07.2017 through which Ms.Disha Sharma had purportedly delegated powers, inter-alia to appoint any legal practitioner to appear and conduct the case before Courts/Arbitrators, to make applications, to represent the Joint Venture in disputes before the Courts, arbitral Tribunals, file petitions, affidavits, documents, etc., in favour of Mr.S.Sivamani, is without authority. Therefore, on that ground also, the O.S.As. filed by the appellants are liable to be dismissed.

Reply of the learned Senior Counsel appearing for the appellant (s):

48. With regard to the submission made by Mr.Yashod Vardhan, learned Senior Counsel appearing for the first respondent-CMRL in O.S.A.No.174 of 2020 that the BG is an independent contract and in the BG agreement, only underlying contract is referred and the clauses of the underlying contract are not bodily lifted and incorporated in the BG, and under such circumstances, when the BG is invoked, the Banks are bound to pay the amount, it is replied by Mr.G.Masilamani, learned Senior Counsel appearing for the appellants in O.S.A.No.174 of 2020 that under Clauses 2 and 3 of the BG the underlying contract is referred, however the

conditions and reliance of the specific clauses of the underlying contract, namely indemnification, sub-clause CPA-7, sub-clause 10.1, performance Certificate, extension of time, defaults, etc., stated in the Clauses 5,6, and 7 of the BG clauses, are not mere references but they are reliance of relevant conditions of underlying contract. Therefore, on a plain reading of the contract, it is clear that it is not standalone contract and it depends on UAA-05 and UAA-01 underlying contract. Therefore,, before invoking BG, as per Clause 4.2 of the GCC, the employer shall in every case, notify the contractor stating the nature of the default for which the claim is made. This is conspicuously absent in this case.

49. Similarly, with regard to the submission made by Mr.P.H.Arvind Pandian, learned Senior Counsel appearing for the first respondent-CMRL in O.S.A.No.173 of 2020 that the appellants did not commence the arbitration proceedings within 90 days as per the dictum laid down by a Division Bench of this Court in Archer Power Systems Private Limited case (supra), it is replied by Mr.G.Masilamani, learned Senior Counsel appearing for the appellants that Section 9(2) of the Act is not mandatory and it is only directory. The judgments relied upon by the learned Senior Counsel appearing for the first respondent-CMRL are distinguishable on facts and they are not applicable to the facts of this case. They are nullity, except the issue of territorial jurisdiction entertainable under Section 9 of the Arbitration and Conciliation Act. In this regard, the learned Senior Counsel appearing for the appellants also relied on a judgment of a Division Bench of the Calcutta High Court reported in 2016 SCC Online Cal 6251 (Smt.Shanti Dey @ Santhi Dey Vs. Sri Suvodeep Saha).

50. On the above submissions of the learned counsels appearing for the appellants and the learned counsels appearing for the first respondent-CMRL, this Court also heard the submissions of the learned counsel appearing for the second respondent-Banks.

51. We have heard the learned counsel on either side at length and perused the materials placed. As we have dealt with the factual matrix of the case at great length, we refrain ourselves from dealing with the same any further in these appeals and the facts which are germane alone, are reiterated hereunder.

52. The two underground tunnelling contracts were awarded to the appellant(s) by the first respondent-CMRL. One relates to Corridor UAA-05 which pertains to construction of underground tunnelling from Anna Nagar East, Anna Nagar Tower and associated tunnels. The contract price is Rs.1030,99,50,000/-. The other contract awarded to the appellant(s) for design and construction of underground stations are Washermanpet, Mannadi, High Court, Chennai Central and Egmore and associated tunnel work. The contract price was Rs.1566,81,00,000/-. The award of the

contracts are not disputed in these cases.

53. As per Clause 4.2 of the GCC, the appellants have furnished performance Bank Guarantee, dated 30.12.2010 for 7.5% of the contract price in respect of UAE-05 performance BG for a sum of Rs.77,36,250/- from Union Bank of India. In respect of UAA-01, the appellants have furnished performance Bank Guarantee of Rs.117,51,07,500/- from IDBI Bank. In respect of UAA-05, after issuance of Taking Over Certificates, dated 27.08.2018, as per Clause 4.2 of GCC read with CPA-7 and Clause 6 of BG, the first respondent reduced the BG to 2.5% from 7.5%. Thereafter, a revised performance BG dated 16.10.2018 for Rs.25,77,48,750/- from Union Bank of India in favour of first respondent was issued with a validity till 26.08.2020 was executed.

