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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 08.09.2021

Pronounced on: 23.11.2021

+ W.P.(C) 5386/2021 & CM APPL 16649/2021

LAS GROUND FORCE PVT LTD & ANR. Petitioners

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Siddhant Buxy, Mr. Ativ Patel & Mr. Atif Shamim, Advocates.

versus

AIRPORTS AUTHORITY OF INDIA & ORS Respondents

Through: Mr. K.M. Natraj, ASG with Mr. Sonal Kumar Singh, Mr. Anshuman Gupta, Mr. Vignesh Raj, Mr. Nabeel Malik & Mr. Vinayak Sharma, Advocates for the respondents No.1 to 3/ AAI.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1) The present writ petition has been filed by the Petitioner seeking the following substantial reliefs:

“(a) *Issue a writ of certiorari or any other writ or order or direction in the nature of Writ of certiorari setting aside / quashing the letter dated 04.05.2021 bearing no. AAI/OPS/GHS/11/GP/2020 sent by the Respondent No. 1 (AAI) to the Petitioner No. 1 cancelling the Letter of Intent to Award dated 12.01.2021 and forfeiting the Bid Security, as arbitrary, unreasonable, mala fide and in violation of Article 14 of the Constitution of India;*

- (b) *Issue a Writ of Mandamus or any other Writ or order or direction in the nature of Writ of Mandamus setting aside the forfeiture of the Petitioner's Bid Security, restoring the Petitioner's Bid Security and restoring the Letter of Intent to Award dated 12.01.2021 issued in favour of the Petitioner No. 1 for the Goa airport;*
- (c) *Issue a Writ of Mandamus or any other Writ or order or direction in the nature of Writ of Mandamus directing the Respondent No. 1 to accept the bank guarantees obtained by the Petitioners in favour of AAI, viz. (i) Bank Guarantee No.1394FB210095 dated 26.02.2021 issued by Axis Bank for Rs. 1,77,54,708/-, and (ii) Bank Guarantee No. 01742IGL0001421 dated 29.04.2021 issued by Union Bank of India for Rs. 3,29,73,029/-, in compliance of Para 6(i) of the LOIA;"*
- 2) Briefly stating the facts giving rise to filing of the present writ petition are as under:
- 3) That the Petitioner No. 1 is a company registered under the Companies Act, 2013 in Mumbai. It is engaged in handling ground services offered to airlines at Airports. The Petitioner No. 2 is also a company registered under the Companies Act, 2013 in Goa and is a Joint Venture (JV) company/ SPV (Special Purpose Vehicle) of Petitioner No.1 and its consortium partner Goldair Handling S.A. (based in Greece) to perform contractual obligations under tenders awarded to the consortium as a Concessionaire.
- 4) The Respondent No.1 is the Airports Authority of India ("AAI"). It is the authority empowered to manage airports across India and to give licenses/ concessions to service providers for providing ground handling services in airports across India.
- 5) The Respondent No.2 is the Executive Director (Operations) of

Respondent No.1 and Respondent No.3 is the Airport Director at Goa airport, the person responsible for correspondence and further execution of work on behalf of the Respondent No. 1.

- 6) In June, 2018, the Respondent No.1 floated a tender for selecting a concessionaire to provide ground handling facilities at Goa airport and various other airports. However, the said tender was cancelled without assigning any reason and a new tender was again floated in August, 2018 for various airports, classified under different groups.
- 7) Subsequently, this tender was cancelled, and a new tender was floated in November, 2018. The consortium of Petitioner No.1 and Goldair Handling S.A. was selected as the successful bidder for Goa airport and some other airports. However, the said tender was also cancelled 12.06.2019.
- 8) On 27.01.2020, the Respondent No.1 issued a Request for Proposal (RFP) for the purpose of selecting a concessionaire to provide Ground Handling Facilities and Ground Handling Services at the Goa Airport, managed by the AAI for a period of 10 years. The RFP was revised in response to the bidder queries by Corrigendum No.1 dated 06.03.2020 for Goa and Pune Tender ID: 2020_AAI_41228_1.
- 9) As per Clause 3.4.4, the selected bidders i.e. the two highest bidders, were each required to incorporate a Special Purpose Vehicle (SPV) under the (Indian) Companies Act, 2013 as Concessionaires.
- 10) As per Clause 3.5.9, after selection of the two highest bidders, the

AAI would issue a Letter of Intent to Award (LOIA) to the selected bidder for an airport. The process after acknowledgment of LOIA by the selected bidder is proscribed under Clause 3.5.10 as follows:

“

<i>Particulars</i>	<i>Timelines</i>
<i>Formation of SPV</i>	<i>30 days of LOIA</i>
<i>Submission of Security Deposit</i>	<i>45 days from LOIA</i>
<i>Security Clearance</i>	<i>90 days from formation of SPV</i>
<i>Issuance of LOA</i>	<i>LOIA will be deemed to be Letter of Award (LOA) after obtaining security clearance</i>
<i>Signing of Concession Agreement (Effective Date)</i>	<i>15 days from Issue of Letter of Award (LOA)</i>
<i>Allocation of Ground Handling site (Commencement Date)</i>	<i>15 days from signing of the Concession Agreement</i>
<i>Commencement of Ground Handling Operation</i>	<i>120 days from date of Security Clearance</i>

”

- 11) Clause 7.2(i) provided that the Authority had the sole discretion to modify the dates and other terms and conditions thereto.
- 12) A revised RFP vide Corrigendum No.1 dated 06.03.2020 for Goa and Pune was issued.
- 13) It is further averred in the petition, that from 06.03.2020 till 10.07.2020, the Respondent No.1 had extended/revised the bid submission end dates and technical bid opening dates on five occasions on account of global Corona Virus ‘Covid-19’ outbreak.

