



W.P. No.5851/2026

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
04.03.2026	10.03.2026

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO.5851 OF 2026

AND

W.M.P. NOS. 6369, 6370, 6371 & 6372 OF 2026

1. Multi Star Metal Trading LLC
Through its authorised signatory
P.T.Gopinath
102, Al Naisser Building, Naif
Deira, P.O. Box 239638
Dubai, United Arab Emirates.
2. SBA Education & Consultancy
Services Private Ltd. Through its
Authorised Signatory P.T.Gopinath
41-C, Krishna Nagar, Mathura
Uttar Pradesh, India 281 001.

.. Petitioners

- Vs -

1. Union of India
Through its Secretary
Ministry of Civil Aviation
Government of India, Block 'B'
Rajiv Gandhi Bhawan
Safdarjung Airport Area
New Delhi 110 003.
2. Airports Authority of India



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Through its Chairman
Rajiv Gandhi Bhawan
Opp: Safdarjung Airport Area
New Delhi 110 003.

3. Airports Authority of India, Chennai
Through its Airport Director
Chennai International Airport
Chennai – Trichy Highway, Tambaram
Meenambakkam, Chennai 600 027.
 4. Flemingo Dutyfree Shop Private Ltd.
D-73/1, ITC, Industrial Area, MIDC
Turbhe, Navi Mumbai 400 705.
 5. GMR Airports Ltd.
Unit No.12, 18th Floor, Tower A
Building No.5, DLF Cyber City
Phase III, DLF QE, Gurgaon
Haryana 122 002.
 6. Heinemann Travel Retail India Private Ltd.
P38, 24th Floor, Etherea Coworking Spaces
Tower B, Aplhathum, Sector 90
Nepz Post Office, Gautam Buddha Nagar
Noida 201 305.
 7. Mumbai Travel Retail Ltd.
Adani Corporate House
Shantigram, Near Vaishno Devi Circle
S.G. Highway, Khodiyar
Ahmedabad 382 421.
 8. Travel Food Services Ltd.
Block A, South Wing, 1st Floor
Shiv Sagar Estate, Dr. Annie Besant Road
Worli, Mumbai 400 018.
- .. Respondents



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Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari to call for the records and quash the Request for Proposal dated 01.01.2026 bearing E-Bid No.2026_AAI_261228_1 issued by respondent No.3.

For Petitioner : Mr. T.Gowthaman, SC, for
Mr. Muthuchharan Sundresh

For Respondents : Mr. AR.L.Sundaresan, ASG,
Assisted by Mr.K.Srinivasamurthy
for R-1
Mr.Ramasamy Meyyappan for
RR-2 & 3
No Appearance for RR-4, 5, 7 & 8
R-6 – Not Ready in Notice

ORDER

Questioning the validity and constitutionality of the Request for Proposal dated 01.01.2026 calling for E-Bid for establishment of Duty Free Shop within the precincts of the airport, floated by the 3rd respondent, the present writ petition has been filed by the petitioner.

2. The brief facts leading to the filing of the present writ petition are as under:-

The petitioners 1 and 2 formed a consortium by entering into a Joint Bidding Agreement dated 10.02.2026 for the purpose of participating in the



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Request for Proposal (for short 'RFP') issued on behalf of the Airports Authority of India (for short 'AAI') by the 3rd respondent on the directions of the 2nd respondent for Development, Operation and Maintenance of Duty-Free Outlets at Chennai Airport.

3. It is the averment of the petitioners that RFP dated 01.01.2026 bearing E-Bid No.2026_AAI_261228_1, was floated inviting bids for Development, Operation and Maintenance of Duty-Free Outlets at Chennai Airport with a clear mention that queries could be submitted by the prospective bidders in the CPP portal by 30.01.2026. It is the further case of the petitioners that by email dated 16.01.2026, it was brought to the notice of AAI that the online tender portal was not allowing the 1st petitioner to submit queries and, therefore, the queries are being sent by email, to which reply email dated 19.01.2026 was issued by AAI expressing its inability to respond to the queries of the 1st petitioner as the timeline for resolving the queries had lapsed and pointing out that the reply submitted to the queries submitted by the other intending bidders could be used by the petitioners.



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4. It is the further averment of the petitioner that Corrigendum-1 was issued by AAI dated 23.01.2026 along with revised timelines for submission of bids and opening of technical bids on 20.02.2026. Further, response to the queries of respondents 4 to 8 were also uploaded on 23.01.2026 by AAI. The 1st petitioner, through its mail dated 30.01.2026 sought extension of timelines for raising queries in view of the extension of timelines for submission of bids and by Corrigendum-2 dated 2.2.2026, AAI responded to the queries of the 1st petitioner. However, AAI, through the aforesaid communication had not meaningfully addressed the queries raised by the prospective bidders, inspite of the glaring constitutional, operational and commercial infirmities highlighted in the pre-bid queries relating to RFP. However, AAI refused to modify any material terms of the RFP, but the response of AAI has only been highhanded and evasive and the critical questions raised by the 1st petitioner have not been addressed, which clearly demonstrates that AAI is intent on proceeding the tender without addressing the fundamental viability concerns.

5. It is the further averment of the petitioners that even to the queries raised by the other bidders, viz., respondents 4 to 8, AAI has met the concerns raised with evasive and non-committal answers, which clearly shows that AAI has



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no intention of regularizing the RFP nor explain its position on the terms contained in the RFP. Therefore, left with no other viable alternative, the petitioners have been constrained to file the present writ petition.

