

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	19.11.2019
Judgment pronounced on	23.01.2020

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.1068 of 2018
and
O.P. No.108 of 2019
and
Application No.1145 of 2019

M/s.URC Construction (P) Ltd.
Rep. by its Authorised Signatory
Mr.V.Ganesan, Manager,
No.13,(Old No.H-102), Periyar Nagar,
Erode – 638 001.

... Petitioner
(in O.P.No.1068 of 2018 and
Respondent in O.P.No.108/2019)

Vs.

M/s.Airport Authority of India,
Rep. by its Senior Manager Engg
(C) Project Division – IV,
Project Office at 2nd Floor, Link Building,
Chennai Airport Project,
Chennai – 600 016.

... Respondent
(in O.P.No.1068 of 2018 and
Petitioner in O.P.No.108/2019)

PRAYER IN O.P.NO.1068 OF 2018: Original Petition is filed under

Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the portions of the Award dated 20.08.2018 passed by the Arbitral Tribunal to an extent, as aggrieved by the Petitioner herein.

PRAYER IN O.P.NO.108 OF 2019: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 20.08.2018 passed by the Arbitrator, in so far as claims 1, 2, 3 and 6 are concerned.

For Petitioner : Mr.P.J.Rishikesh
Petitioner in O.P.No.1068/2018
Respondent in O.P.No.108 of 2019

For Respondent : Mr.V.Lokesh Kumar
Petitioner in O.P.No.108 of 2019
Respondent in O.P.No.1068/2018

COMMON ORDER

This dispute relates to a contract for the construction of the metro station at the Chennai Airport. Pursuant to bids submitted by contractors in this regard, M/s.URC Construction Private Limited (the Contractor) was selected as the successful bidder by Letter of Intent dated 11.05.2012 (the LoI), which was followed by the Letter of Acceptance dated 21.05.2012 (LoA). Thereafter, an Agreement dated 06.06.2012 (the Agreement) was executed between the Airport Authority

of India(AAI) and the Contractor. Apart from the above, the tender documents, including the General Conditions of Contract(GCC), constituted the contract documents and are collectively referred to as the Contract. The work was to be executed within 14 months reckoned from the 10th day after the date of the LoI, i.e. on or before 20.07.2013, and the contract value was a sum of about Rs.48.71 crores. However, the work was delayed due to multiple factors during execution and about 20 provisional extensions of time were granted by the AAI. The first and last provisional extensions were granted by letters dated 04.07.2013(Ex.C-14) and 30.09.2015(Ex.C-42) from the AAI to the Contractor and work was completed within the last extended period, which was up to 31.10.2015. Subsequently, the Contractor submitted a final extension of time(EOT) application on 29.12.2015 and the AAI made a determination that out of the total extended period of 852 days, the Contractor is responsible for the delay of 501 days. On that basis, liquidated damages of Rs.1,21,28,760/- was imposed on the Contractor and a dispute ensued with regard to attribution of responsibility for delay and the consequences thereof and such dispute was referred to arbitration. The Contractor was the claimant in the Arbitration Proceeding and made seven claims before the Arbitral Tribunal. The said claims included a claim that extension of time should be granted without levy of liquidated damages and,

consequently, for release of the sum of Rs.1,21,28,760/- towards wrongful levy of liquidated damages(Claim 1); a claim of Rs.81,91,014/- towards interest/costs incurred on account of the wrongful levy of liquidated damages and on account of bank guarantee extension and commission charges(Claim 2); a claim of Rs.2,63,96,124/- towards compensation for escalation of cost of material and labour during the extended period(Claim 3); a claim of Rs.1,90,00,150/- towards compensation for additional escalation(Claim 4); a claim of Rs.7,42,42,269.50 towards prolongation costs (Claim 5); interest at 18% per annum (Claim 6); and a claim for costs of litigation (Claim 7). By Award dated 20.08.2018 (the Award), the Arbitral Tribunal awarded a sum of Rs.2,04,73,520/- to the Contractor with pendente lite interest at 6% per annum and post-Award interest at 8% per annum. In specific, a sum of Rs.1,21,28,760/- was awarded towards refund of liquidated damages, a sum of Rs.23,00,000/- towards compensation for withholding amounts towards liquidated damages and milestone charges and a net sum of Rs.60,44,760/- towards escalation in cost of materials and labour. The additional escalation claim and the prolongation claims were rejected in entirety. The Contractor challenged the Award by filing O.P.No.1068 of 2018 in respect of the rejection of its claims, whereas AAI filed O.P.No.108 of 2019 in respect of claims 1,2,3 and 6 that were allowed by the Arbitral Tribunal.

