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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
19.01.2022	09.02.2022

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THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO. 16394 OF 2021

AND

W.M.P. NO. 17367 OF 2021

TDI International India (P) Ltd.

rep. by Shri Praveen Bhan, COO

No.5, II Floor, Ambadi Road

Kotturpuram, Chennai 600 085

Regd. Office at No.42, Rani Jhansi Road

New Delhi 110 055.

.. Petitioner

- Vs -

The Airport Director

Airports Authority of India

Chennai International Airport

Chennai 600 027.

.. Respondent

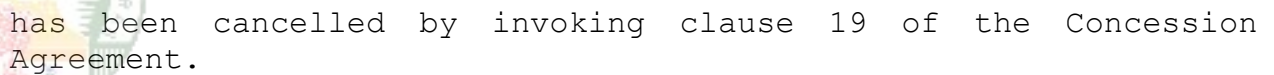
Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus calling for the records of the respondent pertaining to Letter of Termination bearing Ref. No.AAMC.0153/2019/VOL-IV/445 dated 6.5.2021 issued by the respondent to the petitioner in respect of Chennai Airport and quash the same as illegal and unconstitutional and consequently direct the respondent to permit the petitioner to commence its business operations as per the Concessionaire Support Scheme extended by the respondent and accepted by the petitioner on 14.12.2020.

For Petitioner : Mr.P.S.Raman, SC, for
Dr. R.Maheswari

For Respondent : Mr. R.Shankara Narayanan, ASG

ORDER

The present petition has been filed against the order of termination passed by the respondent, in and by which the advertising rights concession/licence granted to the petitioner



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5. To deal with such a condition, the Concession Agreement entered to between the petitioner and the respondent specifically provides for Article 17 in which Force Majeure event is covered and the acts that could be undertaken by either party in such a situation has also been spelt out in Article 17.



It is the further case of the petitioner that inspite of the Force Majeure conditions, the Airports Authority of India unilaterally proceeded to issue an order dated 14.8.20 by brushing aside the contractual rights of the petitioner and intended to charge licence fee with retrospective effect from 25.5.20 on pro rata basis based on the corresponding monthly passenger traffic of the previous year in the respective International Airport.

6. It is the further stand of the petitioner that Article 17.10 of the Concession Agreement is applicable and unless and until a mutual resumption plan is arrived at, the petitioner had informed that it would not commence business and that the entire period would have to be considered as Dies Non with no financial liability on the petitioner in accordance with Article 17.8.

7. It is further averred by the petitioner that in the said communication dated 14.8.20, the respondent has inserted a clause that the relief would be given only to those agencies/concessionaires who clear all their undisputed outstanding dues till the bills of March, 2020 and that the disputed dues here to be considered as the dues for which the recovery is withheld by order of any court of Law/Arbitrator as on 31.03.2020.

8. It is the averment of the petitioner that further to the aforesaid order, a further order dated 20.08.2020 was issued by the respondent, which further took away all the contractual right of the concessionaires relating to termination of contract and the said order was challenged before the Delhi High Court by the Federation of Airport Media Operators, including the petitioner in W.P. (C) No.7390/2020 in which the Hon'ble Delhi High Court permitted the parties to negotiate the terms to try and arrive at an amicable settlement pertaining to period in dispute.

9. Pending the aforesaid writ petition, the petitioner, in respect of the Exclusive Advertising Rights contract pertaining to Chennai Airport, sought reference of certain other disputes to a Disputes Resolution Committee in terms of the contract, which resulted in the constitution of a Dispute Resolution Committee to resolve the disputes raised by the petitioner. Pursuant to the said constitution of the Committee, the petitioner herein, vide letter dated 19.10.2020 submitted its claim, initially for a sum of Rs.4,10,10,152/-, which was later revised to Rs.5,25,41,266/= and after deliberations and negotiations, the respondent partially resolved the dispute and



agreed to give credit of only Rs.1,58,11,288/=-, vide communication dated 9.7.21.

10. Whiles, to the utter shock and surprise of the petitioner, inspite of the continuing Force Majeure conditions, the respondent raised bills and invoices retrospectively with effect from 25.5.20 to 30.11.20 at full rates of licence fee. It is the further averment of the petitioner that in the absence of any mutually agreed resumption plan, as per clause 17.8 of the Licence Agreement, the parties remained absolved of their responsibilities and liabilities and, therefore, there was no occasion whatsoever for the respondent to seek any such amount from the petitioner, as the operation had not resumed and no monetary gains was made by the petitioner.

11. It is the further averment of the petitioner that in view of the negotiations not yielding any fruitful results and in the aftermath of many of the concessionaires placed under similar circumstances going to terminate their contracts in the absence of a satisfactory resolution, the respondent issued another circular No.26/2020 dated 9.12.2020 in continuation of the previous circulars laying down the revised terms and conditions for conduct of business in the "Continuing Force Majeure Conditions". It is the further averment of the petitioner that as per the revised terms and conditions, all the concessionaires were relieved of all obligations from 25.3.2020 to 24.5.2020 and that with effect from 25.5.2020, the billing was to be on pro rata basis and linked to actual passenger traffic effective 25.5.20 till 31.12.20 as compared with the corresponding traffic of the previous year and that the scheme also provided for an additional discount of 40% till 30.6.2021 and 20% till 31.12.2021 on pro rata licence fee based on actual traffic as compared with the corresponding traffic of the previous period.

12. It is the further averment of the petitioner that the respondent, vide letter dated 10.12.20 sought acceptance of the revised terms and conditions and also sought a firm payment plan for clearing all the undisputed outstanding dues pertaining to the bills raised upto 30.11.2020 on or before 31.1.2021. It is the further averment of the petitioner that further to the said communication, the petitioner, vide its reply dated 10.12.20, while accepting the revised terms and conditions, assured the respondent that it would clear all the undisputed outstanding dues upto 29.02.2020 on or before 31.01.2021 without prejudice to the outcome of the decision in the petition pending before the Delhi High Court.



13. It is the further averment of the petitioner that prior to acceptance of the revised terms and conditions on 14.12.20, the petitioner had not conducted any business activity under notice to the respondent due to the continuing Force Majeure conditions and that it had applied for entry passes for its staff into the Airport only on 17.12.20, after mutually agreeing to the revised terms and conditions.

14. In the pending petition before the Delhi High Court, the respondent had submitted that insofar as the concessionaires, who want to terminate their contract, the respondent would not encash their bank guarantees and while recording the same, it was held that insofar as other concessionaires are concerned, the order will not prevent the encashment of Bank Guarantees for recovery of any claim for the period relatable prior to 23.3.2020. Pursuant to the said order, the respondent, vide its communication dated 6.1.2021 sought consent of the petitioner either to continue with the contract or to terminate the same to which the petitioner responded highlighting that it had already accepted the revised terms and conditions vide letter dated 14.12.2020 and that it had commenced its commercial activities only from 15.12.2020 after acceptance of the revised terms and conditions.

15. Computing the quantum of payment for the period upto 31.3.20, a sum of Rs.29.95 Crores was realised from the bank guarantee on 11.01.2021. Further, the respondent computed the amount at Rs.6,56,99,074.38 excluding GST @ 18% for the period 25.5.20 to 30.11.20 on the basis of the revised terms and conditions. Further, the respondent, thereafter, on 29.1.2021, encashed bank guarantee to the tune of Rs.7.7 Crores.

16. It is the further averment of the petitioner that the petitioner conveyed its reservation for the payments realised by the respondent amounting to Rs.37.65 Crores, thereby, the respondent realised all the amounts due to it within the time frame of 31.1.2021. Thereafter, the respondent, vide letter dated 11.2.2021 called upon the petitioner to replenish the deficiency in the security deposits in accordance with the revised terms and conditions to the tune of Rs.1,25,32,000/- towards security deposit and Rs.9,68,48,000/- towards cash deposit. The petitioner replenished the amount of Rs.1,25,32,000/- towards security deposit on 4.3.2021 and to meet the shortfall of cash deposit, informed the petitioner that in view of the specific order passed by the Delhi High Court on 8.3.2021 the respondent may replenish the said amount from the amount that is due to the petitioner from the respondent.