54. So far as UAA-01 is concerned, the contract value was not reduced to 2.5% inspite of issuing Taking Over Certificate by the first respondent-CMRL.

55. Now, both the projects covered under UAA-01 and UAA-05, have been put to public use. In other words, UAA-01 commenced commercial operations from 25.05.2018 (Corridor-2) and 10.02.2019 (Corridor-1) respectively and in respect of UAA-05, commercial operations commenced from 14.05.2017.

56. At this juncture, the first respondent-CMRL sent a letter dated 06.07.2020 to the respective Banks to invoke the Bank Guarantees offered by the appellant(s). On coming to know about the attempt on the part of the first respondent-CMRL to invoke the Bank Guarantee, that too without specifying the amount corresponding to the proportionate alleged loss or damage, the appellant(s) filed O.A.Nos.246 and 247 of 2020 before this Court. This Court granted an interim order on 06.07.2020. Even before the order passed by this Court was communicated, the Bank Guarantee was invoked in respect UAA-05. In respect of UAA-01, the amount was not paid to the first respondent-CMRL by the Bank.

57. The Bank Guarantees were invoked on the ground that several outstanding works left unattended and therefore, only a Partial Taking Over Certificate was issued on 09.02.2019 in UAA-1 contract, with a list of balance works and snags. So far as UAA-05 contract is concerned, the Taking Over Certificate was issued on 27.08.2018, effective from 15.07.2018 and on issuance of Taking Over Certificate, it was reduced from 7.5% to 2.5%, and the same is valid only up to 26.08.2020. But according to the appellant(s), the Bank Guarantees are not independent contracts and their invocation is subject to certain conditions. The invocation of Bank Guarantees depend on the underlying contract. Under such circumstances, as per Clause 4.2 of the GCC, the first respondent-CMRL ought to have notified the defects to the appellant(s) prior to invoking the Bank Guarantee, which has not been done in this case. But it is contended by the first respondent-CMRL that they have notified the defects through various correspondences.

58. Therefore, if it is an independent contract, irrespective of the defects and shortcomings in execution of the work by the appellant(s), the first respondent-CMRL is entitled to invoke the Bank Guarantee. If it is not, the invocation of the Bank Guarantee depends upon the clauses contained in the underlying contract. But it should be borne in mind that the application was filed under Section 9 of the Arbitration and Conciliation Act, seeking interim protection pending the arbitration proceedings. In the instant case, the project was completed and it was put to public use. This is not a case as though the appellant(s) had abandoned the project or intended to rock the boat and made the first respondent-CMRL to complete the works left by the appellant by engaging another contractor. On the other hand, it is the case of the first respondent-CMRL that, though the appellant completed the work, there are some left over works and the same has to be completed by engaging a third party. But this was disputed by the appellant(s) by stating that they were always ready to complete the minor outstanding works pointed out by the first respondent-CMRL and they are not shirking their responsibility from doing so. Further, the appellant(s) contended that, defects, if any, observed, will be rectified by them during the performance period as per the contract. Thus, the appellant(s) disputed the claim of the first respondent-CMRL with respect to the loss said to have suffered by them. Therefore, we are of the opinion that the alleged loss is yet to be determined. One of the conditions for invocation of the Bank Guarantee is that the first respondent ought to have suffered determinable loss and proportionate to such loss quantified, the Bank Guarantee has to be invoked. Further, before invoking the Bank Guarantee, the appellant must be put on notice regarding the extent of loss or damage suffered by the first respondent and the necessity to invoke the Bank Guarantee furnished by the appellant. Further, whatever the amount of Bank Guarantee furnished by the appellant(s) cannot be invoked by the first respondent-CMRL, but the invocation must be to the extent of damage or proportionate to the loss incurred by the first respondent-CMRL. Thus, before invoking the Bank Guarantee, the appellant(s) must be put on notice. Even though there are several correspondences emanated and exchanged between the parties, in all those correspondences, the first respondent-CMRL had only pointed out the defects or shortcomings, which the appellant(s) is/are always ready and willing to rectify. In none of those correspondences, it has been specified by the first respondent-CMRL about the loss incurred by them by reason of the poor workmanship or material used during the course of contract. Further, in none of those correspondences, the first respondent-CMRL has quantified the damages or loss suffered by them. In fact, in the letter dated 06.07.2020 addressed to the appellant(s) by CMRL, it was only stated as under:-