2. I heard the learned counsel for the AAI, Mr.V.Lokesh Kumar, and the learned counsel for the Contractor, Mr.P.J.Rishikesh.

3. The learned counsel for the AAI submitted that the Arbitral Tribunal erred in awarding a sum of Rs.1,21,28,760/- towards refund of liquidated damages. In support of this contention, the learned counsel referred to the GCC and, in particular, to the clause relating to compensation for delay which is as under:

"Clause 2: If the contractor fails to maintain the required progress in terms of clause 5 or to complete the Work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the AAI on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F'(whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete. This will also apply to items or group of items for which a separate period of completion has been specified.

(i) Compensation for delay of work : 0.5%(half percent) of contract value per week of delay.

Provided always that the total amount of compensation for delay to be paid under this condition shall not exceed 10% of the Contract Value of work or of the Contract value of the item or group of items of work for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set-off against any sum payable to the Contractor under this or any other contract with AAI. In case, the contractor does not achieves a particular milestone mentioned in schedule F, or the re-scheduled milestone(s) in terms of Clause 5.4, the amount shown against that milestone shall be with held, to be adjusted against the compensation levied at the final grant of Extension of Time. Withholding of this amount on failure to achieve a milestone, shall be automatic without any notice to the contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released in case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld. However, no interest, whatsoever, shall be payable on such withheld amount."

By referring to the said clause, he pointed out that the Contractor had

agreed to pay agreed compensation if there is delay in the progress of work at the rates specified in the Contract. He also pointed out as to how the AAI is entitled to withhold the agreed compensation without notice to the Contractor. After referring to the above clause, the learned counsel submitted that the conclusion of the Arbitral Tribunal, at internal pages 10 to 12 of the Award, that the Engineer-in-charge is expected to provide a fair and reasonable extension whether or not the Contractor applies for such extension is based on a perverse and unreasonable interpretation of the Contract. In particular, he submitted that clause 5.4 of the GCC merely enables the Engineer-in-charge to provide a fair and reasonable extension of time although the Contractor does not apply for extension. It does not direct the Engineer-in-charge to grant extension of time even though the Contractor does not apply for extension. Therefore, he submitted that the grant of a fair and reasonable extension of time should either be requested for by the Contractor by making an application for such purposes or the Engineer-in-charge should consider it necessary to grant extension of time. In other words, it is not mandatory that the Engineer-in-charge should grant an extension of time where such extension is not considered to be just and necessary by the Engineer-in-charge. He also pointed out that the conclusion at internal page 11 "that no efforts appear to have been made by the AAI in working out the justified and unjustified period of extension" is totally at variance with the

factual position. He further submitted that the conclusion at clause (vii) at internal page 11 of the Award that no records were produced to show that the AAI considered any other remedy to mitigate the inconvenience caused, if any, due to the alleged delay in execution of the work by the Contractor in accordance with Section 73 of Indian Contract Act, 1872 (the Contract Act) is patently erroneous because the Contract contains a stipulation for the payment of agreed compensation. He also pointed out that the conclusion of the Arbitral Tribunal that time was set at large by granting several extensions of time and that liquidated damages could not be levied in that factual context is patently flawed. In other words, he submitted that while granting each extension of time, the Contractor was put on notice that such extension was provisional and did not preclude the levy of agreed compensation for delay. Therefore, he submitted that the requirements of Section 55 of the Contract Act were satisfied in this case. He also pointed out that the excusable and non-excusable delay was clearly demarcated and the agreed compensation was imposed only in respect of non-excusable delay. By referring to various exhibits in the typed set of papers filed by the AAI, he pointed out that the delay is clearly attributable to the Contractor.