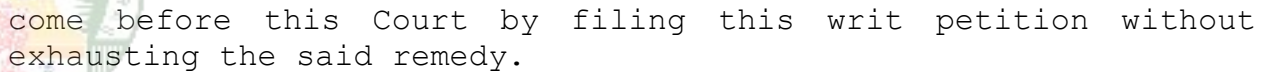
17. It is the further averment of the petitioner that though earlier the respondent, acknowledging Rs.4,10,00,000/- as disputed dues not realisable from the petitioner till the resolution of the disputes, however, did turned around and demanded a further amount of Rs.34,11,87,599.58 towards the alleged outstanding dues till 31.1.2021 vide its letter dated 12.3.2021, which was refuted by the petitioner vide its communication of even date alleging that there was no basis to the computation of the alleged demand.

18. It is further averred by the petitioner that with malicious intent, the respondent, vide letter dated 24.3.2021 sent a Notice of dissatisfaction cum Intent to Terminate the License alleging that the Concessionaire Support Scheme offered by the respondent on 10.12.2020 and accepted by the petitioner on 14.12.20 is not applicable to the petitioner on the pretext that the petitioner had not cleared the dues for the period till 31.3.2020, which was responded by the petitioner vide communications dated 31.3.2021 and 13.4.2021.

19. It is the further stand of the petitioner that without offering any reply to the said stand of the petitioner, the respondent, giving the cure period of 30 days, which expired on 22.4.2021, had issued an order of termination terminating the contract of the petitioner by issuing a fresh notice of dissatisfaction dated 28.4.2021 to the petitioner addressed to its office at Delhi, during which period, the office was under closure due to the lockdown in Delhi. It is the further stand of the petitioner that the respondent merely gave notice of seven days for handing over peaceful vacant possession despite the contract providing for one hundred and twenty days notice, as prescribed under Article 19.1 of the Concession Agreement.

20. In spite of the efforts of the petitioner with the Airport Director as also the Corporate Headquarters of the Airport Authority of India, no affirmative action has taken place and, therefore, the petitioner, left with no other alternative, has come before this Court to file the present petition.

21. Counter affidavit has been filed by the respondent, inter alia raising preliminary objections to the entertainment of the present writ petition. It is the averment of the respondent that clause 5.16 of the Concession Agreement provides for regulation of disputes through Arbitration and the agreement providing such a clause, it is not open to the petitioner to



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26. It is the averment of the respondent that the non-payment of amounts due as per the bills raised and payable under the terms of agreement and non-replenishment of the security deposit and cash deposit constitutes a Concessionaire Event of



Default and is a ground for termination of the agreement. Though the petitioner was provided with ample opportunities, the petitioner did not make the payment and, in fact, virtually, invited the order of termination.

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27. It is the further averment of the respondent that due to the outbreak of COVID-19, WHO declared the same as a pandemic on 30.1.2020, which led to imposition of lockdown by the Central Government on 24.3.2020 and in view of the same, as the said event would constitute an event of force majeure, which was agreed upon by the respondent as an event of force majeure.

28. It is the further stand of the respondent that the agreement included an Article dealing with Force Majeure events. It is pointed out by the respondent in the counter that as per Article 17.5 the party who is affected by force majeure should give notice to the other party in writing of the occurrence of such an event as soon as the same arises and in any event it shall be done within 7 days from the knowledge of such event. It is the stand of the respondent that though the petitioner claims that it was aware of force majeure as early as on 30.1.2020, however, no intimation was given to the respondent.

29. Further, it is the stand of the respondent that though the agreement provides for revised terms as may be mutually agreeable terms, however, proper construction of the said Clause 17.10 is that the continuance of the agreement has to be preceded by mutually acceptable terms between the parties and in default, the affected party has to terminate the agreement or continue with the agreement on the terms that was in force prior to the occurrence of the force majeure event.

30. It is the further stand of the respondent that subsequent to the contract entered into, the petitioner had disagreements with the respondent on payment terms, escalation and on location or alteration of such approved locations of the advertising sites. It is further averred that on the request of the petitioner outstanding due certificate dated 13.9.2019 was issued.

31. It is further averred by the respondent that redressing the disputes between the parties envisages the grievance to be placed before a Dispute Resolution Committee and with regard to the disputes raised by the petitioner relating to a sum of Rs.4.10 Crores, the matter was referred to the Disputes Resolution Committee, which had given relief of Rs.1,51,79,104/- to the petitioner. It is the averment of the respondent that



though as on 31.3.20, the due by the petitioner was to an extent of Rs.32.56 Crores, the dispute sought to be raised by the petitioner relates only to about Rs.4.10 Crores. In spite of the above, the petitioner, deducting the disputed amount, did not pay the admitted amount due to the respondent.

32. It is the specific case of the respondent in the counter that though it is admitted that it is affected by COVID-19, which constitutes a force majeure event, which was communicated vide letters dated 16.3.2020 and 27.4.20 and sought release for the continuance of the agreement, yet, the issues took up by the petitioner in the said communication did not in any way relate to force majeure event, to which the respondent addressed a communication dated 21.5.20 intimating that a holistic evaluation is being made in the matter and that the decision will be communicated to the petitioner.

33. It is the further averment of the petitioner that considering the pandemic situation, the respondent originally came up with the Concessionaire Support Scheme (for short 'CSS') on 14.8.20 through Circular No.24/2020, which was followed by other circulars providing relief, either partly or wholly and in some cases, providing variance in the agreements. It is the pointed stand of the respondent that the CSS had a qualifying threshold of not the concessionaire not having any dues payable to the respondent unless protected by an order of the Court or that of an arbitrator as on 31.3.2020. further, clause 17.8 of the agreement also provides for such a requirement in the event of force majeure. It is the further stand of the respondent that in spite of issuance of continuation CSS dated 9.12.2020 calling upon concessionaires to clear up their dues upto 30.11.2020 on or before 31.01.2021, yet the petitioner did not make any payment towards the subsequent period of business from resumption, more particularly the period after 25.5.20. It is the stand of the respondent that the petitioner was liable to make payments towards its pre-covid contractual liabilities and post-resumption liabilities and that the petitioner was a continued defaulter.

34. It is the further averment of the respondent that admittedly the force majeure continued beyond the period of 120 days and as per Article 17.10 of the agreement, the petitioner was required to follow the procedure prescribed therein by giving notice of its intention to discuss and seek revision of terms or exercise its option to terminate the agreement. The petitioner, vide its communication dated 17.12.20, while requested for grant of Airport entry permit, admitted to



payable by the petitioner and the respondent granted time till 9.3.21 for replenishment of security deposit.

39. In view of non-payment of the dues, the respondent issued notice of dissatisfaction-cum-intent to terminate the licence vide communication dated 24.3.2021 and 28.4.2021 for which evasive replies were received by the respondent from the petitioner. In view of the non-fulfillment of the terms of the agreement and failure of the petitioners to replenish the security deposit in the form of bank guarantee and cash deposit to the extent of Rs.36,39,68,000/-, the impugned order of termination was passed by the respondent.

40. It is therefore the stand of the respondent that the non-compliance with the terms of the agreement, coupled with the default committed by the petitioner in the payment of the dues, which attracts the relevant clause pertaining to termination of the contract, the respondent, invoking the provisions of the agreement, had terminated the contract with the petitioner and, there being no illegality in the said order, the same does not warrant any interference.

41. Mr. P.S.Raman, learned senior counsel appearing for the petitioner submitted that the whole crux of the issue falls within the scope of clause 17.1 of the concession agreement, which pertains to a force majeure event. It is the submission of the learned senior counsel that force majeure was declared between 24.3.2020 and 24.5.2020, which was further continued due to the outbreak of the pandemic and its further continuance.

42. Learned senior counsel appearing for the petitioner further submitted that the sub-clauses set forth in clause 17.1 clearly demonstrates that the event, which occurred is beyond the control of the petitioner and that the petitioner has been unable to overcome or prevent the happening despite exercise of due care and diligence. As the entire airport operations were stopped and force majeure was declared for the said period and the event of force majeure was continuing, CSS was initially provided on 14.8.20, which provided for certain reliefs. However, as the said CSS was a unilateral one, the same was challenged by the Federation before the Delhi Court and certain directions have been issued by the Delhi High Court.