6. Learned senior counsel appearing for the petitioners submitted that Clause 1.1.1 of RFP read with Article 10.2 of the draft concession agreement arbitrarily and unfairly defines and determines the manner in which the concession fee is to be calculated and levied. Pointing out Clause 1.1.1 as also Article 10.2.1, the Minimum Monthly Guarantee (for short 'MMG') as fixed in US Dollars at US \$ 13,03,149.46 with a minimum rate per international passenger arriving and departing at US \$ 2.57, it is submitted by the learned senior counsel that the amount payable monthly to AAI towards the Monthly Concession Fee by the concessionaire would be equal to the rate quoted per international passenger multiplied by the number of international passengers arriving and departing per month or the MMG amount, whichever is higher plus applicable taxes and charges.

7. Pointing out Clause 1.1.1 and Article 10.2.1 of RFP, it is the submission of the learned senior counsel that every month concession will be charged on the



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basis of the higher of the two values, viz., either the total number of arriving and departing passenger viz., footfall, multiplied by a rate fixed per passenger or the MMG, which, for the 1st year shall be US\$ 13,03,149.46. In this backdrop, it is the submission of the learned counsel that total passenger traffic ought not to be the basis for determining the concession fee, as the passenger traffic is dependable on various factors.

8. In this regard it is the submission of the learned senior counsel that transit passengers, passengers for Haj and Umrah, Children and minor passengers have all been taken into account while computing the arriving and departing passengers. It is the submission of the learned senior counsel that transit passengers are persons, who would not be clearing the immigration/customs area and, therefore, cannot be counted for the purpose of passenger traffic as the duty free outlet is only accessible for passengers, who cross the immigration/customs area. Likewise, the passengers for Haj and Umrah do not use the duty free outlet for the purpose of alcohol, which is one of the main items of sale, as such persons are bound by religious protocols and, therefore, abstain from alcohol. It is further pointed out by the learned senior counsel that children and minor passengers are not eligible to purchase alcohol, which is the



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primary offering at the duty free outlets and, therefore, such passengers should not be taken into account for the purpose of computing the arriving and departing passengers.

9. It is the further submission of the learned senior counsel that the total passenger traffic includes the passengers at the arrival as well as departure zone. However, if a prospective concessionaire were to get a duty free outlet only in one of the two zones, it would be unfair and arbitrary to include the passenger traffic at the other zone in calculating the concession fee payable by the concessionaire.

10. It is therefore the submission of the learned senior counsel that passenger traffic cannot even remotely reflect the revenue of the duty free outlets and, therefore, fixation of passenger traffic for the purpose of computing the concession amount payable is grossly arbitrary and unfair.

11. It is the further submission of the learned senior counsel that parallel methods of calculating the concession fee are designed to unfairly protect AAI from business contingencies while leaving the prospective concessionaire



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exposed. In this regard, it is the submission of the learned counsel that a parallel method has been devised by AAI to receive MMG where the passenger footfall does not yield the revenue equal or higher than the amount of MMG. This, according to the learned senior counsel, only saves AAI inspite of any possible decline in foot fall/revenue due to minimised passenger traffic by means of arrival and departure, thereby eroding the concessionaire's revenue and viability.

12. It is the submission of the learned senior counsel that in case of decline in passenger footfall, while the prospective concessionaire is left exposed to the vagaries of passenger traffic and suffers the burnt by having to muster the payment over and above the revenue generated in the concerned month, AAI is saved that irrespective of the passenger footfall, even if it decreases, MMG is payable on the basis of RFP to AAI. In this regard, it is pointed out by the learned senior counsel that Article 10.2.2 of the draft concession agreement will make like more miserable and worse for the concessionaire after the first year, as the said Article contemplates an annual and dynamic escalation of MMG with a minimum escalation of 5% and a maximum escalation of 15%.



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13. It is the further submission of the learned senior counsel that while AAI shares the benefits of favourable footfall, where passenger traffic increases, however, it denies any relief to the concessionaires of unfavourable circumstances, where there is decrease in passenger footfall by seeking payment of MMG. The said dual and parallel method of calculating concession fee fashioned by AAI is nothing but an abuse of its dominating position and is in breach of principles of equity and fairness.

14. It is the further submission of the learned senior counsel that the proposed MMG is not a bare minimum or rudimentary amount, but a close approximation to, if not higher than the projected total passenger footfall, which would leave a sizeable profit margin to AAI all the months even when the concession fee from the total passenger traffic falls lesser than the MMG, which is nothing but a unequal bargain between AAI and the concessionaire.

15. It is the next contention of the learned senior counsel that the Annual escalation on MMG at the end of each concession year is provided for under Article 10.2.2, which is as under :-



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S.No.	Passenger growth in the preceding 12 months from the last month from the month in which escalation is due	Annual Escalation
1	Upto 5% (including negative growth)	5%
2	Greater than 5% and upto 18%	10%
3	Greater than 18%	15%

16. It is the submission of the learned senior counsel that as per the above Article, MMG is subject to an annual escalation of 5% to 15% subject to passenger growth and even in months where there is negative growth, an escalation of 5% would apply on MMG, which, according to the learned senior counsel, is nothing but a colourable exercise of AAI's superior bargaining position.

17. In this regard, it is the submission of the learned senior counsel that the escalation proposed is a myth as the footfall at the Chennai Airport would stand decreased on account of a second airport/terminal coming up at Chennai near Parandur Greenfield Airport. It is the further submission of the learned senior counsel that AAI has lost sight of the international treaties and Free Trade Agreements which have substantially reduced the market prices of the goods sold in duty free shops, and, therefore, the escalating MMG would leave no



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incentive for passengers to buy from the duty free shops, thereby, reducing the productivity and the financial gain of the duty free shops located at the airports.