4. With regard to the factum of loss, the learned counsel for the AAI referred to Page No.89 of Volume III, wherein details of the additional salary that was paid to the staff of AAI during the non-

excusable period is set out. As regards the statement that no direct loss was incurred as a consequence of the delay, he pointed out that no losses may have been incurred by the Chennai Metro Rail Limited but losses were incurred by the AAI as a result of the delay. By referring to pages 28,29, 35, 45, 46, 51, 52, 55, 72 and 73 of Volume II in O.P. No.1068/2018, the learned counsel submitted that only provisional extensions of time were given and that the finding of the Arbitral Tribunal that time was set at large is totally flawed. In support of this submission, the learned counsel for the AAI referred to the judgment of the Hon'ble Supreme Court in **M/s.Construction and Design Services vs. Delhi Development Authority (Construction and Design Services) (2015) 14 SCC 263**, wherein, at paragraphs 14, 15 and 17, the Hon'ble Supreme Court held that evidence with regard to the precise amount of loss may not be possible and that the burden of proof is on the person who contends that no loss was likely to be suffered as a result of the breach. He also relied upon the judgment of the Hon'ble Supreme Court in **M/s.Mitra Guha Builders (India) vs. Oil and Natural Gas Corporation Limited, Civil Appeal No.551/2012** wherein, at paragraphs 14 and 15, the Hon'ble Supreme Court held that the decision of the Superintending Engineer, as per clause 2 of the agreement therein, which is *in pari materia* with clause 2 of the GCC herein, is final and there cannot be any dispute with regard to such conclusion of the

Superintending Engineer. He also relied upon the judgment in **Chimmco Birla Ltd vs. Kochin Fort Trust, the Arbitration Appeal No.22 of 2003**, wherein a division bench of the Kerala High Court held that it is not necessary to prove loss when a sum is stipulated as liquidated damages and not by way of penalty.

5. In response, Mr.P.J.Rishikesh, commenced his submissions by pointing out that unless the factum of loss is established, parties are not entitled to liquidated damages. In this connection, he referred to the judgment of this Court in **Ennore Port Ltd. v. Hindustan Construction Company Ltd. 2005-4-LW 319** and also to the judgment in **Construction and Design Services**. As regards extension of time, he pointed out that the relevant contractual clauses, namely, clause 2 read with clause 5, 5.2 and 5.4 of the GCC provide for compensation only if the work is not completed either within the original or extended period. In this case, he pointed out that extensions of time were granted and the work was completed within the period of completion as per the last extension. He also referred to the conclusions of the Arbitral Tribunal, at paragraph 2.4(iv) and (x) of the Award, to the effect that time was set at large by granting repeated extensions of time. With regard to the Award of only 50% of the claim amount towards commission charges and bank guarantee charges, he submitted that the Arbitral Tribunal committed a patent error by arbitrarily awarding only 50%. With regard to the award

of escalation only to the extent of a gross sum of Rs.95,13,534/- and a net sum of Rs.60,44,760/-, he, once again, pointed out that this was erroneous when a claim of Rs.2,63,96,124/- was made on the basis of the price index published by DGW-CPWD. He also referred to the conclusion at paragraph 6.3 of the Award, at internal pages 20 and 21 thereof, and pointed out that it is totally erroneous to conclude that there is no breach of Contract because neither party is responsible for delay. On that basis, he submitted that the rejection of the claim for prolongation costs is arbitrary. He also pointed out the Arbitral Tribunal erred patently in two respects with regard to the grant of interest, namely, by not granting interest in the pre-reference period and by granting an unreasonably low rate of interest of 6% per annum up to the date of Award and 8% per annum thereafter. He concluded his submissions by adverting to the judgment of the Hon'ble Supreme Court in **Ssyangyong Engineering v. NHAI(Syangyong) 2019 SCC Online SC 677** on the limited scope for interference with an Arbitral Tribunal after the 2015 amendment.

6. By way of rejoinder submissions, the learned counsel for AAI submitted that a hindrance register was available on record which showed the reasons for delay. He reiterated that each time an extension of time was granted, the Contractor was put on notice that this was without prejudice to AAI's right to claim liquidated damages and that,

therefore, Section 55 of the Contract Act was satisfied. He also pointed out that the Award violates clause 2 of the GCC by awarding interest on amounts withheld by way of liquidated damages. With regard to the Award in respect of escalation, he pointed out that escalation was not calculated as per the formula in the Contract. In other words, he submitted that escalation should not have been calculated for the non-excusable period of delay and that it should have been limited to only excusable delay.