43. It is the further submission of the learned senior counsel that in view of the directions of the Delhi High Court, the respondent had provided the modified CSS on 9.12.2020. It is therefore the submission of the learned senior counsel that



once the modified CSS is introduced, the CSS, which was initially provided on 14.8.20 cannot be enforced, as the same stood modified by the subsequent CSS provided on 9.12.2020.

44. It is the further submission of the learned senior counsel that once the total amounts, which were alleged to be due to the respondent from the petitioner, stood recovered by encashing the bank guarantee, even much prior to the date provided for such payment as per the CSS, the respondent is bound to provide the CSS facility to the petitioner. However, it is submitted by the learned senior counsel, that the respondent, though kept the petitioner in the thick of things about what is happening with regard to provision of CSS facility and also sent communication to the petitioner regarding the CSS facility, but had also asked the concurrence of the petitioner for acceptance of otherwise of the CSS facility. That being the case, it is the submission of the learned senior counsel that it does not lie in the mouth of the respondent to contend that the petitioner is not entitled to the CSS facility, as he being a defaulter.

45. It is the further submission of the learned senior counsel that the petitioner cannot be said to be a defaulter, as he is fully eligible for the CSS facility and once the respondent had encashed the bank guarantee, for the amounts, which are alleged to be due to the respondent, the fastening of defaulter on the petitioner by the respondent is wholly incorrect.

46. Learned senior counsel appearing for the petitioner further submitted that the CSS issued on 14.08.2020, which has been challenged before the Delhi High Court, in which certain directions have been issued, prescribed that for the period 25.3.20 to 24.5.20, all commercial concessionaires are relieved from their contractual obligations and that no concession fee/licence fee to be levied on account of complete closure and non-operation of domestic flights. Though the said circular had mandated that CSS facility would be provided only if the undisputed outstanding bills upto March, 2020, are paid before 31.3.20, however, the CSS circular dated 9.12.20 had extended the time till 30.11.20 for payment of the undisputed dues. In fact, the CSS had provided time till 31.3.20 for payment of the undisputed dues upto 3.09.20 on payment of penal interest. However, even before the petitioner could make the payments, the respondent had encashed the bank guarantee for a sum of Rs.29.29 Crores on 29.11.20. In such a backdrop, it is the contention of the learned senior counsel that the encashment of bank guarantee



on 29.11.20 would only mean that by 30.11.20, the petitioner had cleared all the undisputed dues upto 30.09.20 and, therefore, is entitled to avail the CSS facility.

47. It is the further submission of the learned senior counsel that the encashment of the security deposit would only mean payment of the undisputed dues, as a provision has been made in the CSS dated 9.12.20 for maintenance of reduced security deposit to the extent of 50%. It is the further submission of the learned senior counsel that though CSS dated 9.12.20 had provided for the licence fee to be calculated as per the formula given in CSS dated 14.8.20 by discounting it further by 40%, yet, without giving the discounted rate of licence fee, the respondent had calculated the amount as per the original concession agreement, which is wholly against the CSS scheme and against the interest of the petitioner, more especially under the force majeure situation.

48. It is the further submission of the learned senior counsel for the petitioner that for the sake of argument even if it is accepted, without being admitted that the petitioner is to replenish the security deposit in the form of bank guarantee, which, according to the respondent, the petitioner is at default, which was also one of the reasons for the issuance of the impugned order, however, the fact that the requisite reduction in the licence fee as provided in the CSS would leave whatever is necessary to be maintained as bank guarantee and even otherwise, the petitioner is ready to fulfill the shortfall to the tune of 40%, as is mandated under the CSS.

49. It is the further submission of the learned senior counsel that insofar as the cash deposit required to be maintained as security, the attention of this Court is drawn to the order of the Delhi High Court, wherein, in the appeal filed against the award granted in the arbitration proceedings in another matter, a sum equivalent to Rs.9.68 Crores, which has been awarded in favour of the petitioner, has been directed to be adjusted against the cash deposit to be maintained by the petitioner in a sum of around Rs.10 Crores. Therefore, insofar as cash deposit is concerned, there is no shortfall as projected by the respondent in its counter.

50. It is the further submission of the learned senior counsel that though the petitioner had accepted to the CSS dated 9.12.20 vide its communication dated 14.12.20 in response to the communication of the respondent dated 10.12.20, and subsequent acceptance of the petitioner for availing the CSS facility,



however, without appreciating the aforesaid facts, the respondent had, not only calculated the licence fee and other dues to be paid by the petitioner wrongly and encashed the amounts, but also demanded much higher amounts which are over and above the amounts not required to be paid by the petitioner and on top of all this, for not paying the dues, the impugned order terminating the contract of the petitioner has been passed.

51. It is the further submission of the learned senior counsel that even the impugned order of termination is not in consonance with the provisions contained in the concession agreement. It is the further submission of the learned senior counsel that when the respondent relies on certain parts of the concession agreement to encash the bank guarantee and to not grant the benefit of CSS to the petitioner and even to terminate the contract with the petitioner, the act of the respondent in not granting the mandatory period of 120 days as prescribed in clause 19.1 of the concession agreement, would reveal the devious mind of the respondent not to grant the benefit to the petitioner.

52. In fine, it is the submission of the learned senior counsel that the amounts having been encashed from the bank guarantee already provided by the petitioner well before the date when the amount of expiry of the time the petitioner is entitled to the CSS facility and in the said scenario, the bank guarantee that is required to be maintained with the respondent could only be in tune with the CSS facility and insofar as the cash guarantee, the amount being in deposit before the Delhi High Court, which the respondent can adjust against the cash guarantee that is required to be provided by the petitioner at Chennai, the petitioner is ready and willing to replenish any shortfall in the bank guarantee and without appreciating the above, the respondent had passed the impugned order of termination and demanded huge amounts towards dues, which is impermissible and unsustainable and, therefore, the present petition deserves to be allowed.

53. In support of his submissions, learned senior counsel appearing for the petitioner placed reliance on the following decisions :-

- i) Radhakrishna Agarwal & Ors. - Vs - State of Bihar & Ors. (AIR 1977 SC 1496);
- ii) Kulchinder Singh & Ors. - Vs - Hardayal Singh & Ors. (AIR 1976 SC 2216); and
- iii) Banchhanidhi Rath - Vs - The State of Orissa & Ors. (AIR 1972 SC 843)



54. Mr. Shankaranarayanan, learned Addl. Solicitor General appearing for the respondent submitted that the petitioner is a clear defaulter and, therefore, the petitioner is not entitled to the CSS facility provided by the respondent. While on facts upto the point of the pandemic outbreak, the learned Addl. Solicitor General concurred with the stand of the petitioner, it is the submission of the learned Addl. Solicitor General that the initial CSS facility offered vide communication dated 14.8.20 by the respondent prescribed that only insofar as the concessionaires, who have no outstanding dues upto March, 2020 would be eligible for the CSS facility. However, the petitioner was a defaulter and was due in a sum of approximately Rs.32 Crores. The petitioner never paid the amount inspite of the multiple communication from the respondent calling upon the petitioner to pay the amount.

55. It is the further submission of the learned Addl. Solicitor General that the time offered for clearing the dues as per the subsequent CSS facility dated 9.12.20 is only to such of those concessionaires, who have paid their dues upto March, 2020. Therefore, defaulters, who have not paid the dues upto March, 2020 would not be eligible to the CSS facility offered vide communication dated 9.12.20. It is the further submission of the learned Addl. Solicitor General that even the CSS facility makes it crystal clear that the subsequent CSS facility dated 9.12.20 is only in furtherance to the CSS facility dated 14.8.20. Neither CSS dated 14.8.20 nor CSS dated 9.12.20 should be read in isolation and it is a comprehensive scheme, which safeguards not only the interest of the concessionaires, but also the interest of the respondent.