The dates are as under:

<i>Dates</i>	<i>Corrigendum Nos.</i>
<i>23.03.2020</i>	<i>Corrigendum No. 2</i>
<i>11.04.2020</i>	<i>Corrigendum No. 3</i>

<i>13.05.2020</i>	<i>Corrigendum No. 4</i>
<i>11.06.2020</i>	<i>Corrigendum No. 5</i>
<i>10.07.2020</i>	<i>Corrigendum No. 7</i>

- 14) As per the petition, there seems to be no corrigendum no. 6. As per Corrigendum No.7 dated 10.07.2020, the completion dates are as under:

<i>Sr. No.</i>	<i>Items</i>	<i>Date</i>
<i>1.</i>	<i>Bid Document Download / Sale End Date & Time</i>	<i>31st July 2020 & 1500 hrs</i>
<i>2.</i>	<i>Bid Submission End Date & Time</i>	<i>31st July 2020 & 1800 hrs</i>
<i>3.</i>	<i>Last Date & Time of Submission of Bid Security and other original documents</i>	<i>07th August 2020 & 1700 hrs</i>
<i>4.</i>	<i>Tech Bid Opening Date & Time</i>	<i>10th August 2020 at 1100 hrs</i>
<i>5.</i>	<i>Financial Bid Opening Date & Time</i>	<i>To be intimated through CPP portal</i>

- 15) The Petitioner has also relied upon various circulars issued by the Government of India, and more particularly, the following Office Memorandums (“OM”)
- (i) OM dated 19.02.2020 clarifying Clause 9.7.7 (Force Majeure) of the Manual for Procurement of Goods, 2017 stating that disruption of supply chains due to spread of corona virus in China or any other country should be considered as a case of natural calamity and force majeure clause may be invoked, whenever considered appropriate.
 - (ii) OM dated 13.05.2020, by which the Government of India

extended all obligations under government contracts which had to be completed after 20.02.2020 by a period of 6 months.

- (iii) On 03.06.2020, the Ministry of Road Transport & Highways, Government of India issued a circular giving relief for contractors/developers of road sector of COVID-19 which included-
 - a) Extension of time to contractor/concessionaire for meeting their obligation under the Contract for 6 months.
 - b) Waiver of penalty for delay in submission of Performance Security/ Bank Guarantee in new contracts entered into during March, 2020 to September, 2020
- (iv) On 18.08.2020, the AAI also acknowledged the Central Government's declaration of the pandemic situation due to COVID - 19 as force majeure. It issued a circular extending the validity of no objection certificates for height clearance of Aerodromes at airports under the responsibility of AAI, in view of the instructions of Ministry of Housing and Urban Affairs, Government of India.
- (v) On 12.11.2020, the Department of Expenditure, Ministry of Finance, Government of India issued an Office Memorandum under Rule 6(1) of the General Financial Rules, 2017 reducing Performance Security from the existing 5-10% of the contract value to 3% of the contract

value for all tenders/contracts issued/concluded till 31.12.2021. This was done in view of the acute financial crunch due to the pandemic affecting timely execution of contracts and was held to be applicable for all kinds of procurements including Works.

- 16) On 04.11.2020, the AAI opened financial bids and the Petitioner No.1 was declared as the highest bidder for Goa Airport. The Minimum Annual Guarantee (MAG) offered by the Petitioner for the first year was Rs. 6,11,17,755/-.
- 17) The AAI provided a draft Concession Agreement that would be executed with the Petitioner for carrying out the work of providing ground handling services at Goa Airport. The Petitioner duly signed the said Concession Agreement and seeks to rely on Clause 12.1.2(ii) read with Clause 12.4.1 (that provides that the period for commencement of operational readiness should stand extended for the duration of COVID-19 lockdown that prevents contractual obligations) of the Agreement which reads as under:

“12.1 Force Majeure

12.1.1 As used in the Agreement, the expression “Force Majeure” or “Force Majeure Event” shall mean occurrence in India of any or all of event, as defined in Clause 12.1.2, if it affects the performance by the Party claiming the benefit of Force Majeure (“Affected Party”) of its obligations under this Agreement and which act or event

*(i) is beyond the reasonable control of the Affected Party,
or*

(ii) the Affected Party could not have prevented or overcome

by exercise of due diligence and following Good Industry Practice, or

(iii) has material adverse effect on the Affected Party.

12.1.2 A Force Majeure Event shall mean one or more of the following acts or events:

(i) nation-wide lawful strike or lockout by persons other than the Concessionaire's personnel, employees and workmen; or

(ii) acts of God, fire, flood, lightning, storm, tornado, earthquake, landslide, soil erosion, epidemics, volcanic activity, tsunami or other natural disaster excluding circumstances where the source or cause of the explosion or contamination or radiation is brought or has been brought onto or near the Airport by the Affected Party or those employed or engaged by the Affected Party unless it is or was essential for the performance of obligations under this Agreement; or

(iii) loss of or serious accidental damage at the Airport; or

(iv) act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, rebellion, terrorism, revolution, insurrection, military or usurped power, blockade, embargo, hostilities (whether war declared or not), revolution, riot, bombs or civil commotion or civil war; or

(v) any act, event or circumstance of a nature analogous to the foregoing.

Provided further that none of the following matters or their consequences shall be capable of constituting or causing Force Majeure:

(i) failure or inability to make any payment; or

(ii) the effect of market conditions unless such market conditions were themselves caused by or were a result of a Force Majeure event; or

(iii) strikes or labour disputes of any kind or collective bargaining agreements, by/of Concessionaire, resulting in a delay or stoppage of work (other than strikes, labour disputes on a nationwide basis); or

(iv) economic hardship.

12.4 Effect of Force Majeure Event

12.4.1 Upon the occurrence of any Force Majeure Event before COD is achieved, the period set forth for the COD shall be extended by a period equal in length to the duration of the Force Majeure Event.