18. It is the further submission of the learned senior counsel that MMG is quoted and pegged in US Dollars. In this regard, it is the submission of the learned senior counsel that insistence to use US Dollars as a financial standard is inherently arbitrary and lacks any rational nexus to the fully domestic nature of the contract. It is the further submission of the learned senior counsel that though it is the claim of AAI that the tender is a global tender intended to attract international entities, however, the RFP is silent on this aspect.

19. It is the further submission of the learned senior counsel that even otherwise, even if international players participate in the tender process, yet, they receive revenue from customers in Indian Rupees and pay taxes in Indian Rupees and discharge all statutory liabilities in Indian Rupees and, therefore, insisting on use of US Dollars for payment of MMG and other escalating costs is perverse. Furthermore, it is the submission of the learned senior counsel that designing a policy to prioritize foreign bidding by neglecting the interests of the



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Indian bidders is clearly a perverse and arbitrary act notwithstanding the fact that the two bidders, whose technical bids have been qualified are Indian companies.

20. It is the further submission of the learned senior counsel that mandatory paying in US Dollars introduces a layer of commercial uncertainty, as constant fluctuation and historically weaker Indian Rupee against the US Dollars ensures that the concessionaires always suffer an ever increasing and unwarranted financial burden that bears no relation to the actual service provided, leading to unjust enrichment of AAI. Further the risk of fluctuation also introduces an element of needless uncertainty in the contract, which is an anathema to commercial contracts, especially in contracts/tenders floated by State instrumentalities.

21. It is the further submission of the learned counsel that Articles 22.1.3 (b) and 22.1.3 (c) of the Draft Concession Agreement provide for unilateral appointment of sole arbitrator by the Chairman of the 2nd respondent with a caveat of 50% of deposit of the disputed amount as a condition precedent for arbitration. It is the submission of the learned senior counsel that provision for unilateral appointment of an arbitrator is a direct violation of the settled



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principles of law laid down in ***Perkins Eastman Architects DPC – Vs – HSCC (India) Ltd. (2022 (2) SCC 760)***.

22. It is the further submission of the learned senior counsel that the choice given to the licensee to choose from the list of arbitrators furnished by the respondents itself is flawed inasmuch as it projects the supremacy of respondents 1 to 3 with restricted consent to the concessionaire.

23. It is the further submission of the learned senior counsel that pre-deposit as a condition precedent for arbitration has been struck down as arbitrary by the Apex Court in ***IComm Tele Ltd. – Vs – Punjab State Water Supply and Sewerage Board (2019 (4) SCC 401)***, which has since been followed in the decisions in ***Lombardi Engineering Ltd. – Vs – Urrarakhand Jal Vidut Nigam Ltd. (2024 (4) SCC 341)*** and ***Lite Bite Foods – Vs – Airports Authority of India (2020 SCC OnLine Ker 4736)***. Therefore, the clause in the RFP, which is against the decision of the Apex Court cannot be permitted and necessarily the same requires to be struck down. It is further submitted by the learned senior counsel that the severability of the said clause by AAI cannot be permitted, as insertion of



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illegal clauses constrains the concessionaires to seek judicial intervention, which by itself is an arbitrary and unfair approach.

24. It is the further submission of the learned senior counsel that clauses 5.4.6 and 5.4.7 of the RFP provides for the concessionaire to pay the concession fee even if AAI hands over only a partial portion of the promised units or locations, which, according to the learned senior counsel is grossly on-sided, illogical and against the interests of the concessionaire.

25. It is the further submission of the learned senior counsel that inspite of the promise made by AAI for providing six shops as shown in the layout and promised to the petitioners, with the departure terminal generating more profits, as it would offset the lower volume at the arrival terminal, however, the impugned clauses allow AAI to demand the entire concession fees even if it hands over zero or less than the promises outlets to the concessionaire. In this backdrop, learned senior counsel submitted that if AAI fails to deliver high traffic departure premises while continuing to charge based on passenger traffic, it will destroy the commercial undertaking of the petitioners and force for payment of passengers passing through the area inspite of the non-operation or the shops by



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the concessionaire. The RFP also does not give any timeline as to when the outlets would be handed over, which casts a financial obligation on the petitioners without there being reciprocal duties being fulfilled.

26. It is the further submission of the learned senior counsel that clause 2.2 and Article 7.3 of the Draft Concession Agreement mandate a NIL dues certificate across all AAI airports for a bidder to be eligible to participate in this tender and it also allows unilateral set off of security deposits against unrelated disputed claims, which are nothing but breach of principles of privity of contract.

27. It is the submission of the learned senior counsel that the mandate of NIL outstanding certificate across all airports is nothing but a tool at the hands of AAI as a mechanism for debts recovery and is nothing but an arm-twisting tactics to force the bidders to settle the bona fide disputes which has arisen in other jurisdictions to avoid disqualification in the present tender.

28. In this regard, it is the submission of the learned senior counsel that the power to unilaterally set off security deposits from this contract against alleged dues in unrelated contracts is a breach of principles of privity and it



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revises the conditions of the previously entered into contract between AAI and a concessionaire. Such clauses is against the articulated proposition of law laid down by the Apex Court in ***Gangotri Enterprises Ltd. – Vs – Union of India (2016 (11) SCC 720)***. Thus the higher bargaining power of AAI is used to settle disputes by preventing the bidders to participate in the tender process, if they fail to settle the dues in the other contracts, which clause is perverse, arbitrary and unreasonable.