7. The submissions of the learned counsel were considered carefully and the records were examined. This case turns largely on the decision of the Arbitral Tribunal with regard to time being set at large. In contracts wherein parties specify the time for completion and also provide for the payment of liquidated damages for delay by the contractor, if parties continue to perform or execute the contract beyond the stipulated time limit on account of acts of prevention by the employer, time would be set at large unless the contract in question envisages the grant of extension of time and extensions of time are granted as per contract. Consequently, the employer would not be able to claim liquidated damages even if there is a contractual stipulation in that regard. The rationale for the above is that liquidated damages clauses are enforced with reference to the stipulated completion date and if such completion

date could not be adhered to on account of acts of prevention by the employer, it would be inequitable to permit the employer to, nonetheless, impose liquidated damages. Especially in the history of construction contracts, extension of time clauses were inserted so as to obviate the consequence of time being set at large. In addition, as per Section 55 of the Contract Act, if time is of the essence, the aggrieved party would lose the right to claim damages for delay unless it reserves the right to do so while granting extension of time. The object and purpose of specifying that time is of the essence is to treat time as a condition, as opposed to a warranty, under the contract and thereby enable the aggrieved party to treat non-compliance as a repudiatory breach that justifies termination. The other aspect to be borne in mind is that contracts with provision for extension of time would ordinarily be construed as contracts wherein time is not of the essence notwithstanding contractual stipulations to the contrary and this would be the rule as regards construction contracts. The conclusions of the Arbitral Tribunal should be examined in light of the above legal position.

8. In this case, several extensions of time, about 20, were granted by the AAI/Employer albeit on provisional basis and work was completed within the last extended time limit. While granting such provisional extensions of time, the AAI reserved its right to recover liquidated damages. All these letters granting extension of time are,

substantially, on the same terms and the operative portion of the provisional extension letter dated 04.07.2013(Ex.C-14) is set out below by way of illustration:

"Reference to your letter No.URC/RO-C/AMS/168/07/2013 dated 03.07.2013 regarding grant of extension of time for completion of the above work.

The stipulated date of completion for the above mentioned work is 20.07.2013 as per agreement.

Provisional extension of time for completion of the above mentioned work is granted up to 08.11.2013 without prejudice to the right of AAI to recover the liquidated damages on accordance with the provision of the said contract agreement.

Provided notwithstanding the extension hereby granted time is and shall still continue to be the essence of the said agreement."

These letters granting provisional extension of time refer to the Agreement but are not based on a determination as to whether the delay is attributable to AAI or the Contractor. The specific provisions of the Contract, as regards extension of time, were also not adverted to therein. Therefore, the question arises as to whether such extensions may be construed as extensions as per clauses 5.2 to 5.4 of the GCC, which are set out below:

“5.2 If the work(s) is delayed by:

- (i) force majeure,
- (ii) abnormally bad weather
- (iii) serious loss or damage by fire,
- (iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or
- (v) delay on the part of other contractors or tradesmen engaged by Engineer-in-charge in executing work not forming part of the Contract, or
- (vi) non-availability of stores, which are the responsibility of AAI to supply or
- (vii) non-availability or break-down of tools and Plant to be supplied or supplied by AAI or
- (viii) any other cause which, in the absolute discretion of the Engineer-in-charge is beyond the Contractor's control. Then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer-in-charge but shall nevertheless use constantly his best endeavors to prevent or make good the delay and shall do all that may be reasonably required to prevent or make good the delay and shall do all that may be reasonably required

to the satisfaction of the Engineer-in-charge to proceed with the works.

5.3 Request for re-scheduling of Milestones and extension of time, to be eligible for consideration, shall be made in writing within fourteen days of the happening of the event causing delay in the prescribed form. The contractor may also, if practicable, indicate in such a request the period for which such extension is desired.