"Sub : Design and construction of underground stations at Washermanpet, Mannadi, High Court, Chennai Central & Egmore and Associated Tunnels - Contract No. UAA-01 Contract UAA 01- Default of contractor - Notice under GCC 4.2 reg

Ref :

1. GCC-282-C1U-1847746-A dated 19-Dec-2018
2. GCC-282-COU-1950231-A dated 19-Oct-2019
3. TCC:GCC-282-COU-1950539-A dated 13-Dec-2019
4. GCC-282-C1U-2050657-A dated 06.01.2020
5. SAC Certification:GCC-282-C1U-2050827-A.dated 08-Feb-2020

With reference to the 'Works' on the subject contract and for which Taken Over Certificate has been issued by the Employer vide letters cited 3rd above, it is stated that you have defaulted on certain key obligations under the contract. Several notices regarding these defaults have been issued by GC/Employers Representative during the contract period. The defaults, inter-alia include the following

\* Failure to adhere to completion schedules agreed in Addendum 1 and consequently delay in completion of the project.

\* Failure to complete/fulfil certain pending obligations under the contract within reasonable time for completion, the details of which have already been informed vide letters cited reference 2, 3, & 4 above.

Due to the above defaults, CMRL is constrained to invoke clause 4.2 of General Conditions of Contract to make a claim under the performance security. Accordingly, you are hereby notified under clause 4.2 of GCC for encashment of Performance Bank Guarantees on account of the defaults mentioned above."

59. Further, in the letter dated 06.07.2020 addressed to The Manager, IDBI Bank Limited, Mumbai, it was only stated by the first respondent-CMRL that "As per the terms of the Bank Guarantee, CMRL requests you to encash the aforementioned Bank Guarantee and treat this as Firm Demand from CMRL and credit the proceeds to CMRL's Bank Account as per the details given hereunder." Thus, the entire Bank Guarantee offered by the appellant(s) was sought to be encashed by the first respondent-

CMRL without specifying the quantum of amount proportionate to the extent of damages or loss incurred by the first respondent. In such circumstances, we are not in agreement with the findings of the learned Single Judge that it is always open to the appellant(s) to recover the differential amount from the first respondent-CMRL. In the absence of quantifying the extent of loss or damage said to have suffered by the first respondent-CMRL, the proposed action of the first respondent-CMRL to encash the entire BG amount offered by the appellant, is liable to be interfered with. Therefore, we hold that the appellant(s) is/are entitled for injunction restraining the first respondent-CMRL from invoking the Bank Guarantee especially when the contract has been completed and Taking Over Certificate has also been issued by first respondent and the project has been put to public use.

60. Though it is the submission of the first respondent-CMRL that Taking Over Certificate is not for having completed the work in full, but only a partial Taking Over Certificate had been given, in our opinion, this can be dealt with only by the Arbitrator by adducing evidence as to whether the entire work has been completed or what was the extent of work actually completed, whether such completion of work is partial or full. This cannot be gone into by us in these appeals. In this regard, it is appropriate to place reliance on the decision of this Court reported in Radhakrishnan Raghavan Nair vs. M/s. Consul Consolidated Private Limited and others reported in (2015) 3 Law Weekly 882, wherein, it was held that, when the loss said to have suffered by the first respondent therein, has not yet determined and when it is disputed by the appellant therein, then the invocation or enforcement of Bank Guarantee is not proper. Therefore, in the case on hand, it is appropriate to issue a direction to keep the Bank Guarantee(s) alive and direct the parties to work out their remedy before the Arbitrator, who shall determine all the disputes or liability of the parties, including as to whether the invocation of Bank Guarantee is proper or not.