29. In fine, it is the submission of the learned senior counsel that the clauses referred to above are arbitrary and perverse and inspite of specific questions posed to AAI, no proper response was forthcoming and, therefore, the said clauses being unconstitutional, illegal and perverse, the impugned notification deserves to be set aside and accordingly prays for allowing the writ petition.

30. Per contra, learned Addl. Solicitor General appearing for respondents 1 to 3, viz., AAI, submitted that the challenge to the RFP is wholly misconceived as it forms part of a commercial tender process involving purely contractual terms and conditions and the petitioners being only prospective bidders with no vested



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interests or accrued rights cannot invoke the extraordinary jurisdiction of this Court under Article 226 to seek rewriting or restructuring of the commercial tender conditions.

31. It is the further submission of the learned Addl. Solicitor General that the RFP is purely part of a commercial tender process and the relationship contemplated under the RFP is purely contractual between the licensor and the concessionaire and is governed by mutually agreed commercial terms. It is the further submission that the petitioners are mere prospective bidders and, therefore, they cannot insist upon modification of tender conditions, moreso, when the participation of the petitioners in a government tender is not a fundamental right and at best the bidder is entitled to only fair and non-discriminatory treatment.

32. It is the further submission of the learned Addl. Solicitor General that the petitioners do not challenge any disqualification, procedural irregularity or discriminatory treatment and instead, the petitioners seeks judicial intervention to restructure the financial and commercial architecture of the tender, including the concession fee model, MMG, escalation mechanism and security deposit,



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which are commercial parameters and within the discretion of the tender inviting authority and cannot be subjected to judicial review.

33. It is the further submission of the learned Addl. Solicitor General that the scope of judicial review in tender matters is extremely limited and the Courts can only examine the decision making process and cannot question the commercial wisdom as the same is within the realm of the tender inviting authority.

34. It is the further submission that the clauses of RFP are commercially burdensome or financially unattractive for the petitioners, but commercial hardship and disagreement cannot be the basis to alter the structure and cannot be constitutionally challenged. It is upto the tender inviting authority to prescribe stringent or commercially demanding conditions in order to protect the public revenue and public assets and any contention seeking to reduce such commercial value is not maintainable at the present stage.

35. Referring to the specific contentions advanced on behalf of the petitioners, in earnestness, learned Addl. Solicitor General submitted that the



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denomination of concession fee and related financial paramaters in US Dollars is a standard in commercial practice in duty free retail industry across international airports. It is the submission of the learned Addl. Solicitor General that duty free retail operations involves the use of US Dollars, as it provides uniformity and predictability in long term concession agreements and, therefore, AAI, while restructuring the RFP, has adopted this model to ensure consistency with prevailing global industry practice, moreso when the tender involve global stakeholders and only with a view to have a balance and uniformity and to enable more players to participate, the concession fee in US Dollars has been mandated.

36. It is the further submission of the learned Addl. Solicitor General that the petitioners have not demonstrated how the adoption of US Dollars as a reference currency results in discrimination or arbitrariness. Further the currency denomination applies uniformly to all the bidders and does not confer any advantage or disadvantage to any particular participant and further exchange rate fluctuations are inherent commercial risk in international business transactions and bidders participating in such concessions are expected to factor such variables into their financial models. Further, it is submitted that the prescription of the currency for mode of payment is very much within the



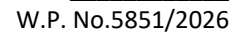
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discretion of the tender inviting authority and when the said prescription has been fixed for all the tenderers, the petitioners cannot claim that it is arbitrary and perverse as no other tenderers, including Indian entities have raised any such plea and the petitioners being a consortium consisting of a foreign investor, fixing the currency which is normally transacted in the global market cannot be said to be arbitrary and perverse.

37. It is the further submission of the learned Addl. Solicitor General that insofar as the challenge made to the arbitration clause is concerned the said contention is premature and misconceived as clause 22.1.3 is not opposed to public nor does it confer any unilateral advantage upon AAI. It is the further submission that the clause merely provides that for disputes where the amount is below INR 50 Crores, a sole arbitrator shall be appointed by the Chairman/Member of AAI after obtaining consent of the other party. Therefore, it is clear that the mechanism does not involve unilateral appointment.

38. It is the further submission of the learned Addl. Solicitor General that stipulation of deposit of 50% of the disputed amount as provided in clause 22.1.3 (c), though the Apex Court had held that such pre-deposit is erroneous, however



39. It is further submitted that the present tender is only at a nascent stage and the arbitration clause would arise only if and when the contract is awarded and a dispute arises between the parties. There being no contractual relationship between the parties and the petitioners are merely prospective bidders, the apprehension and challenge to the said clause by the petitioners is wholly premature and based on hypothetical contingencies and, therefore, does not require the consideration of this court.

40. It is the further submission of the learned Addl. Solicitor General that the challenge made to clause 7.3.1 of RFP is wholly misconceived. It is submitted



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by the learned Addl. Solicitor General that the clause merely recognizes the contractual right of AAI to exercise a lien in respect of amounts that are due and payable by the concessionaire under the agreement. It is the further submission that the aforesaid clause are standard commercial safeguards in concession contracts involving public assets and are intended to secure performance of financial obligations under the contract.