12.4.2 The Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence.

12.4.3 It is agreed by the Parties that when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

12.4.4 Notwithstanding anything contrary to Article 7, it is hereby clarified that the Concessionaire agrees to pay the Premium to the Authority, as the case may be, even if the Ground Handling Services or the operations of the Airport are suspended due to the events attributable to Force Majeure.”

- 18) On 12.01.2021, AAI issued LOIA (“Letter of Intent to Award”) to the Petitioner No.1 for Goa Airport.

- 19) As per Clause 6(i) of LOIA, the Petitioner was required to submit the performance bank guarantees from a scheduled commercial bank by 26.02.2021 (45 days from 12.01.2021 that is the date of issue of LOIA).
- 20) The Petitioner submits that the obligation to submit performance bank guarantees was on the consortium of the Petitioner No. 1 and M/s Gold Air Handling SA. It was a joint effort and as per the Petitioner, the Petitioner No.1 did not have enough fund and was dependent on its consortium partner M/s Goldair Handling S.A. to submit the bank guarantee. The performance bank guarantee was to be submitted in the name of Petitioner No.2 i.e. LAS Goldair Handling (GIA) Pvt. Ltd. (SPV).
- 21) As per the Petitioner, since the bank guarantee (BG) was required to be obtained and submitted by the SPV, (i) incorporation of the SPV (ii) existence of SPV's bank account and (iii) infusion of funds in the SPV by the joint venture partner in Greece were prerequisite for obtaining the bank guarantee.
- 22) However, as per the Petitioner, on account of the COVID - 19 pandemic, Greece was under a complete national lockdown since November 2020 and the lockdown was repeatedly extended from time to time till the end of April, 2021. It was on account of COVID - 19 pandemic that there was some procedural delay from the consortium partner M/s Goldair Handling S.A. in Greece that has delayed the business, legal and regulatory transactions.
- 23) As per the Petitioner, on account of several restrictions, it became difficult for:

- a) Sending official documents from Greece that could not be apostilled in time due to the lockdown. Banks and relevant apostil offices were working with highly restrictive functioning. It was also difficult to arrange appointments with relevant banks and apostil offices.
- b) Due to travel restrictions, apostilled documents were taking 21 days to be delivered from Greece to India on original hard copy form.
- c) For incorporation of the SPV, it was necessary to submit original apostilled documents with Registrar of Companies in India. Thus, the SPV could be incorporated only on 23.02.2021, instead of the prescribed deadline of 11.02.2021.
- d) Due to delay in incorporation of the SPV, the process of obtaining the performance bank guarantee also got delayed, as it could commence only after incorporation of the SPV.
- e) After incorporation of the SPV, a bank account had to be opened for the SPV followed by infusion of funds in the SPV by the joint venture partner in Greece.
- f) For infusion of funds, the Petitioner No. 1 and the joint venture partner in Greece had to execute a shareholders agreement and appoint a foreign director in the board of the SPV. The corporate compliance formalities involved in these processes also required the parties to submit documents apostilled in Greece to the Indian authorities.

- g) On account of the lockdown in Greece and the sharp surge of covid cases in Mumbai, the offices of the consortium partners, their accountants and legal advisors were not functioning in usual capacity, further delaying the completion of transactions and the infusion of funds in the SPV.
- 24) From 24.02.2021 till 04.05.2021, there were numerous letters and emails exchanged between the Petitioner and the Respondents wherein the Petitioners were explaining the reasons for their delay in submitting the requisite bank guarantee as well as the documents.
- 25) On 04.05.2021, the LOIA granted in favour of the Petitioner for Goa airport was cancelled. The Petitioner made representations, but the same was also rejected by the Respondents. On 11.05.2021, AAI responded to the Petitioner's representations stating that in view of the letter dated 04.05.2021 cancelling the LOIA, no further request can be acceded to.
- 26) It will also be pertinent to mention that an LOIA was issued in favour of the Petitioner in respect of Chennai airport as well. However, the Petitioner was unable to proceed with the said tender which resulted in forfeiture of its bank guarantee for the Chennai Airport Tender.
- 27) Being aggrieved by the cancellation of the LOIA granted in favour of the Petitioners for the Goa Airport, the Petitioner filed the present writ petition.

Contentions of Respondents:

- 28) The Respondent has filed a detailed counter affidavit and stated that in terms of LOIA, the Petitioner was to submit a bank guarantee of Rs. 5,07,27,737/- within 45 days. Prior to that, the Petitioner No.1 was to form an SPV by 11.02.2021. It is submitted that the SPV i.e. Petitioner No.2 was incorporated only on 23.02.2021 (delay of 12 days).
- 29) As regards submission of the original bank guarantee is concerned, the same was to be submitted by 26.02.2021. On 27.02.2021, the Petitioner submitted a scanned copy of the BG for Rs. 1,77,54,708/- (Partial Bank Guarantee) and sought for an extension of time to submit balance BG. Even then the original of partial BG was not submitted by the Petitioner. It is a common understanding among all the bidders that an original bank guarantee has to be submitted and scanned copy is not a valid form of submission. Even otherwise, the Respondent had informed the Petitioners that original bank was required to be submitted.
- 30) On 18.03.2021, the Respondent No. 3 wrote to Respondent No. 2 informing that the Petitioners had till date not submitted the original Partial Bank Guarantee, and had failed to submit the balance amount of the bank guarantee till date.
- 31) On 23.03.2021, the Petitioners wrote to Respondent No. 3 seeking extension for submission of balance amount of the bank guarantee on account of writ petitions challenging the award of tender for Group A1 and C airports, pending before this Court and the High Court of Judicature at Madras. To this, the Respondents states that

the writ petitions pertained to Udaipur and Chennai airports, and had no effect on the tender for Goa airport. Further, there was no lockdown imposed in Mumbai on this date. The Petitioners also failed to show as to how the lockdown in Greece precluded the Petitioners from submitting the Original Partial Bank Guarantee and the also, the balance amount. Further, they have failed to substantiate on record that they made any efforts in Greece or elsewhere, to submit the requisite bank guarantee.