56. It is the further submission of the learned Addl. Solicitor General that initially the Federation approached the Delhi High Court against the CSS facility dated 14.8.20 and the Delhi High Court had directed consideration of the CSS facility through negotiations and there was no order of stay of CSS facility dated 14.8.20 by the Delhi High Court. Subsequent to the said order, after deliberations and negotiations, certain other reliefs were granted to the concessionaires through CSS facility dated 9.12.20. In fact, the circular issued while issue CSS facility dated 9.12.20 itself clearly speaks that the said scheme is only in furtherance of CSS facility dated 14.8.20, which clearly means that it is in addition to the scheme issued on 14.8.20. Nowhere, the respondent has stated that the scheme dated 14.8.20 was recalled or rescinded, but the scheme dated 9.12.20 was only issued in addition to the scheme dated 14.8.20. Therefore, the mandatory clause that the



57. It is the further submission of the learned Addl. Solicitor General that inspite of several reminders were sent to the petitioner calling upon the petitioner to pay the dues, but the petitioner did not pay the dues and only attempted to drag on the payment. It is the submission of the learned Addl. Solicitor General that the petitioner was neither willing to pay the pre-Covid contractual liabilities nor ready to pay the post-Covid contractual liabilities and the petitioner has all along been in default in payment.

<https://hcservices.ecourts.gov.in/hcservices/>



further scheme on 9.12.20. That being the resultant position, it is submitted that the petitioner, not having satisfied the requirements mandated under the scheme dated 14.8.20 and even in the scheme dated 9.12.20, cannot seek the extension of the scheme to the petitioner.

59. It is the further submission of the learned Addl. Solicitor General that clause 17.8 of the Agreement provided for performance excuse, which clearly mandates that the only to the extent rendered unable to perform the obligations under the agreement, as a consequence of the force majeure event, excuse would be granted to the affected party and it would be for no longer duration than is reasonably warranted and that the excuse granted above would not absolve the affected party from its payment obligations, which have accrued prior to the occurrence of the force majeure event. It is therefore submitted that for the amounts due prior to the force majeure event, the petitioner is duty bound to pay the same within the periods prescribed in the concession agreement. However, the petitioner has not only been a persistent defaulter prior to the force majeure event, but has been a defaulter even subsequent to the force majeure event and, therefore, the petitioner can neither claim the benefits of the CSS facilities nor the concessions provided in the agreement.

60. It is the further submission of the learned Addl. Solicitor General that the respondent had encashed the bank guarantee to the tune of Rs.29.95 Crores on 29.11.20; Rs.7.70 Crores on 29.01.2021 and Rs.8.80 Crores on 08.08.2021. The encashment related to the amounts that were in default by the petitioner, which were not paid. Merely because the amounts stood realised by encashment of bank guarantee, the petitioner cannot claim that the dues have been settled as per the terms of the schemes dated 14.8.20 and 9.12.20 and, therefore, the petitioner is not only entitled to the benefits of the said scheme, but also to the benefit of reduced security deposit in the form of bank guarantee.

61. It is the further submission of the learned Addl. Solicitor General that even in respect of the cash deposit, which the petitioner is liable to maintain as per the concession agreement, the same has not been maintained, in which case also the petitioner is a defaulter. The contention of the petitioner that amount to the extent of Rs.9.68 Crores is lying to the credit of the appeal before the Delhi High Court, which has been directed to be adjusted against the cash deposit to be made by the petitioner before the respondent, the Delhi High Court has



categorically observed that the petitioner herein/respondent therein shall submit the requisite Bank Guarantee before the Delhi High Court upon which the said amount be released to the petitioner for being deposited before the respondent. However, the petitioner has not taken any steps to withdraw the amount lying in deposit before the Delhi High Court but merely takes shelter under the orders of the Delhi High Court to the extent that it is favourable to the petitioner. The petitioner being a defaulter on all the counts cannot have any right to claim the relief of schemes, which have been offered by the respondent.

62. In fine, it is the submission of the learned Addl. Solicitor General that without adhering to the terms of the concession agreement towards the payment to the made to the respondent and having been adjudged to be a defaulter, the petitioner cannot claim the benefit of the schemes and further the petitioner having not performed his part of the contractual obligations as provided for under the concession agreement, cannot come before this Court and seek enforcement of a portion of the concession agreement, which has been provided to safeguard such of those concessionaires, who have not been defaulters from any wrongful action by the respondent. The petitioner being a defaulter and has committed multiple acts of default is not only entitled to the protection offered in the other portion of the concession agreement, but also not entitled to the schemes, which have been issued by the respondent in the aftermath of the outbreak of pandemic. The respondent, in their discretion, which has been provided under clause 19.2 of the concession agreement, having not satisfied with the response given by the concessionaire, after duly complying with all the clauses in the concession agreement have terminated the contract of the petitioner and the petitioner even now in default in payment of the dues to the respondent, is not entitled to the relief claimed for and, therefore, no interference is warranted with the impugned order of termination issued by the respondent.

63. This Court paid its undivided attention to the vehement and vociferous contentions put forth by the learned senior counsel on either side and also perused the materials to which specific attention of this Court was drawn as also the decisions on which reliance has been placed by the learned senior counsel for the petitioner.

64. The basic facts as to the entering of the concession agreement between the petitioner and the respondent is not in dispute. There is also not dispute about the fact that upon entering into the concession agreement, the petitioner, though a



little belatedly, had made good the security deposit in the form of bank guarantee and cash deposit, as mandated under the concession agreement with the respondent and at the time of outbreak of the pandemic, the security deposit and cash deposit as provided in the concession agreement was very well available with the respondent.

65. Before proceeding to analyse the subject matter in issue which is raised before this Court, the following clauses in the Concession Agreement entered into between petitioner and the respondent, which have a significant bearing on the Concessionaire Support Schemes, which have been issued by the respondent during the period of force majeure and ensuing thereafter, which are relevant to the adjudication of the issues are quoted hereunder for better appreciation :-

"7.1 Security Deposit

7.1.1 (a) the Concessionaire shall, as security for the performance of its obligations hereunder during the Concession Term, provide to and maintain with the Authority, an interest free Security Deposit. On or before the date of execution of the concession agreement the selected bidder shall deposit from an Indian Scheduled Bank only (Not from Co-operative Bank) Bank Guarantee equivalent to eight (8) months Concession fee of the first year and two (2) months Concession fee in cash deposit with AAI in the first phase with validity upto 6 years.

* * * * *

7.1.2 Failure of the concessionaire to provide and/or maintain the security deposit for the prescribed amount in accordance with the provisions hereof, shall entitle the Authority to forfeit and appropriate the available security deposit as damages, and to terminate this agreement in accordance with Article 19.

7.2 Appropriation of Security Deposit

Upon occurrence of a Concessionaire Event of Default, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate the relevant amounts from the Security Deposit as Damages for such Concessionaire Event of Default. Upon such appropriation from the Security Deposit, the Concessionaire shall, within 15 (fifteen) days



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thereof, replenish, in case of partial appropriation, to its original level the Security Deposit, and in case of appropriation of the entire Security Deposit provide afresh Security Deposit, as the case may be, and the Concessionaire shall, within the time so granted replenish or furnish fresh Security Deposit as aforesaid failing which the Authority shall be entitled to terminate this Agreement in accordance with Article 19. Upon replenishment or furnishing of a fresh Security Deposit, as the case may be, as aforesaid, the Concessionaire shall be entitled to an additional Cure Period of 30 (thirty) days for remedying the Concessionaire Event of Default, and in the event of the Concessionaire not curing its default within such Cure Period, the Authority shall be entitled to appropriate such Security Deposit as Damages, and to terminate this Agreement in accordance with Article 19. Further, the Authority shall be at liberty to invite fresh Bids at the risks and costs of the Concessionaire.

* * * * *

10.5 Payment of Concession Fee

10.5.1 The Concession Fee payable under the provisions of this Article 10 shall be due and payable in monthly instalments. The Concession Fee bills however will be raised by the Authority in accordance with the terms and conditions of the Concession Agreement by 10th of every month. Irrespective of the receipt of the bills from AAI, the Concessionaire is bound to remit the License fee on 25th day of the current month as per the concession agreement. The concessionaire has to pay the bill by the 25th of the same month failing which interest at the rate of 12% per annum shall be charged for a period of 90 days thereafter.

10.5.2 Consequent to raising of an invoice as stipulated at 10.5.1 above, the Concession Fee shall be paid by the Concessionaire to the Authority every month, by twenty fifth (25th) day of every month.

* * * * *

17.1 Force Majeure Event



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As used in this Agreement, Force Majeure Event means the occurrence of any of the Non-Political events, the Political events or the Other events in India, set out in Articles 17.2, 17.3 and 17.4 respectively including the impact/consequence thereof which :

(a) is beyond the control of the party claiming to be affected thereby (the "Affected Party");

(b) prevents the Affected Party from performing or discharging its obligations under this Agreement; and

(c) The Affected Party has been unable to overcome or prevent despite exercise of due care and diligence.