41. It is the further submission of the learned Addl. Solicitor General that the said clause merely enables AAI, upon prior notice to adjust or appropriate amounts due from the concessionaire against amounts held by AAI and such contractual right of lien is well recognized and it cannot be held to be arbitrary or illegal.

42. It is the further submission of the learned Addl. Solicitor General that the reliance of the petitioners on the doctrine of privity of contract is misplaced and the same has no application to the facts of the present case and doctrine of privity operates only where a third party seeks to enforce rights under a contract to which it is not a party. Clause 7.3.1 does not involve any third party



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enforcement nor does it create rights in favour of strangers to the contract and it only governs the rights and obligation between the contracting parties.

43. It is the further submission of the learned Addl. Solicitor General that in concession agreements involving long term financial obligations, it is commercially prudent for the licensor to retain the right to adjust dues payable by the concessionaire against amounts held by it as such provisions are intended to safeguard public revenue and ensure financial discipline and mere existence of such a right of adjustment cannot render the clause void or arbitrary and it is a misapprehension on the part of the petitioners.

44. It is the further submission of the learned Addl. Solicitor General that Article 5.4.6 of RFP has been misconstrued by the petitioners, as the said clause makes it clear that 50% abatement of concession fee is granted where AAI fails to hand over atleast one location in the departure area of the terminal. This clause is a protective mechanism, which safeguards the concessionaire in the event of delay in handing over the operational premises and a similar provision is available under Article 5.4.7 with regard to arrival terminal as well.



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45. It is the further submission that the petitioners have incorrectly equated the situation of *“no premises being handed over”* with the situation contemplated under clause 5.4.6. It is submitted that the clause does not deal with a scenario where absolutely no premises are handed over, instead it operates in defined circumstance where the authority is unable to provide atleast one location in a particular zone (departure area). Only in such an eventuality, the concessionaire is granted a 50% concession in the concession fee, thereby proportionately adjusting the financial liability of the concessionaire.

46. It is the further submission of the learned Addl. Solicitor General that there is a clear distinction between the two situations; where the concessionaire is deprived of the opportunity to operate even a minimum location in the designated zone, the clause grants a 50% reduction in concession fee as a form of contractual relief, which clearly shows that it is intended to balance the commercial interests of both parties rather than impose any unilateral burden upon the concessionaire.

47. It is the further submission of the learned Addl. Solicitor General that the contention of the petitioners that payment of concession fee is demanded



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even if premises is not handed over is incorrect and such an interpretation ignores the express language of the clause which provides for abatement and thereby mitigates the financial obligation of the concessionaire in the event of delayed handover. The interpretation of the petitioner with regard to Article 5.4.6 is an erroneous and misreading of the said provision as it is not legally infirm warranting any interference.

48. In fine, it is the submission of the learned Addl. Solicitor General that the contentions advanced on behalf of the petitioners are not made out, more particularly with reference to issues involving contracts and the same cannot be interfered with by this Court as the construction and application of clauses is best left to the tender inviting authority and the Courts shall not normally interfere and this is one such instance where this Court shall not enter into the domain of the tender inviting authority in formulation of the provisions and, accordingly, prays for dismissal of the petition.

49. In support of the aforesaid submissions, learned Addl. Solicitor General placed reliance on the following decisions :-

- i) *Uflex Ltd. – Vs – State of TN (2022 (1) SCC 165);*



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- ii) *Silppi constructions Contractors – Vs – Union of India (2020 (16) SCC 489);*
- iii) *TANGEDCO – Vs – CSEPDI-Trishe Consortium (2017 (4) SCC 318);*
- iv) *Montecarlo Ltd. – Vs – NTPC Ltd. (2016 (15) SCC 272);*
- v) *Siemens Public Communication Networks (P) Ltd. – Vs – Union of India (2008 (16) SCC 215);*
- vi) *Global Energy Ltd. – Vs – Adani Exports Ltd. (2005 (4) SCC 435);*
- vii) *Association of Registration Plates – Union of India (2005 (1) SCC 679);*
- viii) *Master Marine Services (P) Ltd. – Vs – Metcalfe & Hodgkinson (P) Ltd. (2005 (6) SCC 138);*
- ix) *IComm Tele Ltd. – Vs – Punhab State Water Supply & Sewerage Board (2019 (4) SCC 401); and*
- x) *Michigan Rubber (India) Ltd. – Vs – State of Karnataka & Ors. (2012 (8) SCC 216)*

50. This Court gave its careful consideration to the submissions advanced by the learned senior counsel appearing on either side and perused the materials available on record as also the decisions relied on, on behalf of the parties.

51. In *Uflex case (supra)* the Apex Court has broadly visualised about the process of tender and the limitations in judicial review in the said process and the



same is quoted hereunder by this Court before embarking upon analysing the merits and demerits of the contentions put forth by the parties :-

“The enlarged role of the Government in economic activity and its corresponding ability to give economic ‘largesse’ was the bedrock of creating what is commonly called the ‘tender jurisdiction’. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the ‘Constitution’), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation (‘PIL’) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be



governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted.

4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in *Michigan Rubber v. State of Karnataka* as under:

"23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of



reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

(Emphasis Supplied)



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52. It is evident from the above ratio laid down by the Supreme Court, that fairness in action by the State, non-arbitrariness in essence and substance is the heartbeat of fair play, which are the basic requirements of Article 14 and that judicial review should not be for whimsical or ulterior purpose so long as the State's acts are within the bounds of reasonableness. The Supreme Court had gone on to tabulate the various factors that govern the tender process and the yardstick that needs to be adopted and the flexibility that needs to be given to the State in the discharge of its constitutional obligations by resorting to fair play and showing bona fide intent. Therefore, this court has to analyse the facts and provisions of the tender in the present case on the touchstone of the ratio laid down in the aforestated decision.