- 32) On 23.03.2021, a show cause notice was issued to the Petitioner by Respondent No. 3, after almost a month from the deadline for submission of the requisite bank guarantee, for non-submission of requisite bank guarantee.
- 33) On 26.03.2021, the Petitioners had a meeting with Respondent No. 3 in Goa. Petitioners were informed that they had to submit the original Partial Bank Guarantee, and had to remit the balance amount of the bank guarantee. Even though the Petitioners had visited the Goa office of Respondent no. 3 in Goa physically, they failed to submit the bank guarantee. The fact they had travelled to Goa also shows that there no restrictions at that time.
- 34) Even on 30.03.2021, when a representative of the Petitioner visited the office of the Respondent no. 3, he was again reminded to do the needful. Moreover, the Petitioner failed to submit the bank guarantee at that point as well.
- 35) On 05.04.2021, the Petitioners had a video conference with Chairman of Respondent No. 1, wherein the Petitioners were advised to submit the original bank guarantee at Goa airport at the

earliest, and thereafter, submit a reasonable justification for delay in submission of the bank guarantee.

- 36) On 06.04.2021, the Petitioners responded to the show cause notice dated 23.03.2021, giving the pendency of writ petitions against the tender for other airports and lockdown restrictions in Mumbai and Greece, as excuses for condonation of the delay in submission of the bank guarantee.
- 37) On 30.04.2021, the Petitioners sent a scanned copy of bank guarantee dated 29.04.2021 of Rs. 3,29,74,029/- ("Balance Bank Guarantee") and promised to submit the original Balance Bank Guarantee at the earliest.
- 38) On 04.05.2021, Respondent No. 1 cancelled the LOIA issued to the Petitioners, and forfeited the bid security remitted by the Petitioners at the time of bid submission, to the tune of Rs. 40,00,000/-. This impugned letter was issued almost 2.5 months after the deadline for submission of the requisite bank guarantee under the LOIA.
- 39) The submission of the learned ASG on behalf of the Respondent is:
 - (i) The conduct of the Petitioners does not entitle them to any discretionary relief either from this Court, or from the Respondent authority for the following reasons:
 - a. The Petitioner failed to form SPV within the stipulated period.
 - b. The Petitioner failed to submit the requisite bank guarantees by 26.02.2021.

- c. The bank guarantee was contrary to the terms of LOIA and was in piecemeal.
 - d. The Petitioners kept raising irrelevant and inconsequential excuses for delaying compliance with LOIA condition and failed to realise that the Petitioners are responsible for maintaining their own financial affairs.
 - e. The Petitioner was duly served show cause notice and thereafter, the contract was terminated.
 - f. The Petitioner was given sufficient opportunities to submit the requisite bank guarantee.
 - g. The Petitioners are habitual defaulters and failed to submit the requisite bank guarantees in case of Chennai airport as well.
 - h. The Respondent authorities have given ample time to Petitioners to comply with their LOIA obligations.
- (ii) *Force majeure* is not applicable to the facts and circumstances of the case:
- a. As there is no Force Majeure clause in the RFP or the LOIA.
 - b. The Petitioners' breaches of the LOIA's conditions are not attributable to the COVID-19 pandemic. The Petitioners were obligated to submit the requisite bank guarantees at the Goa airport in the period between 12.01.2021 and 26.02.2021. It is submitted that there were no lockdown restrictions in place in either Mumbai, New Delhi or Goa

in the months of January, and February, 2021. Thus, the failure of the Petitioners to submit the requisite bank guarantees was not attributable to any lockdown restriction. Furthermore, the Respondent authorities had not yet cancelled the LOIA, and the Petitioners had sufficient opportunity to submit the requisite original bank guarantees at Goa airport, after being directed to do so by the Chairman of Respondent No. 1 on 05.04.2021. It is also submitted that lockdown restrictions were imposed in Mumbai only from 14.04.2021, in New Delhi from 19.04.2021 and in Goa from 29.04.2021.

- c. Even during lockdown restrictions, flight operations in Mumbai, New Delhi and Goa were functional.
- d. The Petitioners have failed to establish the impact of the lockdown restrictions in Greece on the performance of their obligations under the LOIA.

- 40) Learned counsel for the Respondents has relied on the following judgments in support of his submissions: *Jagdish Mandal v. State of Orissa and Others* [(2007) 14 SCC 517]; *Joshi Technologies International Inc. v. Union of India* [(2015) 7 SCC 728]; *Patel Engg. Ltd. v. Union of India* [(2012) 11 SCC 257]; *Air India Ltd. v. Cochin International Airport Ltd.*, [(2000) 2 SCC 617]; *B.S. N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, [(2006) 11 SCC 548] *Maa Binda Express Carrier and Anr. v. North-East Frontier*

Railway and Othrs., [(2014) 3 SCC 760], *Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.* [OMP (I) (Comm.) No. 88/2020 (Delhi HC, judgment dated 29.05.2020)], *Standard Retail Pvt. Ltd. v. G.S. Global Corp & Ors*, [2020 SCC Online Bom 704]

- 41) When the matter came up before this Court on 24.05.2021, we directed that the Petitioner should provide the original bank guarantees in sealed cover to the learned counsel for the Respondent, Mr. Sonal Kumar Singh within one week. We also directed the Respondents to examine whether they were, even at that stage, willing to accept the bank guarantees and close the matter by withdrawing the impugned communication. The Respondents were also directed to maintain the status quo with regard to the tender in question till the next date.
- 42) On 09.07.2021, the learned counsel for the respondent had pointed out that the tender in question was related to Pune and Goa Airports and that the present petition only relates to Goa Airport. Therefore, in our order dated 24.05.2021, it was stated that Pune airport will be excluded from the purview of the interim order. Thereafter, the matter was heard on 18.08.2021, 03.09.2021 and 08.09.2021.
- 43) We have heard learned counsel for the parties and gone through the documents and averments as well as the case law relied upon.