17.5 Notice of Force Majeure Event

(a) The Affected Party shall give written notice to the other Party in writing of the occurrence of any of the Force Majeure Event (the "Notice") as soon as the same arises or as soon as reasonably practicable and in any event within 7 (seven) days after the Affected Party knew, or ought reasonably to have known of its occurrence and the adverse effect it has or is likely to have on the performance of its obligations under this Agreement.

* * * * *

(ii) The duration or estimated duration and the effect or probable effect which such Force Majeure Event has or will have on the Affected Party's ability to perform its obligations or any of them under this Agreement.

(iii) The measures which the Affected Party has taken or proposes to take, to alleviate the impact of the Force Majeure Event or to mitigate the damage; and

* * * * *

17.8 Performance Excused

The Affected Party, to the extent rendered unable to perform its obligations or part thereof under this Agreement as a consequence of the Force Majeure Event shall be excused from the performance of the obligations. Provided that, the excuse from performance shall be of no greater scope and of no longer duration than is



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reasonably warranted by the Force Majeure Event. Provided further, nothing contained herein shall absolve the Affected Party from any payment obligations accrued prior to the occurrence of the underlying Force Majeure Event.

17.10 Termination Due to Force Majeure Event

If the period of Force Majeure continues or is in the reasonable judgment of the parties likely to continue beyond a period of 120 (One Hundred and Twenty) days, the parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed revised terms. If the parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 (one hundred and twenty) days be entitled to terminate the Agreement in which event, the provisions of Article 19 shall, to the extent expressly made applicable, apply.

* * * * *

18.1 Events of Default

Event of Default means the Concessionaire Event of Default or the Authority Event of Default or both as the context may admit or require.

18.2 Concessionaire Event of Default

Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, of where no Cure Period is specified, then within a Cure Period of 30 (thirty) days, the Concessionaire shall be deemed to be in defaults of this Agreement (the "Concessionaire Event of Default"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:

(a) The Security Deposit has been appropriated in accordance with Clause 7.2 and the Concessionaire fails to replenish or provide fresh Security Deposit within a Cure Period of 15 (fifteen) days.



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19.1 Termination for Concessionaire Event of Default

Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Event of Default, the Authority shall be entitled to terminate this Agreement; provided that before such Termination, the Authority shall by a notice of dissatisfaction, inform the Concessionaire of its reasoned intent to terminate the Agreement and grant thirty (30) days to the Concessionaire to make a representation, and may after expiry of such thirty (30) days, whether or not it is in respect of such representation, terminate the Agreement by issuing a Notice of Termination of one hundred and twenty (120) days as defined in the RFP.

* * * * *

22.1 Dispute Resolution

Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Concession Agreement (including its interpretation) between the Parties, shall be governed and regulated in accordance with the provisions contained in Clause 5.16 of the RFP and in accordance with the provisions of Arbitration and Conciliation Act, 1996 as amended from time to time.

* * * * *
* *"

(Emphasis Supplied)

66. With regard to the clauses covered under the relevant Articles, which have been extracted above, there is no quarrel between the petitioner and the respondent. But the dispute between the petitioner and the respondent is only in relation to the declaration of force majeure due to the outbreak of the COVID-19 pandemic, which falls under Article 17 due to which certain facilities have been provided by the respondent through the Concessionaire Support Schemes and its applicability to the petitioner in the light of the provisions in the Concession Agreement.



67. In the light of the above position, the Concessionaire Support Schemes, more particularly, the schemes dated 14.8.20 and 9.12.20, which are pressed into service in different forms by the petitioner and the respondent, for better clarity and appreciation, the relevant portion of the same are quoted hereunder :-

CSS - Dated 14.8.20

Along with other sectors of the economy, air traffic is vulnerable to external factors, such as oil crises, natural disasters, armed conflicts, terrorist attacks, economic recessions and disease outbreaks. Researchers data pointed out that the recent outbreak of Covid-19 pandemic had severely impacted the domestic and international aviation markets including India. Based on the representations received from various stake holders and industry bodies, the situation has been assessed by AAI management.

2. Accordingly, as per AAI Board Resolution No.5/2020, the following measures were approved, as a Concessionaire Support Scheme to re-vitalize the Airport economic environment in a phased manner :-

2.1 For Airport operation suspension period (from 23 of 25/3/2020 till the date of lifting of restrictions by the GOI):

- (a) For facilities in domestic terminal or domestic part of integrated terminal.
- For the period 25.3.2020 to 24.5.2020 all commercial concessionaires may be relieved from their contractual obligations. Accordingly, no concession fee/license fee to be levied on account of complete closure and non-operation of domestic flights.

* * * * *

Any relief measures, as brought out at (para 2.1 and 2.2 above) is to be given only to those agencies/concessionaires who clear all their undisputed outstanding dues till the bills of March, 2020. The disputed dues here to be considered as the dues for which the recovery is withheld by order of any court of Law/Arbitrator as on 31.3.2020.

* * * * *

CSS - Dated 09.12.20



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* * * * *

2. In furtherance to the relief measures specified under Commercial Circular No.24/2020, AAI Board Resolution No.196.16C has approved the following relief measures under Concessionaire Support Scheme (CSS) :

(i) CSS issued vide Commercial Circular No.24/2020 is extended upto 31.12.2021 or till such time passenger traffic in three consecutive months during FY 2020-21 or FY 2021-22, equals to 100% of traffic during corresponding three months of previous two years average i.e., 2018-19 and 2019-20, whichever is earlier.

(ii) Following methodology to be adopted to incorporate the impact of buying behaviour in the CSS :

a. For the period w.e.f. 01.01.2021 to 30.06.2021, the license fee/MMG calculated on the basis of formula given in CSS (issued vide Commercial Circular No.24/2020) to be discounted further by 40%.

* * * * *

(iii) Commercial Concessionaires may be given a relaxation on account of Security Deposit maintained with AAI, subject to following conditions:

a. 50% of the amount of security deposit stipulated in the agreement is to be retained which includes Bank Guarantee as well as cash component of SD. However, there shall be no reduction in Cash Component of Security Deposit from the amount stipulated in the agreement.

b. The retention (BG + Cash) should not be less than security deposit equal to four months' license fee/MMG. Further, wherever the contract driven Security Deposit happens to be less than or equal to four months' license fee, the entire security deposit as per agreement is to be retained.

c. At the time of such relaxation towards partial release of Security Deposit, the licensee should have cleared outstanding dues for the period till preceding month. Also, the licensee will have to submit an undertaking to the effect that on or before 01.01.2022 (i.e., by the time



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of cessation of CSS), the Security Deposit as per provisions of License Agreement would be restored.

* * * * *

(viii) For availing the benefit of CSS, timeline of up to 31.01.2021 may be given to the concessionaires for clearing the undisputed outstanding dues pertaining to bills till 30.11.2020. In this regard, following is clarified.

a. As per CSS Scheme issued earlier (Commercial Circular No.24/2020) and subsequent clarification thereto, the pre-requisite for availing CSS scheme was clearance of dues for the period till 31.3.2020 by the timelines of 30.09.2020.

b. It is already approved herein that the first half of FY 20-21 would be interest holiday period.

c. Therefore, the agencies who clear/will clear the dues for the period till 31.3.2020 beyond 30.09.2020 would be under obligation to make payment of interest towards delayed payments for availing CSS CC No24/2020 scheme.

* * * * *

3. The relief measures mentioned above would form part of Concessionaire Support Scheme issued earlier vide Commercial Circular No.24/2020 dated 14.08.2020 and would be applicable for the period commencing from the date of applicability of Commercial Circular No.24/2020 till 31.12.2021, unless specifically stated otherwise."