61. Mr. Aravindh Pandian, learned Senior Counsel appearing for the first respondent-CMRL submitted that as per Section 9(2) of the Arbitration and Conciliation Act, before commencement of the arbitration proceedings, a Court can pass an order, as an interim protection and in such event, the arbitration proceedings has to be commenced within a period of 90 days from the date of such order or within such further time as the Court may determine. In the instant case, interim order of "status-quo" was granted by the learned Single Judge on 08.07.2020 and the same continued from time to time, until the impugned order was passed. Thereafter, on the request of the learned counsel for the appellant(s), the learned Single Judge has instructed the learned counsel for the respondents to maintain status quo till 21.08.2020. Thereafter, in the appeals, interim order was

granted. Even after more than 90 days, the arbitration has not been commenced. Therefore, the interim order will lapse automatically and the matter cannot be referred to arbitration. In Archer Power Systems Private Limited vs. Kohli Ventures Limited and others) reported in 2018 (2) CTC 241, it was held that the applicant has to establish that it is manifest to arbitrate by commencing arbitration proceedings at the earliest. In the said case, the arbitrator notice was issued only a day before the filing of the appeal and that was not accepted by the Division Bench of this Court by concluding that there is no intention to initiate arbitration proceedings.

62. But we find that the above proposition of law laid down by the Division Bench of this Court deals with territorial jurisdiction of the Court to entertain an application under Section 9 of the Act. Only a passing reference was made with regard to non-commencement of the arbitration proceedings. However, the judgment of Division Bench of Calcutta High Court in 2016 SCC Online Cal 6251 (supra), gives a fitting answer to this issue, wherein it was held that Section 9 (2) is not mandatory and it is only directory. Section 9 (2) did not state any consequences due to non-compliance of the said provisions. It is a general principle of interpretation of law and whenever a direction is contained in a section and it is not followed up with consequential penal provision, such direction are to be considered directory and not mandatory notwithstanding the usage of "shall" before the direction. Section 9 (2) provides a rider that if the arbitration proceedings are not commenced within 90 days, it shall be commenced within such a period as may be directed by the Court, meaning thereby, the Court specify a time period within which the arbitration proceedings shall be set in motion. In view of this, we direct the parties to approach the Arbitrator(s) within a period of 30 days from the date of receipt of a copy of this judgment. All the disputes between the parties shall be resolved there.

63. We however direct the parties to maintain "status-quo" as on date of this judgment, for a further period of 60 days from the date of receipt of a copy of this judgment, as far as the encashment of the respective Bank Guarantee(s) are concerned. The appellant(s) may therefore file appropriate application(s) before the Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act, 1996, for such interim measure as regards the invocation of the Bank Guarantee(s) is concerned. The amount which has already been transferred to the first respondent-CMRL by the Union Bank of India is concerned, we leave it to the parties to work out their remedies before the learned Arbitrator(s) in accordance with law.

64. If such applications are filed, the Arbitral Tribunal shall consider the relative merits, strengths and weakness of

the case of the parties and pass such orders as an interim measure. If however, the appellants fail to approach the Arbitral Tribunal within the specified time as mentioned above and obtain an interim order under Section 17 of the Arbitration and Conciliation Act, 1996 from the Arbitral Tribunal within such period of 60 days, the first respondent is entitled to have the amounts from the Bank Guarantee(s) transferred to it from the IDBI.

65. We expect that the first respondent-CMRL will co-operate with the appellants in the appointment of the Arbitrator(s) under the terms and conditions of the contract/Agreement. If the Arbitrator(s) are already seized of the issue arising out of the contract/Agreement as of the date of this judgment, it is open to the appellant(s) to approach the same Arbitrator(s) under the contract for getting further orders as an interim measure under Section 17 of the Arbitration and Conciliation Act, 1996 and final awards.

66. In the result, we set aside the order dated 14.08.2020 passed by the learned Single Judge in O.A.No.246 and 247 and the Original Side Appeals are allowed to the extent indicated above. As a consequence of allowing of the Original Side Appeals, the Cross Objections are dismissed. No costs. Consequently, C.M.Ps. are closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

rsh/cs

To

1. The Sub-Assistant Registrar,  
Original Side, High Court, Madras.

2. M/s.Chennai Metro Rail Ltd.,  
Administrative Building,  
Chennai Metro Rail Depot,  
Poonamallee High Road,  
Koyambedu, Chennai-600 107

+2ccs to Mr.D.Balaraman, Advocate SR.No. 19409,19410

+2ccs to Mr.S.Arjun Suresh , Advocate SR.No. 19427

+1cc to Mr.Srinath Sridevan , Advocate SR.No. 19530

+2ccs to Mr.S.Arjun Suresh , Advocate SR.No. 19426 (20.04.2021)

O.S.A.Nos.173 and 174 of 2020  
and

Cross Obj.Nos.36 and 37 of 2020

vbm co

A.SK(09.04.2021)