ANALYSIS

- 44) The questions before us are the following:
- a) Whether Respondents cancelling the LOIA due to Petitioners failure to comply with the terms and conditions, justified?

- b) Whether the *force majeure* clause provides relief to the Petitioners from their contractual obligations?
- 45) It is an admitted position that the Petitioner did not adhere to the timeline as per LOIA dated 12.01.2021. The Petitioner has sought to justify this delay for the following reasons:
- a. Covid-19 pandemic
 - b. Complete lockdown (periodically in Greece, where the joint-venture partner of the Petitioner is located).
 - c. Practical difficulty in formation of SPV and opening of bank accounts
 - d. Covid-19 pandemic being recognised as an epidemic and the provision of *force majeure* provided by the Government of India
 - e. AAI itself extending performance of contracts due to Covid-19 pandemic.
 - f. The dates of performance of contract repeatedly extended by the Respondents recognising the enormity of Covid-19 pandemic.
 - g. Lastly, no prejudice being caused to the Respondents by non-submission of the bank guarantee as the Petitioner was in a position to commence ground handling at Goa airport on the last date i.e. 08.09.2021.
- 46) Additionally, the Petitioner states that by cancelling the LOIA, serious prejudice and financial loss would be caused to the Public Exchequer as they would lose a sum of Rs. 6,11,17,755/- per annum which the Petitioners had to pay.

- 47) The Petitioner, in the present writ petition, is seeking a writ of *Certiorari* for quashing/ setting aside of letter dated 04.05.2021, whereby LOIA dated 12.01.2021 in favour of the Petitioner was cancelled.
- 48) The Petitioner also seeks a writ of *Mandamus* seeking restoration of Petitioner's bid security and LOIA dated 12.01.2021. In order to seek a writ of *Mandamus*, the Petitioner has to show existence of a legal right in its favour. The entire gamut, pleaded and elaborated by Petitioners and Respondents before us, show that: (i) there was delay in performance of conditions of LOIA by the Petitioner, and; (ii) that the delay was not condonable as a matter of right to the Petitioner but was at the sole discretion of the Respondent.
- 49) The Respondent, according to us, showed adequate indulgence, and waited for the Petitioner to perform its LOIA obligations.
- 50) In fact, in their letter dated 06.04.2021, the Petitioners informed that their bankers i.e. New India Co-operative Bank Ltd., have a tie up with HDFC/ Corporation Bank to proceed ahead with the issuance of the Bank Guarantee for the balance amount of INR 3,29,73,029/- and that they would be submitting both the original Bank Guarantees aggregating to INR 5,07,27,737 once they receive the same from their Bankers. This shows that the Petitioner had the fund and despite that they chose not to give bank guarantee.
- 51) Under Section 11 of the Airports Authority of India Act, 1994, the airport authorities are mandated to act as prudent businessmen, and not as a State. Section 11 states that '*in the discharge of its*

functions under this Act, the Authority shall act, so far as may be, on business principles’. The Respondent should not be expected to bear the burden of dealing with the Petitioner for the next 10 years in Goa, when the conduct of the Petitioner is in violation of the terms of LOIA.

- 52) The Respondent has also relied on the provisions of the RFP to substantiate that Petitioners failed to conform with the provisions of RFP. Following are the relevant provisions of the RFP:

“3.5.10. After acknowledgment of the LOIA as aforesaid by the Selected Bidders, it shall fulfil the conditions set forth as below:

Particulars	Timelines
Formation of SPV	30 days from LOIA
Submission of Security Deposit	45 days from LOIA
Security Clearance	90 days from date of formation of SPV
Issuance of LOA	7 days from Security Clearance Date (as defined in the Concession Agreement) <u>LOIA will be deemed to be Letter of Award (LOA) after obtaining security clearance.</u>
Signing of Concession Agreement (Effective Date)	15 7—days from Issue of LOA <u>Letter of Award (LOA)</u>
Allocation of Ground Handling Site (Commencement Date)	15 7—days from signing of the Concession Agreement
Commencement of Ground Handling Operation	120 days from date of Security Clearance

The Selected Bidders shall procure all necessary security clearances under Applicable Laws, within the time specified

*in this clause. In case the Selected Bidders fail to obtain the clearances as per the time specified in this clause, the Authority, at its discretion, reserves the right to extend the period up to additional period of 3 months for obtaining necessary security clearance (**‘Additional Extension’**), provided, the Selected Bidders provide reasonable justification for not being able to obtain such security clearances for reasons beyond its control. In the event, the Selected Bidders fail to procure security clearances even after such Additional Extension, the Authority may annul the bid process and invite fresh tender. The Authority also reserves the right to forfeit the Security Deposit of the Selected Bidder who is unable to obtain the necessary security clearances even after such Additional Extension.”*

- 53) In the Letter of Intent to Award, the Petitioners were clearly informed by the Respondents of their contractual obligations. Furthermore, the Petitioners were made aware that if they failed to comply or perform the terms and conditions of the LOIA, then the LOIA or the Letter of Award shall cease to exist. The LOIA is reproduced below:

“AIRPORT AUTHORITY OF INDIA

No. AAI/OPS/GHS/11/GP/2020/19 Dated: 12.01.2021

To,

*M/s LAS Ground Force Pvt. Ltd.
301, The Glacis Tower, Above IndusInd Bank,
Linking Road, Khar West,
Mumbai- 400052*

Sub: *Letter of Intent to Award (LOIA) for Concession for Ground Handling Services to Goa Airport, to the consortium of M/s LAS Ground Force Pvt. Ltd. & M/s Gold Air Handling SA.*

- Ref.** 1. E-bid invitation no.:2020_AAI_41228_1 dated 6th March 2020.
2. Your technical bid dated opened on 11.08.2020 and financial bid dated opened on 04.11.2020 through CPP portal.