(Emphasis Supplied)

68. In the light of the afore-stated CSS schemes, the CSS scheme dated 14.8.2020 was put in issue by the Federation of Airport Media Owners, of which the petitioner also forms a part before the Delhi High Court, questioning its legality and the Delhi High Court had passed the following order :-

"3. Relying upon Clause 17.10 of the Concession Agreement, the learned senior counsel for the petitioners submits that on the occurrence of a force majeure event, the parties are to mutually decide the revised terms for continuation of the Agreement or can mutually decide to terminate the



vide the clarificatory letter of the respondent dated 20.08.2020. More particularly, it pertained to certain modification in clause 17.10 of the Concession Agreement, which was entered into between the Concessionaires and the respondent. According to the petitioner therein, the said modification was done without mutual discussion between the respective concessionaire and the respondent, which is impermissible according to clause 17.10 of the Concession Agreement. Therefore, the order of the Delhi High Court in the aforesaid case is limited to the purpose of the clarification/modification made by the respondent, vide its communication dated 20.08.2020 to clause 17.10 of the Concession Agreement and the said order, in no unequivocal terms dealt with the CSS Scheme dated 14.8.20. The order of the Delhi High Court did not in any way deal with any of the reliefs said to have been granted by the respondent to the concessionaires, but it pertained only to the unilateral alteration of clause 17.10 of the Concession Agreement. Therefore, the said order would not in any way be useful nor would in any way further the case of the petitioner as the issue with regard to the petitioner is not relatable to the said order passed by the Delhi High Court.

70. In the backdrop of the above, this Court has to look at the clauses in the concession agreement vis-a-vis the CSS scheme dated 14.8.2020 and 9.12.2020 to find out whether there has been unilateral alteration of any of the terms and conditions of the concession agreement and whether the petitioner could be termed to be a defaulter, as stated by the respondent for failure to adhere to the terms of the concession agreement and, therefore, would not be entitled to the benefit of the CSS scheme dated 14.8.20 and 9.12.20.

71. There is no dispute about the fact that the COVID-19 pandemic has caused a global havoc, thereby, disrupting not only the lives of the people but also putting the Government in the various countries in a bewildered state. Only to whittle down the difficulties faced by the concessionaires, the CSS schemes were issued by the respondent.

72. Clause 17.1 deals with force majeure event, and details the types of events that would fall within the said bracket. Vide communication dated 30.01.2020, WHO had declared the COVID-19 as a public health emergency, which resulted in circular dated 4.2.20 being issued by the Director General of Civil Aviation enforcing conditional restrictions for international air travel. Thereafter, vide order dated 19.2.20, the Government of India had declared COVID-19 as a force majeure



condition. Thereafter, various circulars have been issued by the Director General of Civil Aviation with regard to travel restrictions followed by the WHO declaring COVID-19 as a pandemic.

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73. Pursuant to the declaration of force majeure condition by the Government of India, vide communication dated 16.3.20, the petitioner had addressed the respondent pointing out the force majeure situation and seeking certain reliefs on the terms and conditions in the concession agreement. Therefore, in compliance of clause 17.5 of the concession agreement, the petitioner had brought to the knowledge of the respondent about the force majeure situation. The first leg of the concession agreement in relation to the force majeure situation has been fulfilled by the petitioner.

74. A perusal of the communication dated 16.3.20 of the petitioner seeking modification in the concession agreement reveals that since March, 2020, the petitioner has sought for certain relaxation and exclusion from performance of the concession agreement as was entered into between the petitioner and the respondent and sought mutual agreement to modify the agreement by making some suggestions to the respondent for the period during which the force majeure situation continues. However, it is to be pointed out here that the said communication dated 16.3.20 is silent about the dues that are due and payable to the respondent as on 29.2.20. It has not been spelt out by the petitioner that it has cleared the dues upto 29.2.20 as by the 25th of the current month, the petitioner, as per the existing concession agreement, ought to have cleared his dues.

75. Complete National Lockdown was imposed by the Government of India under the National Disaster Management Act, 2005 with effect from 25.3.20. As per the concession agreement, more especially clause 10.5.1, the petitioner ought to have cleared the concession fee for March, 2020 by 25th March, on which date National Lockdown was imposed. On the very same day, i.e., 25th March, 2020, when National Lockdown was imposed, vide communication to the respondent, the petitioner had informed about the closing down of the operation by switching off the lights of all the advertisement displays at Chennai International Airport.

76. Consequent upon the continuation of the National Lockdown, the petitioner, in response to the communication of the respondent dated 23.7.20 for depositing an amount of about



Rs.10,68,48,000/- towards cash security deposit by 31.7.20, failing which bank guarantee to the tune of Rs.9.68,48,000/- would be encashed, the petitioner has addressed a communication dated 30.7.2020 to the respondent pointing out that in spite of their representation as the Affected Party as per clause 17.5 of the Concession Agreement, vide communication dated 16.3.20, no action has been taken by the respondent, has sought for certain reliefs, including exemption from making the deposit of cash guarantee citing force majeure condition.

77. It is borne out by record that since the outbreak of the pandemic and declaration of National Lockdown since 25.3.20, the respondent had not responded to the petitioner on his communication dated 16.3.20. It is not the case of the petitioner that bills were raised by the respondent during the lockdown period 25.3.20 to 25.5.20, pursuant to the restricted resumption of flights pursuant to the order of the Ministry of Aviation on 21.05.20. Thereafter, on 14.08.20, the first of the CSS scheme was issued by the respondent, in which the respondent, while granting relief measures to all the concessionaires in view of the global pandemic had made it clear that For the period 25.3.2020 to 24.5.2020 all commercial concessionaires were relieved from their contractual obligations and that no concession fee/license fee would be levied on account of complete closure and non-operation of domestic flights and further, it was stipulated therein that the aforesaid relief measures would be available only to such of those agencies/concessionaires who clear all their undisputed outstanding dues till the bills of March, 2020.

78. Further to the said CSS scheme, a further clarification was issued on 20.08.20 in which clause 17.10 of the Concession Agreement was sought to be modified unilaterally, which has invited a writ petition before the Delhi High Court, which has already been dealt with by this Court.

79. Therefore, from the above CSS scheme dated 14.8.20, it is clear that only such of the agencies/concessionaires, who clear all their undisputed outstanding dues till the bills of March, 2020 would be eligible to the reliefs provided in the said CSS scheme. As noticed above, though challenge to the said CSS scheme was made before the Delhi High Court, but it mainly pertained only to the alleged unilateral modification of clause 17.10 of the concession agreement and not for the other reliefs that were granted in the said CSS scheme dated 14.8.20. the Delhi High Court, highlighting all the aforesaid facts, had



asked the parties to the lis to negotiate and come to an amicable settlement.

80. Though it is the contention of the petitioner that CSS scheme dated 9.12.20 was only in view of the said direction of the Delhi High Court, however, it is evident from the CSS scheme dated 9.12.20 that nowhere the order of the Delhi High Court has been said to be the basis for consideration of relief measures for the concessionaires. The said CSS scheme dated 9.12.20 is said to be in furtherance of the Commercial Circular No.24/20 dated 14.8.20. By the said circular No.26/20 dated 9.12.20 (CSS Scheme) slew of further reliefs were granted to the concessionaires in addition to the reliefs, which were granted vide the CSS Scheme dated 14.8.20. Therefore, at no point of time the CSS scheme dated 14.8.20 was either cancelled or rescinded and in place of the said scheme, the new CSS scheme dated 9.12.20 was put in.

81. The whole case of the petitioner hinges on clause (viii) of the said circular No.26/20 dated 9.12.20 in and by which the timelines were extended upto 31.01.2021 to the concessionaires for clearing the undisputed outstanding dues pertaining to bills till 30.11.20. Further, it is also evident that such of those agencies who clear/will clear the dues for the period till 31.3.20 beyond 30.09.20 would be under obligation to make payment of interest towards delayed payments for availing CCS scheme vide circular No.24/20, dated 14.8.20.

82. From the above, it is evident that such of those concessionaires, who clear/will clear the dues for the period till 31.3.20 beyond 30.09.20 would be under obligation to make payment of interest towards delayed payments.

83. It is to be pointed out that even as per the CSS Circular No.24/20 dated 14.8.20, the mandate that has been made is that the concessionaires, who clear all their undisputed outstanding dues till the bills of March, 2020, would be entitled for the reliefs provided in Circular No.24/20. Therefore, a clear and unambiguous reading of the above reveals that till 14.8.20, the day on which Circular No.24/20 was issued, the concessionaires were provided time to pay the dues upto March, 2020. It is to be pointed out that clause 10.5.1 provides the period within which the monthly concession fee has to be paid. However, considering the pandemic situation, even in the Circular No.24/20 dated 14.8.20, the concessionaires were given time till the date of the circular for clearing their outstanding dues upto March, 2020.