53. In the case of ***Tata Cellular – Vs – Union of India (1994 (6) SCC 651)***, the Supreme Court has elucidated the following principles :-

“94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative



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decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

(Emphasis Supplied)

54. Yet again, the Supreme Court in **Silppi Constructions Contractors – Vs – Union of India & Anr. (2020 (16) SCC 489)** has succinctly pointed out that the Court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal.



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Authority which floats the contract or tender, and has authored the tender documents is the best Judge as to how the documents have to be interpreted. If two interpretations are possible, then the interpretation of the author must be accepted and the Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

55. In the teeth of the ratio laid down on the question of appreciation and interference by the Courts in matters relating to contracts/tenders, it is clear that the Courts should be very much circumspect, while interfering in the tender process, as it is a qualitative analysis to be made by experts in the particular field. Suffice for the Court to see that no unreasonableness, arbitrariness, bias or mala fides has crept in, in the tender process. The Supreme Court has also cautioned that the awarding of contracts by the Government and the Public Sector should not be made a cumbersome exercise in a long drawn out litigative battle.

56. Five-fold contentions have been raised by the petitioners, which could be broadly classified under the following heads :-

- i) Insistence of quoting and payment of concession fee in US Dollars;*



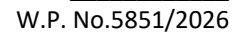
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- ii) *Arbitrariness in Annual Escalation of Concession Fee;*
- iii) *Partial Handover of locations vis a vis concession fee payable;*
- iv) *Appointment of Sole Arbitrator & requirement of pre-deposit; and*
- v) *Cross claims and set off.*

57. However, before proceeding to analyse the contentions advanced, the preemptive contention put forth on behalf of AAI is with regard to the maintainability of the present petition. Though it is submitted that petitioners are prospective bidders and have no right to insist for modification with regard to the manner in which the clauses in the tender have been couched, however, it is not in dispute that the petitioners have partaken in the RFP and have raised some queries, which have not been disputed and, therefore, on that ground this Court is not inclined to decide the question on the technical issue of maintainability and, therefore, is inclined to decide the issue on its own merits.

Issue No.1 :

Insistence of quoting and payment of concession fee in US Dollars



*"1.1.1.1. The Airports Authority of India (the "**Authority**") is engaged in the development, operations and maintenance of airports in India and as part of this endeavour, the Authority construct, operate, maintain and enhance the facilities at Chennai Airport located at Chennai in the state of Tamilnadu, Authority intends to grant Concession for the Development, Operation and Maintenance of Duty-Free Retail Outlets (the "Concession") at designated Concessionaire Managed Locations within the Airport, and has decided to carry out the competitive bidding process for selection of a Bidder to whom the Concession may be awarded (the "Concessionaire"). Brief particulars of the Concession as follows:*

Name of the concession	Develop, Operate and Maintain Duty-Free Outlets at Chennai Airport
Term of Concession	Seven (07) years
Area of Duty-Free Outlets [Detailed in Schedule-A]	1,095 square meter (approx.)
Minimum Monthly Guarantee (MMG) (in USD)	USD 13,03,149.46
Minimum Rate per International Passenger (Arrival + Departing) (in USD) [Bidding parameter]	USD 2.57
Type of Concession	"Quoted rate per



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	<i>International passenger" x "Number of International passenger (arriving + departing)" per month or Minimum Monthly Guarantee (MMG) amount, whichever is higher plus applicable taxes and charges.</i>
--	--

Note: -

i. Bidding will be done on "Minimum Rate per International passenger (Arriving + Departing)" as prescribed in the table above.

ii. Highest quote / offer equal to and above "Minimum Rate per International Passenger (Arriving + Departing)" shall be the sole parameter for selection of highest bidder amongst the qualified bidders.

Offers below "Minimum Rate Per International Passenger (Arriving * Departing)" will not be considered for award.

iv. **Payable monthly Concession Fee:** Monthly concession fee will be equal to: "the quoted Rate Per International Passenger X Number of International Passengers (Arriving + Departing)" OR "Minimum Monthly Guarantee (MMG)", whichever is higher plus applicable taxes and charges.

For more details on the Monthly Concession fee and applicable annual escalation thereon, **Article-10** of the draft concession agreement of this RFP may be referred.



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59. A perusal of the above clause reveals the manner in which the rate is to be determined on which the bidders can bid, which is to the effect that it would be determinable on the basis of per international passenger, both departure and arrival included. However, in case of lower turn out of international passenger in the departure and arrival put together, MMG is also provided to be paid by the allottee. All the above amounts are quoted in US Dollars, which according to the petitioner is disadvantageous and that it works great hardship due to the fluctuating nature of the US Dollars in relation Indian Rupees.

60. In this regard, it is to be pointed out, as laid down in *Uflex case (supra)* that determination of the terms and conditions is within the purview of the tender inviting authority and so long as the terms and conditions are not discriminatory or arbitrary, then the Courts shall not enter into the validity and correctness of the terms and conditions.