Kind Attn: Mrs. Humin B. Daver, Authorised Signatory on behalf of consortium of M/s LAS Ground Force Pvt. Ltd. & M/s Gold Air Handling SA.

Madam,

1. This has reference to your submission of Bid on 31.07.2020. The Competent Authority is pleased to accept your offer as **H1** bidder quoted MAG, at INR Rs. **6,11,17,755.00**. (Rupees Six Crore Eleven Lakhs Seventeen Thousand Seven Hundred and Fifty-five only) inclusive of all taxes except GST for the first year for providing Ground Handling Services at Goa Airport.
2. This is a non-exclusive Concession for providing Ground Handling services to Goa Airport is for a period of 10 years from the Commercial Operations Date (COD). AAI reserves its right to select additional 3rd party ground handling agency through bidding process as and when it deems fit as per Applicable Law.
3. Airports Authority of India ("AAI"), hereby declares the consortium of M/s LAS Ground Force Pvt. Ltd. & M/s Gold Air Handling SA. as the H1 **"Selected Bidder"** (hereby now referred as **You**) within the meaning of the RFP document for the implementation of the Project, subject to the fulfilment of terms and conditions of the RFP document and the Concession Agreement including the obtaining of requisite security clearance as per Applicable Laws.
4. You are advised to extend the validity of Bid Security Bank Guarantee for 90 days w.e.f. 27.01.2021 (as

already instructed via email). If failed, AAI have sole discretion to cancel the LOIA.

5. *You are advised to submit the duplicate copy of LOIA along with undertaking enclosed in acknowledgement and acceptance of all the terms and conditions of this LOIA duly signed within 7 (seven) days of issue of this LOIA.*

6. *You shall incorporate a **Special Purpose Vehicle (SPV)** under the (Indian) Companies Act, 2013 (the "**Concessionaire**"), within 30 (thirty) days from the date of issue of LOIA. The SPV is to be registered in Goa. For entering into the Concession Agreement with AAI and for performing all its obligations under the RFP document and as the Concessionaire in terms of the Concession Agreement for the Project;*

(i) *You shall submit for the performance of obligations hereunder no later than 45 (forty-five) days from the date of issue of LOIA or signing of the Agreement whichever is earlier, an irrevocable unequivocal and unconditional guarantee from a scheduled commercial bank (other than cooperative scheduled bank) in India in favour of 'Airports Authority of India' Payable at Goa Airport for a sum equivalent to 83 (Eighty Three) percent of the Minimum Annual Guarantee for the first year (MAG₁) quoted i.e. **Rs. 5,07,27,737/- (Rupees Five Crore Seven Lakhs Twenty-Seven Thousand Seven Hundred and Thirty Seven only)** including all taxes except GST. The validity of the bank guarantee should be for a period of 18 months from the date of its issue, as per the terms and conditions of the RFP document and the Concession Agreement.*

- (ii) *You/ SPV shall obtain requisite Security Clearance as per the timelines provided in the RFP / Concession Agreement.*
 - (iii) *This LOIA shall be deemed as Letter of Award (LOA) on the date of receipt of requisite Security Clearance as per Applicable Laws.*
 - (iv) *You shall ensure the execution and delivery of the Concession Agreement through SPV within 7 (Seven) days from the LOA.*
 - (v) *The SPV shall submit one-month advance license fee of quoted MAG₁ i.e. **Rs. 50,93,146/- (Rupees Fifty Lakhs Ninety-Three Thousand One Hundred and Forty-Six only)** including all taxes except GST in the office of Airport Director, Goa Airport before commencement of operation.*
- 7 *In the event, You/ SPV fail to comply with the terms of the RFP document and / or the Concession Agreement including the terms and conditions as stated above, AAI shall forfeit the Bid Security or Performance Security, as the case may be, in accordance with the terms of the Concession Agreement and the RFP document and AAI also have sole discretion to cancel the LOIA, LOA or the Concession Agreement as the case may be.*
- 8 *You/ SPV shall comply with all other requirements as set out in the RFP document and for all purposes, the conditions of the RFP, Corrigendum's and Concession Agreement document form the part of this LOIA and shall be read as part of this LOIA. You/ SPV shall not be entitled to seek any changes in the Concession Agreement and shall have to agree to abide by and be bound by the terms of the RFP document, Corrigendum's and the Concession Agreement.*
- 9 ***If You/ SPV fail to comply with the above or fails to get the security clearance as per the timelines provided in the RFP/ Concession Agreement or fails to get the Concession Agreement executed within the period as***

prescribed above, then this LOIA or LOA, as the case may be, shall automatically cease to exist and You shall not be entitled to and shall be considered to have forgone all its rights, benefits and interests under the LOIA or LOA. In such event, AAI shall forfeit the Bid Security or Performance Security, as the case may be, in accordance with the terms of the Concession Agreement and the RFP document. Unless otherwise defined herein, all capitalized terms herein, shall have the meaning ascribed to it in the RFP document.

- 10 *You/ SPV are required to submit the undertaking enclosed i.r.o. the verification of credentials/ experience certificate submitted by you to be eligible as per technical criteria. Documents submitted by You/ SPV, is found to be forged / false at any stage, AAI have sole discretion to cancel the LOIA and You/ SPV shall be debarred from AAI for taking participation in all future AAI works & any other suitable action may be taken against your company/ firm as deemed fit by AAI.*
- 11 *You are advised to contact immediately to the Airport Director, Goa Airport i.e. the Authority's Representative for further execution of the above-mentioned steps in this LOIA.*

Yours faithfully,

*Sd/-
(Anil Kumar Rai)
General Manager (Ops)
for and on behalf of Chairman
Airport Authority of India”*

- 54) The Petitioners had failed to submit the requisite bank guarantee by 26.02.2021 and only managed to submit a scanned copy of a bank guarantee dated 26.02.2021 to the tune of Rs. 1,77,54,708. The Respondents could not have accepted the scanned copy of the

Partial Bank Guarantee as per the terms, as only acceptance of the full bank guarantee was envisaged in the terms of the RFP and the LOIA. A scanned copy of the Partial Bank Guarantee was of no use, as it could not be invoked, in case the occasion for its invocation arises at any stage.