84. In furtherance to the above circular No.24/20, the respondent issued circular No.26/20 dated 9.12.20 providing further reliefs one of which is that the dues upto 31.3.20 was to be cleared by the outer limit of 30.9.20 and that any payment made for clearance of the bills for the period upto 31.3.20 beyond 30.9.20 would incur interest towards delayed payments for availing the benefits of circular No.24/20.

85. It is not the case of the petitioner that it had paid the dues upto March, 2020 any time prior to or by 30.09.2020. However, the petitioner is taking shelter under the clause provided in circular No.26/20 which provides that the CSS issued vide commercial circular No.24/2020 is extended upto 31.12.2021 and, therefore, the petitioner is entitled to pay the dues accruing upto 30.11.2020 by 31.01.2021. Though such a fanciful argument is advanced on behalf of the petitioner, it is to be pointed out that Circular Nos.24 and 26 of 2020 should be read harmoniously and interpreted in the light of the concession agreement entered between the parties and it cannot be to the advantage of only one party.

86. Keeping the above in mind, a perusal of circular No.26/2020 reveals that the extension of timeline upto 31.1.2021 was directed to be given to concessionaires for clearing the undisputed outstanding dues pertaining to bills till 30.11.20. Further, it has also been provided that dues for the period till 31.3.2020 ought to be cleared by 30.09.2020. From the above it is amply clear that the outer time limit of 30.9.20 is provided for concessionaires to clear the bills upto 31.3.20 and it is not as if that the timeline has been extended upto 31.1.21. The extension upto 31.1.2021 has been given only for settling the undisputed amounts that are due from 25.5.20, the day on which partial resumption has been permitted to 30.11.2020. Even in Circular No.24/20 it has been made clear that only such of those concessionaires, who have fulfilled all the conditions enumerated in the said CSS scheme would be entitled to avail the benefits of the said scheme. Similarly, the further reliefs provided in circular No.26/20 would be eligible only to such of those concessionaires, who fulfill the conditions enumerated in the said scheme. Further, the circular No.26/20 should be read in conjunction with circular No.24/20 would be evident from S. No.3 of circular No.26/20, which clearly mandates that the relief measures mentioned above would form part of Concessionaire Support Scheme issued earlier vide Commercial Circular No.24/2020 dated 14.08.2020 and would be applicable for the period commencing from the date of applicability of Commercial Circular No.24/2020 till 31.12.2021. From the above



it is evident that the relief measures that were granted vide Circular No.24/20 stood in place even subsequent to the issuance of Circular No.26/20 and that the said relief measures given in Circular No.24/20 would stand carried to Circular No.26/20. Therefore, reading both the circulars in tandem, Circular No.24/20 dated 14.8.20 had mandated that undisputed dues till 31.3.20 should be cleared to avail the reliefs provided under the CSS scheme and Circular No.26/20 had fixed the outer limit for payment of the said undisputed dues till 30.9.20 to avail the reliefs provided under both the circulars. From the above, it is evident that payment must be made by the concessionaire to avail the reliefs provided under circular No.24/2020 and circular No.26/2020.

87. The petitioner, however, claims that within the time stipulated in the aforesaid two circulars, payments were paid to the credit of the respondent before the due date, as the respondent had, by then, encashed the bank guarantee given by the petitioner. In substance, it is the stand of the petitioner that even encashment of bank guarantee by the respondent should be treated as payment made towards the outstanding dues by the concessionaire within the time stipulated in the CSS schemes and the security deposit should be permitted to be kept at a lower value, as provided in the CSS scheme, as the petitioner was not required to maintain the same level of security deposit in view of the relief granted under the CSS Schemes. Therefore, it is the stand of the petitioner that the encashment of bank guarantee would not in any manner jeopardize the position of the respondent insofar as bank guarantee is concerned and, therefore, the termination of the concession agreement by the respondent is wholly unsustainable.

88. The above contention of the petitioner is nothing but putting the cart before the horse. It is to be pointed out that pursuant to the outbreak of the pandemic, to alleviate the difficulties faced by the concessionaires, on they placing request before the respondent, certain relief measures were granted by the respondent, which resulted in the issuance of the CSS schemes vide circular Nos.24/2020 and 26/2020. The said circulars, nowhere, mandated any change in the terms and conditions of the concession agreement. Only the communication of the respondent dated 20.8.20 had, in fact, made a subtle change in one of the terms of the concession agreement, which was put in issue before the Delhi High Court, as aforesaid. The circulars dated 14.8.20 and 9.12.20 had not made any alterations to the terms and conditions of the concession agreement.



89. In fact, to put it pointedly, certain measures were approved by the respondent Board as Concessionaire Support Scheme to revitalize the economic environment in the Airport on the basis of representations received from the stakeholders. In fact, circular No.26/20 uses the phraseology that the measures are relief measures, which clearly mean that the respondent, with a view to grant relief to the concessionaires, from the difficult situation, had issued the said schemes so as to augment the economic situation of the concessionaires. Therefore, from the above it is evident that there was no change in the terms and conditions of the concession agreement and only with a view to help the concessionaires to get over the difficult situation, certain reliefs were granted to the concessionaires. It is to be pointed out that the said CSS scheme was issued vide the aforesaid circulars with a view to help such of those concessionaires, who are not defaulters and who have been prompt in the payment of their concession/license fee to the respondent. Therefore, by no stretch of imagination could it be said that the reliefs granted vide the aforesaid circulars in any way alter/modify the terms of the concession agreement, which requires mutual discussion between the concessionaires and the respondent to come to a mutual agreement to modify the concession agreement. The reliefs granted by the respondent are only to ease out the difficulties of the concessionaires and are not intended to victimize the concessionaires. That being the case, the reliefs granted cannot be said to be an act of modifying the terms and conditions of the concession agreement entered into between the petitioner and the respondent.

90. In view of the aforesaid finding rendered by this Court, the only issue that looms large ultimately is whether the terming of the petitioner as a defaulter resulting in termination of the concession agreement is sustainable.

91. It is to be pointed out that irrespective of the reliefs granted vide Circular Nos.24/2020 and 26/2020, as per clause 10.5.1 of the concession agreement, the concessionaire is to pay the concession fee payable in monthly installments and that irrespective of the receipt of the bills from the respondent, the concessionaire is bound to remit the license fee on the 25th day of the current month as per the concession agreement.

92. It is the case of the respondent that the petitioner is a persistent defaulter and that amounts have been in default to the tune of about Rs.29.95 Crores for the period ending March,



2020.. It is not the case of the petitioner that the petitioner is not in default of the amount and that he has paid all the dues that is due to the respondent as per clause 10.5.1 of the concession agreement. Even the communication dated 14.12.2020, in and by which the petitioner states to have accepted the terms of the Concessionaire Support Scheme dated 9.12.2020, there is a categorical admission in sub-clause (a) of clause (i) of Para-2, where the following admission has been made :-

"(a) That TDI in all sincerity would make all out efforts to clear all undisputed dues for the period up to 29.02.2020 on or before 31.01.2021."

93. From the above admission, it is evident that the petitioner is a defaulter and has not paid even the undisputed amounts, which are due and payable to the respondent. Therefore, in the absence of clearing the entire dues as per the terms of the concession agreement, the petitioner would not be entitled to the reliefs granted in the Concessionaire Support Schemes vide circular Nos.24/2020 and 26/2020.

94. However, the petitioner claims that the encashment of the bank guarantee, which was over and above the amount required to be maintained by the petitioner during the pandemic period would be sufficient to meet the amounts due by the petitioner to the respondent.

95. It is a matter of record that the petitioner has not paid all the undisputed amounts due and payable to the respondent as of 29.02.2020, which is also accepted by the petitioner vide its communication dated 14.12.2020. The default on the part of the petitioner had literally forced the respondent to encash the bank guarantee. May be the bank guarantee, which was with the respondent, was over and above the amount that needs to be kept by the petitioner during the pandemic period, as per the CSS scheme. But it should not be lost sight of that the reliefs provided under the CSS scheme would enure to the petitioner only if it satisfies the conditions prescribed in the said circulars. However, inspite of very many communications, the petitioner has not thought it fit to settle the dues, which were due and payable to the respondent, even as early as in February, 2020.