61. In the light of the aforesaid ratio laid down, it is seen that the tender inviting authority, considering the global nature of the tender, in which participants/bidders bid as a consortium, which includes foreign entities as well,



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the enormity of the tender and the nature of the tender, which calls for global bidders and the petitioner also being a consortium of a foreign entity, the tender inviting authority, in the best interest of AAI and also for better yield of public revenue had thought it fit to fix the choice of currency as US Dollars. Further, the establishment of duty free retail outlets is mainly to cater to the international air passengers, who depart/arrive through the international terminal, the normal currency globally being transacted by such international travellers being in US Dollars and it is an universally accepted currency, the tender inviting authority had thought it fit to fix the concession fee payable in US Dollars, which cannot be said to be arbitrary, erroneous or perverse. Further, it is to be pointed that more the transaction through US Dollars, the country gets to transact more in international currency, which is better for the economic condition of India.

62. Further, it is also not the case of the petitioners that there is any discrimination in such a condition, as all the players, who are taking part in the bid are made to pay through US Dollars. It is even the admitted case of the petitioners that respondents 4 to 6, who are also bidders in the present tender process are Indian entities while the petitioner is a consortium of an overseas player associated with an Indian and the said respondents have not raised any



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grievance with regard to payment of the said amount in US Dollars. Such being the case, the fixation of choice of currency for payment of the concession fee in US Dollars cannot be said to be perverse or arbitrary.

63. It is also to be pointed out, as aforesaid, that the tender is a global tender attracting foreign investors as well and mainly catering to international travellers and in such a scenario, if the tender inviting authority had, at its discretion, thought it fit to fix the choice of currency as US Dollars, this Court, under the guise of judicial review, cannot interfere with the said fixation unless it is shown to be arbitrary or perverse, which the petitioners have miserably failed to establish.

64. Though it is the stand of the petitioners that even if international players participate, they are mere concessionaires and, therefore, imposing payment in US Dollars is perverse, however, it is to be pointed out that shelling out payments in US Dollars, which is accepted globally, by international players would cause no prejudice to them as the amount which they pay in US Dollars is determined and it is only when it is converted into Indian Rupees, the difference seems to expand exponentially due to the international conversion factor.



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However, a currency, so long as it is not converted into another currency, remains the same and such being the case, the contention advanced by the petitioners is wholly misconceived, as US Dollars is akin to Indian Rupees so long as no conversion takes place. Therefore, there would arise no advantage to AAI and disadvantage to the petitioners due to choice of currency being US Dollars. There is no uncertainty so long as there is no element of conversion from one currency to another and the payment being fixed in US Dollars would not cause any disadvantage to the intending bidders. Further economic disadvantage to the petitioner cannot be construed as arbitrariness of the provisions of the conditions, as other bidders, including Indian bidders have accepted the conditions and, therefore, disadvantage to the petitioners cannot be pleaded as a wholesome disadvantage to all the intending bidders. ***Therefore, the contention advanced on behalf of the petitioners cannot be sustained and accordingly Issue No.1 is answered in favour of AAI.***

ISSUE NO.2 :

Arbitrariness in Annual Escalation of Concession Fee



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65. Escalation in concession fee annually is provided for under Article 10.2.2 of the Draft Concession Agreement, which, according to the petitioners, is arbitrary, as even where there is negative growth or falling passenger traffic, commercial viability of the petitioners have not been looked at but the safety of AAI alone is taken into consideration, which hits at the root of fair play. For better appreciation, Article 10.2.2, for better appreciation, is quoted hereunder :-

“10.2.2 Annual Escalation

i. The Concession fee shall be subject to annual escalation.

ii. The annual escalation shall be applicable as below: -

A. MMG:

Annual escalation* on the Minimum Monthly Guarantee (MMG) shall be applicable at the end of each Concession Year as described below:-

S. No.	Passenger growth (in the preceding 12 months from the last month from the month in which escalation is due)	Annual Escalation
1.	Up to 5% (including negative growth)	5%
2.	Greater than 5% and up to 18%	10%
3.	Greater than 18%	15%

B. Rate Per International Passenger:

5% annual escalation (compounding) shall be applicable on the Quoted Rate per International passenger at the end of each Concession Year.

Note: The first annual escalation is to be applicable after completion of one year of the concession. The date of first



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escalation period shall be reckoned from the original date of commencement of concession term. Thereafter the same will be applicable after completion of subsequent one-year period therefrom.”

66. Prescribing annual escalation cannot be said to be erroneous and equally fixing the escalating percentage cannot also be questioned, as it is very well within the realm of the tender inviting authority in fixing the said percentage. However, the very fixation is questioned with more stress that escalation would be permissible even if there is negative growth in passenger traffic. It is in this backdrop the petitioner contends that the said escalation is perverse.

67. It is to be pointed out that in every activity there is always an element of escalation from one year to the next. It is fixed on the basis of the consumer price index and with the clear understanding that everything is prone to increase and that being the admitted position, the fixation of 5% escalation cost over the MMG cannot be said to be bad. The cost is fixed based on the passenger traffic and even if the passenger traffic comes down, the payable concession fee is only the MMG. Therefore, escalation is fixed on MMG and, thereafter, the further escalation is based on the passenger traffic. If the passenger traffic dwindles,

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then necessarily the 5% escalation is fixed only on MMG. Therefore, on all counts, the tender inviting authority has properly appreciated the facts and had fixed the manner in which the annual escalation charges would be payable by the successful bidders. Growth in passenger traffic would result in growth for the bidders like the petitioners and negative growth would only entail in a nominal increase in annual concession fee, which is a legally permissible increase, which cannot be said to be perverse or erroneous. ***Therefore, the contention of the petitioners that escalation in annual concession fee even if there is negative growth is erroneous does not merit acceptance and Issue No.2 is answered in favour of AAI.***

ISSUE NO.3 :

Partial Handover of locations vis a vis concession fee payable

68. The grievance espoused on this head by the petitioners relate to Clause 5.4.6 and 5.4.7 of the FRP, which deals with concession fee payable during partial hand over of locations of the duty free outlets. For better appreciation, the aforesaid clauses are quoted hereunder :-

"5.4 Concession Fee

* * * * *



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5.4.6 In the event the Authority fails to hand over a minimum of one location in the Departure Area of the Terminal, the Concessionaire shall be entitled to a fifty percent (50%) abatement in the Concession Fee; provided that such abatement shall extinguish on the Concession Fee Commencement Date of the first Location handed over to the Concessionaire in the Departure Area.