- 55) The Covid-19 pandemic was not the sole reason for non-compliance with the terms of the LOIA. Petitioners wrote to Respondent No. 3 on 12.03.2021 and again on 23.03.2021, seeking extension for submission of balance amount of the bank guarantee on account of writ petitions challenging the award of tender for Group A1 and C airports, pending before this Court. It is submitted by the Respondents that the writ petitions had no relation to the instant RFP, and this had no effect on the performance of obligations under the RFP and the LOIA for Goa airport. The same can be seen from the letter dated 23.03.2021, wherein the Petitioners had written to the Respondents, asking for extension on account of pendency of writ petitions:

“LAS GOLDAIR HANDLING (GIA) PVT. LTD.

Goldair Handling

Ref.: AAI/GIA-TENDER/2021/083
23.03.2021

To,

The Airport Director,
Airports Authority of India,
GOA International Airport,
GOA.

Dear Sir,

**SUB: Extension of time for submitting Bank Guarantee
under the terms of LOIA dated 12.01.2021 – reg.**

This is in furtherance of the Letter of Intent to Award AAI/OPS/GHS/10/CK/2020/18 dated 12.01.2021 issued in our favour for operating as Concessionaire at GOA International Airport. Your kind attention is drawn to the following facts:

1. *We had vide our e-mail dated 2nd March 2011 forwarded you a letter dated 27.0.2021 submitting a copy of Bank Guarantee bearing number 1394FBG210095 dated 26.02.2021 for Rs. 1,77,54,708/- and requested for extension of time for submitting the remainder. One of the main reason for requesting for extension of time was the fact that our Consortium partner, M/s. Goldair Handling SA is situated in Athens, Greece which is currently under lockdown and therefore it would take some more time for us to complete all the RBI and Income Tax Formalities required to enable our Foreign Partner to bring in their share of the investment into the SPV. These formalities are now nearing completion and we are in a position to issue the BG as required.*
2. *However it has now come to our knowledge that the unsuccessful parties in tenders of Category 'A' and Category 'C' airports have challenged the declaration of us as H1 bidder before the Madras High Court vide proceeding W.P. 2735 of 2021 and the Delhi High Court vide proceeding in W.P. 2986 of 2021.*
3. *While the proceeding in the Madras High Court has been withdrawn with liberty to approach the Delhi High Court vide order dated 18.03.2021, the matter in Delhi High Court is pending. The Delhi High Court, vide order dated 10.03.2021 in W.P. 2986 of 2021 has restrained the officials of AAI from entering into any contract till the next date of*

hearing, viz. 27.04.2021.

4. *We would like to state that despite fulfilling all requirements as per the terms of the RFP, we are put to great difficulty and are continuously being stressed with uncertainty by the writ petitioners by various proceedings before different forums with a view to prevent us from taking charge. In the interest of transparency, we have shared the litigation details with our Bankers and they have expressed their serious concern on issuance of a BG given the pending litigation. We are taking steps to vacate the ex-parte interim order granted by Delhi HC and are also awaiting the proposed writ which is likely to be filed the withdrawal from the Madras High Court.*
5. *Considering the above circumstances, till such time as the litigation has not been settled to the satisfaction of our various stakeholders and Bankers, we request your kind self to grant us an appropriate extension of time to submit the BG, preferably till the culmination of the legal proceedings.*
6. *We would like to assure you that we have made all arrangements for the issuance of the remainder of the Bank Guarantee and it is only due to the pendency of the legal proceedings and the Bank's concerns regarding the outcome of the litigation that we are requesting for an appropriate time extension till such time as the litigation has been settled and fully disposed off. We confirm that we will submit the BG immediately once the litigation is fully resolved and will endeavour to adhere to the timelines for deployment of manpower and commencement of commercial operation as scheduled. This request also falls in line with your communication dated 12th Jan 2021 whereby you have asked to deploy manpower and commence work as per the guidelines mentioned in the Tender Document. Granting us this extension would ensure that there is some finality of court proceedings which would hopefully pave the way forward for our smooth execution of the License.*

7. *We also would like to state that we have already initiated the process of all other activities including obtaining BCAS clearance, procurement of Ground Support Equipment from both Indian & Foreign Manufacturer, induction of manpower in the Management Level and are fully and sincerely committed to start Commercial Operations at GOA International Airport as a Licensed Ground Handler after executing the Concessionaire Agreement before the stipulated period as provided in your Tender Document.*

We are submitting the above for your kind consideration and look forward to your early and positive response.

*Thanking you,
Yours Faithfully,*

*Sd/-
(Hrishikesh Bose)
VP Contracts*

*CC: GM, Operations,
AAI HQ : Kind Attn Mr. Anil Kr. Rai.
Rajiv Gandhi Bhavan
New Delhi*

Registered Office: Bunglow No.8, Nuvem, Margao, South Goa – 403601.
Corporate Office: 301, 3rd Floor, Bhavya Plaza, Near Gaurav General Store, 5th
Station Road, Khar (W), Mumbai – 400 052.
Tel: 022 42531500, www.lasgroundforce.com

- 56) Therefore, it is clear that the Petitioners were constantly making excuses leading to an inordinate delay in fulfilling their contractual obligations. We are of the view that the Respondent authority has acted fairly and reasonably and the Petitioner cannot be allowed to invoke a public law remedy under Article 226 of the Constitution of India when the conduct of the Petitioner leaves a lot to be

desired.