96. Once the petitioner has failed to perform its part of the concession agreement and not paying the undisputed dues as per clause 10.5.1, necessarily default as per clause 18.2 stands committed by the petitioner and in such an event, the respondent in terms of sub-clause (a) of clause 18.2 is entitled to



appropriate the security deposit. On such appropriation by the respondent, it is incumbent on the part of the petitioner to replenish or provide fresh security deposit within a cure period of 15 days, which, admittedly, the petitioner has failed to do.

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97. It is to be pointed out that only on the petitioner complying with the terms and conditions of the concession agreement and making all the undisputed payments due and payable, the petitioner would be entitled to get the reliefs as provided under the concessionaire support schemes. In the case on hand, admittedly, the petitioner has not honoured its part of the bargain, by paying the undisputed amounts due and payable as per the terms and conditions of the concession agreement and after a lapse of time, after series of correspondences, the respondent had to encash the bank guarantee. In fact, not once, but thrice, the respondent were forced to encash the bank guarantee to meet the obligations of the petitioner and, in effect, the respondent were left with only a miniscule of security deposit.

98. The petitioner cannot plead before this Court that it is entitled for the concessionaire support schemes, which were issued only for the benefit of the concessionaires, who were diligent and prompt in payment of their dues and only for alleviating their difficulties, the said reliefs were granted. The petitioner cannot put itself in the shoes of the prompt and diligent concessionaires and claim the reliefs provided under the concessionaire support schemes, which the petitioner had, not taken any steps, to pay the undisputed dues due to the respondent. Without complying with the payment, the petitioner cannot plead that it is entitled to the concessionaire support scheme. Even the circular No.24/2020, which was issued had made a categorical assertion that the relief measures contained in the said circular is to be given only to those agencies/concessionaires who clear all their undisputed outstanding dues till the bills of March, 2020. It is to be pointed out that the said clause has not been assailed before any Court of law, either by the petitioner or by the Federation, which had taken up the cause of the concessionaires with regard to clause 17.10 of the concession agreement, which was unilaterally modified in the communication dated 20.8.20. That being the resultant position, this Court is of the considered view that the petitioner is not entitled to any of the reliefs provided in the concessionaire support schemes, which were issued vide circular Nos.24/20 and 26/20. A defaulter is not entitled to any relief, much less the relief of the support, which has been granted by the respondent to the concessionaires,



who were diligent and prompt and it is not intended for such of those concessionaires, who had intended to take the respondent for a ride.

99. Further, it is to be pointed out that encashment of bank guarantee by the respondent cannot be deemed to be payment made by the petitioner. A bank guarantee is given as a mode of security against any default that may be committed in which event, the same can be encashed for the purpose of realising the amount. In the case on hand, the default committed by the petitioner in not paying the undisputed dues has resulted in the encashment of the bank guarantee by the respondent. Therefore, it is a clear case of default. If this Court holds that the encashment of bank guarantee would partake the character of payment to erase the act of default committed by the petitioner, it would be nothing but giving a clean chit to the petitioner, who has been a persistent defaulter and under the guise of a technicality, is trying to obtain favourable orders from this Court. The default committed by the petitioner has only resulted in the encashment of bank guarantee. Had the petitioner duly paid the undisputed dues to the respondent, no necessity would have arisen for the respondent to encash the bank guarantee. Therefore, the above act of the respondent clearly establishes that the petitioner is a defaulter, which has resulted in the respondent invoking the relevant provision of the concession agreement to encash the bank guarantee.

100. Further, one other issue which requires to be pointed out is the fact that even in respect of cash guarantee, according to the respondent, the petitioner has not replenished the same inspite of repeated requests from the respondent. However, it is countered by the petitioner saying that the Delhi High Court had already directed that the amount lying in deposit before the Delhi High Court may be taken account of towards the cash deposit to be maintained by the petitioner with the respondent and that the respondent having not taken any action, the same cannot be put against the petitioner.

101. To appreciate the aforesaid contention, it is just and necessary for this Court to advert to the order of the Delhi High Court dated 08.03.2021 in OMP (Comm) No.573/2020 filed by the respondent against the arbitration award and for better clarity, the relevant portion of the said order is quoted hereunder :-

"1. By way of this application as noted in the order dated 3rd March, 2021, applicant/respondent seeks a direction for release of an amount of INR 9,68,48,000/- out of the amount lying deposited before this Court. Pursuant to the afore-noted



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order, the petitioner has filed a short reply opposing the request made in the application.

* * * * *

8. 8. In view of the above, the application is allowed and the Registry is directed to release an amount of INR 9,678,48,000/- to the respondent, subject to respondent furnishing a bank guarantee in the name of Registrar General of this Court for the said amount. On the release of the amount, respondent shall within a week deposit the same with Chennai International Airport for replenishing the security deposit. List before the Registrar General for accepting the bank guarantee, as and when the same is filed."

102. From the aforesaid order, it is evident that on the respondent therein/petitioner herein submitting a bank guarantee for a sum of Rs.9,68,48,000/-, the Registrar General was directed to accept the same and release the said amount and a further direction was also issued that the respondent therein/petitioner herein shall deposit the same with Chennai International Airport within a week. The order was passed way back on 8.3.2021. However, according to the respondent, till date, the amount has not come to the coffers of the respondent, which only reveals that the petitioner has not taken any steps to submit any bank guarantee and get the amount released to be deposited with the respondent. The petitioner is also not able to place any document before this Court to substantiate the said amount has been received by submitting requisite bank guarantee and the amount has been deposited with the respondent. In the absence of any substantive material, the above act would also clearly reveal an act of default committed by the petitioner in not replenishing the cash guarantee, which is mandatorily to be submitted by the petitioner as per the terms and conditions of the concession agreement.

103. All the abovesaid factors, culled out from the materials available on record, clearly reveal that the petitioner has not only been a persistent defaulter, but has also been evading payment of the security deposit in the form of bank guarantee and cash guarantee and the said act of the petitioner is nothing but a clear and calculated violation of the terms and conditions of the concession agreement.

104. Though it is the submission of the petitioner that on the notice of dissatisfaction being served on the petitioner by the respondent with regard to its intent to terminate the agreement, within the period of 30 days, representation has been



filed by the petitioner and in the event of the respondent not accepting the said representation, termination should be preceded by a notice of 120 days, which has not been given and, therefore, the impugned notice is bad in law.

105. Though such a contention has been advanced and in line with clause 19.1 of the concession agreement, it is to be pointed out that default has been in existence for over a period of over a year and a half, whereinafter, the respondent has realised the amount by encashing the bank guarantee. It is further evident from the materials available on record that even as on date, there is a chunk of money that is due to the respondent from the petitioner as per the terms and conditions of the concession agreement, which the petitioner has not paid. This Court has already held that the petitioner is a persistent defaulter and has not paid the amounts, but belatedly raising some disputes to wriggle itself out from paying the amount. Such being the case, the petitioner being a defaulter even as per the provisions in the concession agreement, cannot invoke the very same concession agreement to claim that the respondent has not followed the relevant clauses in the concession agreement. In spite of opportunities, the petitioner has not thought it fit to pay the undisputed dues, which had to be realised by the respondent by resorting to encashing the bank guarantee. Further, still various amounts are due from the petitioner, permitting the petitioner to the period provided under clause 19.1. would only further frustrate the respondent, which would be against the very intent and purpose of the provision envisaged under clause 19.1. In such circumstances, the submission of the petitioner that it has not been provided with the period of 120 days as mandated under clause 19.1 of the concession agreement, though is a technical infraction on the part of the respondent, but on an overall appreciation of the case, this Court is of the considered view that the said infraction would not be sufficient to hold that the impugned order passed by the respondent is unsustainable, perverse, unreasonable and illegal. The said contention advanced by the petitioner also does not deserve acceptance.

106. For the reasons aforesaid, the writ petition filed by the petitioner is devoid of merits and, accordingly, the same is dismissed. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar



GLN

To

The Airport Director
Airports Authority of India
Chennai International Airport
Chennai 600 027.

+1cc to Mr.R.Maheswari, Advocate SR.No.8201

+1cc to Mr.R.Sankaranarayanan, Advocate SR.No.8550

W.P. NO. 16394 OF 2021

NK(CO)
GN(18/02/2022)