5.4 In any such case the Engineer-in-charge may give a fair and reasonable extension of time and re-schedule the Milestones for completion of work. Such extension shall be communicated to the Contractor by the Engineer-in-charge in writing, within 3 months of the date of receipt of such request. Non-application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the Engineer-in-charge and this shall be binding on the contractor”

9. By referring to the aforesaid contractual provisions which enable extension of time in specific circumstances that are either attributable to AAI or beyond the Contractor's control, the Arbitral Tribunal concluded that clause 5.4 provides for an application for extension by the Contractor within 14 days of the relevant delay event and a determination thereof by the Engineer-in-charge within 3 months of receipt of an

application. This conclusion follows from a plain reading of clause 5.4. In addition, the Arbitral Tribunal concluded that the Engineer-in-charge was obligated to make this determination even without an application by the Contractor. On that basis, the Arbitral Tribunal concluded that clause 5.4 of the GCC was not complied with by the Engineer-in-charge. While there could be more than one interpretation as regards the obligation of the Engineer-in-charge, in this regard, it cannot be said that the interpretation of the Arbitral Tribunal is perverse. Thereafter, the Arbitral Tribunal took note of the correspondence indicating that the Contractor was also responsible for delay and that the AAI did not make a determination and instead granted extensions of time. By proceeding further on that basis, the Arbitral Tribunal also took into account the fact that the Contractor also accepted these extensions of time and proceeded to execute work on that basis and eventually concluded that the parties thereby set time at large.

10. Therefore, the question that arises for consideration is whether this conclusion of the Arbitral Tribunal is liable to be interfered with under Section 34 of the Arbitration Act. As set out in paragraph 7 above, extension of time clauses were introduced in construction contracts so as to ensure that time is not set at large. However, in this case, the contractual mechanism was not used to grant extension of time when

work was being executed. Instead, provisional extensions of time were granted repeatedly although there is no provision in the Contract for such provisional extensions. Eventually, after completion of work, the apportionment of responsibility for delay was undertaken by the AAI. In these facts and circumstances, the Arbitral Tribunal concluded that time was set at large. In so holding, in effect, the Arbitral Tribunal concluded that the two parties, by their conduct, departed from the contractual mechanism and procedure for extension of time. This conclusion cannot be said to be perverse or unreasonable. To put it differently, the Arbitral Tribunal impliedly held that extra-contractual extensions of time were granted by mutual consent and that this is akin to a situation wherein the Contractor is permitted to proceed with work beyond the completion date without duly extending time. In this connection, in **Lim Chin San Contractors Pte. Ltd. v. LW Infrastructure Pte. Ltd. [2011] SGHC 162**, the Singapore High Court discussed the law on the subject and concluded that time would be set at large if the completion of work, as opposed to progress of work, is delayed on account of prevention by the employer. In this case, there is no doubt that the completion of work and not merely progress of work was substantially delayed. As a corollary to the conclusion that time was set at large, the Arbitral Tribunal held that the withholding of amounts by way of liquidated damages or agreed compensation is invalid and, consequently, the Arbitral Tribunal directed

that such agreed compensation should be refunded or released to the Contractor. This inference is a logical fall-out of the determination that time was set at large by the parties and cannot be faulted. Ordinarily, this amount should carry interest from the date it was withheld. The Arbitral Tribunal concluded that interest would be payable on this and other claims from the date of reference, i.e. 02.09.2017. This is ex facie erroneous and, as regards this claim, interest should be reckoned from the date of withholding by AAI. The Contractor stated that these amounts were withheld from RA bills 4-39. In view of the fact that the cumulative withholding of Rs.1,90,00,000 was completed in the 39th RA bill, interest shall be payable from the date of payment of RA bill 39.

11. As regards the award of escalation, Clause 10 CA of the GCC clearly provides for price variation on account of escalation and de-escalation in prices of materials, as specified in Schedule F, both during the original contract period and the extended period. Such price variation is required to be determined, as per the formula specified in Clause 10 CA, by using the prices specified in Schedule F and the price index of DGW as on the last date for bid submission as the base price/index. In addition, price variation would be payable only during the justified extended period and the price index that is prevailing at the relevant point of time or on the scheduled date of completion, whichever is lower, is to be adopted.