- 57) As a prudent businessman, the Respondents had asked the Petitioners to comply with terms of both Chennai and Goa airports by submitting the requisite bank guarantees during the pendency of the present writ. However, the Petitioner failed to comply with this as well. The Petitioner had stressed that it cannot be asked to furnish bank guarantees for both the airports in this particular writ petition. However, we do not agree with this submission, as the Respondents have to think as a prudent businessman and secure compliance when there had been multitude of excuses from the Petitioner.
- 58) The Petitioner relied on the judgments of the Supreme Court in *Kasturi Lal Lakshmi Reddy v. State of J & K*, [(1980) 4 SCC 1]; *Tata Cellular v. Union of India* [(1994) 6 SCC 651]; and *Sterling Computers v. M/s M & N Publications Ltd. & Ors.*, [(1993) 1 SCC 445]. Additionally, the Petitioner relies on the Delhi High Court of *UEE Electrical Engineers Pvt. Ltd. v. DDA & Ors.*, [2002 SCC OnLine Del 713]. The main point that the Petitioner contends through these judgments is that administrative action should be reasonable and within the touchstone of Article 14, 19 and 21. It should be in public interest and not arbitrary, capricious and malafide.
- 59) The Petitioner also relies on the following paragraphs from *Tata Cellular* (Supra):

“138. The High Court observed thus:

“We also do not find any error on the part of the respondents in treating the financial bid of BPL in order if at

that stage BPL dropped one of its three foreign collaborators (which were named by it at the technical bid stage) as otherwise financial bid satisfied all the criteria and dropping of one of the collaborators made no difference.”

It further observed:

“We, therefore, find that stand of the petitioner that any undue preference had been given to some of the companies cannot be upheld. We even otherwise do not find that deviation or relaxation in the standards prescribed has resulted in any arbitrariness or discrimination. (See in this connection G.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488 (para 18)].) We do not think it is necessary for us to go into each and every deficiency as alleged by the petitioner we find that the action of the respondents had been bona fide. Motivation is providing of best possible service to the consumers.”

We are in agreement with this finding.

139. *Yet another attack that is made against BPL Systems and Projects is that it submitted its application for foreign collaborator on 22-4-1992 to SIA beyond the cut-off date of 31-3-1992. It should not loom large because there was a confusion as to who was competent authority to receive the application. As a matter of fact BPL Systems and Projects did submit its application for foreign collaboration on 31-3-1992 to the Reserve Bank of India. When that application was returned on 20-4-1992 it came to be sent to SIA on 22-4-1992. We do not think BPL Systems and Projects could be faulted on this score. Equally, the argument that the memorandum and articles do not mean cellular business does not merit acceptance at our hand. In fact, the High Court has correctly construed the main object, namely, to design, develop, fabricate, manufacture, assemble, exporting from and importing into India by self or otherwise dealing and act as consultants and render services in connection with all kinds of*

telecommunication equipments as including cellular telephones.”

- 60) We are not in agreement with the above contentions. The RFP and the LOIA clearly stipulated the period for compliance in the RFP and the LOIA. There is no ambiguity in the LOIA which categorically permits the respondent to cease the LOIA or LOA on account of non-compliance. In the present case, the Respondents have ceased the LOIA on account of non-compliance which in our neither unfair nor malafide.
- 61) At this stage, it important to point out the extent of judicial review of administrative action. The same has been observed in *Jagdish Mandal v. State of Orissa*¹:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to

¹ (2007) 14 SCC 517.

decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

- 62) It is not for us to evaluate the soundness of the decision but whether it was made in a lawful manner. The Respondents herein did not make the particular decision to favour someone, and it was squarely within the terms and provision of the RFP and LOIA.

63) The second consideration that the Petitioners have put forth is *force majeure* clause made applicable by Office Memorandum issued by the Government. It is our view, that the Petitioners have failed to make a case for the same. In February, when the Bank Guarantees had to be submitted, the second wave of the pandemic had still not hit the nation. The situation was the same in March. It was only in April and May, 2021 that the situation worsened drastically. Even a perusal of the articles that Petitioners had attached for lockdown in Greece, show that banking services were operational for essential tasks. Therefore, we are of the view that *force majeure* principle would not be applicable in this case, especially because it was not the sole reason for non-compliance. The Petitioners were also unsure because of the ongoing writ petitions in the related tender matters that did not have anything to do with the tender in question. The same has also been highlighted in the letter dated 23.03.2021 reproduced above. We are also helped in our view by the following extract from *M/s Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.*², with which we agree.

“62. The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition. The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in

² O.M.P. (I) (COMM.) No. 88/2020, High Court of Delhi, Date of Decision: 29.05.2020.

the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.

63. *It is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in **Energy Watchdog (supra)** it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a 'real reason' and a 'real justification' which the Court would consider in order to invoke a Force Majeure clause."*

- 64) Therefore, we do not think COVID-19 would justify non-compliance. The conduct of the Petitioners as well as the documents placed on record do not show that the Petitioners did everything within their power to comply with the terms and conditions of the RFP and LOIA. The Petitioners have also not been able to justify that the actions of the Respondents were arbitrary, mala fide or unreasonable.
- 65) The fact that there is an affidavit filed by the respondent contradicting the stand of the petitioner that the petitioner's representative had sought to submit the original partial bank guarantee on 03.03.2021 and for the reasons stated above, the question whether partial bank guarantee was attempted to be submitted need not detain us as we have already held that the petition is devoid of merit for various other reasons as well which

includes the fact that bank guarantee needed to be submitted in full.

- 66) Hence, we find no merit in the present petition. The same is, accordingly, dismissed.

JASMEET SINGH, J

VIPIN SANGHI, J

NOVEMBER 23, 2021/ 'ms'

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