The Arbitral Tribunal took note of this contractual stipulation whereby there was reference both to the Schedule F prices and the price index as of the last date of bid submission and reconciled the two in paragraph 4.3.2.1 of the Award by concluding that escalation is admissible only if the price of material exceeds the prices prevailing as of the date of opening of bids. This conclusion turns on a reasonable interpretation of Clause 10 CA and no interference is warranted. As regards labour-related escalation, the above interpretive exercise with regard to Schedule F was not required and, therefore, the conclusions on that score are based on a fairly straight forward and reasonable interpretation of Clause 10C and cannot be faulted. As regards interest on this Claim, the final escalation bill was submitted by the Contractor on 16.02.2016 (Ex.C-45, typed set of Petitioner, Volume-II in O.P. No.1068 of 2018) and the earlier escalation bills were paid. Consequently, interest should be paid on the amount awarded on the escalation claim from 16.03.2016, i.e. 30 days from the date of the final escalation bill.

12. The prolongation claim of the Contractor is premised and contingent on establishing that the AAI was responsible for the delay in completion of work. As a consequence of the conclusion of the Arbitral Tribunal that extensions of time were granted and accepted by mutual consent without adhering to contractual provisions, in that regard, and

that time was set at large, the prolongation claim becomes unsustainable and was rejected by the Arbitral Tribunal. I do not find any reason to interfere with this finding.

13. One more claim and the decision of the Arbitral Tribunal thereon remains to be considered, namely, Claim 2, which pertains to compensation for wrongful withholding of liquidated damages and milestone recovery and costs incurred in extending the bank guarantee, including commission. A sum of Rs.45,95,511/- was claimed towards the wrongful withholding of amounts towards liquidated damages and milestone charges, Rs.30,42,349/- towards bank guarantee extension charges and Rs.5,53,154/- towards bank guarantee commission charges, thereby aggregating to Rs.81,91,014/-. As against this claim, the claim for bank guarantee extension charges becomes untenable on the basis of prior conclusions that extension of time was mutually agreed to on "without fault attribution" basis and was, therefore, rejected. Towards this claim, the Arbitral Tribunal awarded 50% of the amount claimed, i.e. Rs.23,00,000/-, in respect of the withholding of amounts towards liquidated damages and milestone charges by holding that the Contractor's claim was for compound interest and is, therefore, awarded only to the extent of 50%. The award of 50% of the amount claimed is clearly arbitrary and cannot be sustained. In effect, this is an interest

claim on the amount of Rs.1,90,00,000 that was withheld towards agreed compensation and, subsequently, released in part, and on the charges and costs incurred on providing a bank guarantee for Rs.75,00,000 towards milestone charges. The conclusion of the Arbitral Tribunal that this amount should not have been withheld, as per clause 2 of the GCC, is consistent with the other conclusions in the Award and, therefore, sustainable. Out of the aforesaid sum of Rs.1,90,00,000, a sum of Rs. 68,71,240 was released on 16.08.2016 (Ex.C-54, letter dated 24.08.2016 from AAI, typed set of Petitioner, Volume-II in O.P. No.1068 of 2018) and a sum of Rs.1,21,28,760 was retained and such retention is the subject matter of Claim 1. Similarly, the bank guarantee of Rs.75,00,000 was also released on 18.07.2016 (Ex.C-54, letter dated 24.08.2016 from AAI, typed set of Petitioner, Volume-II in O.P. No.1068 of 2018). Therefore, the Contractor would be entitled to interest on the sum of Rs.68,71,240 from the date the amount was withheld up to 16.08.2016 because interest on the agreed compensation amount is covered in Claim 1. As regards the bank guarantee charges for the milestone charges bank guarantee for Rs.75,00,000, it would be confined to charges incurred up to 18.07.2016 when the said bank guarantee was released. The learned counsel for the AAI contended, in this regard, that interest is not payable on amounts withheld towards agreed compensation as per Clause 2 of the GCC. However, such contention would be valid only if the contractual procedure

was adhered to for determining both extension of time and agreed compensation. In this case, as stated earlier, the contractual procedure was not adhered to in the above respect. Thus, on this claim, the amount awarded should be reworked by computing interest on the released amount of Rs.68,71,240/- from the date that the said amount was withheld up to 16.08.2016 at the simple interest rate of 12% per annum, which would be a reasonable rate in light of the prevailing interest rates at the relevant time. Given the fact that these amounts were withheld incrementally from RA bills 4-39 and the full amount was withheld while paying RA bill 39, interest should be calculated from the date of payment of RA bill 39. Indeed, the grant of interest by the Arbitral Tribunal at 6% per annum in the pre-reference and pendente lite period, on Claims 1 and 3, and at 8% per annum in the post-Award period on the aggregate sum awarded is unduly low in view of the fact that this is a commercial transaction and also bearing in mind the prevalent interest rate environment. Therefore, Claim 1 shall carry interest at 12% per annum in the pre-reference and pendente lite periods from the date of payment of RA Bill – 39. With regard to Claim 3, the cumulative escalation claim was made on 16.02.2016. Therefore, Claim 3 shall carry interest from the 31st day after 16.02.2016. As regards the post-Award period, the aggregate sum awarded towards Claims 1 and 3 shall carry interest at 12% per annum.

14. In the result, the amount awarded in respect of Claim 2 shall be re-worked, as indicated above, and interest on Claims 1 and 3 shall apply at the rate of 12% per annum from the dates specified above, in respect of each Claim, in the pre-reference, pendente lite and post-Award period. Except to the extent indicated above, the respective Petitioners have failed to make out a case to interfere with the Award, as per principles laid down in **Ssyangyong**, including in paragraphs 35 and 42 thereof. Consequently, O.P. No.108 of 2019 is dismissed and O.P. No. 1068 of 2018 is disposed of on the terms indicated above. No costs. Consequently, connected Application is closed.

23.01.2020

Speaking order
Index: Yes
Internet : Yes
rrg

सत्यमेव जयते

WEB COPY

O.P.No.1068 of 2018 and
O.P.No.108 o 2019

SENTHILKUMAR RAMAMOORTHY, J.

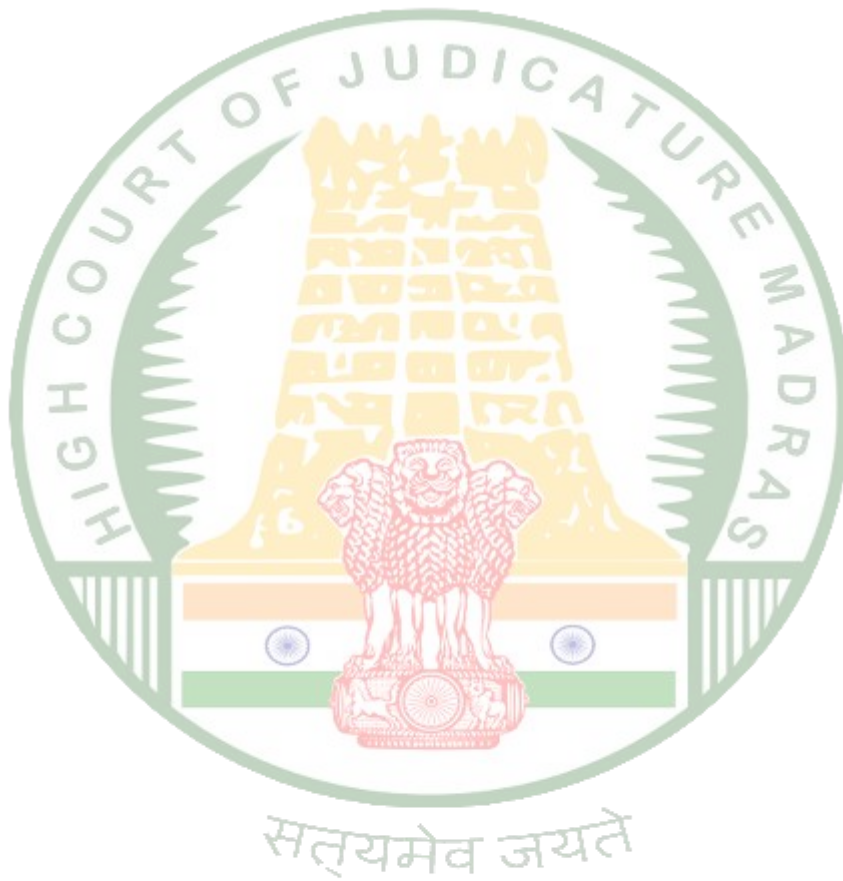
rrg



Pre Delivery order
in
O.P.No.1068 of 2018
and
O.P.No.108 o 2019

WEB COPY

23.01.2020



WEB COPY