5.4.7 In the event the Authority fails to handover a minimum of one Location in the Arrival area of the Terminal, the Concessionaire shall be entitled to a fifty percent (50%) abatement in the Concession Fee; provided that such abatement shall extinguish on the Concession Fee Commencement Date of the first Location handed over to the Concessionaire in the Arrival Area.”

69. As per the contention of the petitioner, a successful bidder is allotted six shops, viz., three in the Departure Area and three in the Arrival Area. The aforesaid clauses proceed on the footing that if AAI fails to hand over a minimum of one location in the Departure/Arrival Area, the concessionaire would be entitled to 50% abatement in the concession. The said clause gives an impression that if a minimum of one location is failed to be handed over by AAI, then 50% abatement in concession fee is given. It is therefore the apprehension of the petitioners that even if no shop is allotted, only 50% concession in the concession fee is provided to the concessionaire and the concessionaire would be required

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to pay the MMG or the rate per international passenger as provided for in clause 1.1.1 and Article 10.2.1 of the RFP even if no shop is allotted.

70. There could be no second thought that the aforesaid clause is a bit ambiguous, as it gives an understanding that if the authority fails to hand over a minimum of one shop in the Departure/Arrival area of the terminal, then the concessionaire would be entitled to 50% abatement in the concession fee, thereby giving a presumption that even if no shop is allotted in the Departure/Arrival terminal, the concessionaire would have to pay 50% of the concession fee. In other words, it portrays a meaning that failure to hand over even one location, the concessionaire would be entitled only to an abatement of 50% of the concession fee.

71. When not even a minimum of one location in the departure/arrival area of the terminal is allotted, the concessionaire cannot be called upon to pay 50% of the concession fee and the said clause cannot be interpreted to mean that the successful bidder would be bound to pay 50% of the concession fee even if no shop is allotted. It is to be pointed out that when no area is allotted for the business enterprise of the concessionaire, no amount can be charged from the



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concessionaire as concession fee. In a contract, the parties should be equally placed and one cannot have a march over the other merely because of the overwhelming bargaining position of one party. The concession fee is on the basis of the allotment made and that the concession fee should be proportionately fixed to the extent of the allotment made. Therefore, necessarily, clause 5.4.6 and 5.4.7 have to be interpreted in the manner that where a minimum of one shop is allotted in the departure/arrival terminal, then the concessionaire would be entitled to 50% abatement of the concession fee and if no shop is allotted in the departure/arrival terminal, then till such time atleast a minimum of one shop is allotted, the concessionaire would not be required to pay any concession fee.

72. Though it is the submission on behalf of AAI that the aforesaid clauses clearly demonstrate the balancing of commercial interests of both the parties rather than imposing any unilateral burden on the concessionaire, however, the clauses, read as such, clearly have an element of ambiguity as it proceeds on the premise that even if one shop is allotted the concessionaire is bound to pay the entire concession fee and if no shop is allotted, in such a scenario, the concessionaire is bound to pay only 50% of the concession fee, as 50%



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abatement in concession fee is provided, which clearly shows that AAI, as the licensor, gets an upper hand in getting its return when the successful bidder has not even started its business. Read in tandem with clause 5.4.5, it would be clear that on and from the commencement date, concession fee is payable, and when even one shop is allotted, the abatement will stand extinguished, which would be against the interests of the concessionaire.

73. Further, it is to be pointed out that the concession fee is based on the passenger traffic and higher the passenger traffic, the higher would be the outflow of the concessionaire and where the concessionaire is not provided with the entire extent of the allotment, only to off-set the difficulties of the concessionaire, the provision is provided by granting 50% abatement in the concession fee, which is to off-set the loss of the concessionaire and, therefore, the said clause has to be read in the above fashion, which alone would be in the interests of both parties to the contract. ***Therefore, clauses 5.4.6 and 5.4.7 are have to be read in the manner that where a minimum of one shop alone is allotted in the departure/arrival terminal, then the concessionaire would be entitled to 50% abatement of the concession fee and if no shop is allotted in the departure/arrival terminal, then till such time atleast one shop is allotted, the***



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concessionaire would not be required to pay any concession fee till such time a minimum of one shop is allotted from which time, the concessionaire would be entitled to abatement of 50% of the concession fee.

ISSUE NO.4 :

Appointment of Sole Arbitrator & requirement of pre-deposit

74. To appreciate the abovesaid issue, it is but necessary to refer to Clause 22.1.3 of the RFP and the same is quoted hereunder :

22.1.3 Adjudication through Arbitration: In case no final settlement has been arrived at between the parties after mediation or partially settled as per Clause 22.1.2 above, the unresolved dispute(s), on invocation by the aggrieved party shall be referred for adjudication by arbitration.

a. When the amount involved is above 50 crores, adjudication shall be made by Arbitral Tribunal comprising of 03 arbitrators. Each party to appoint one arbitrator and the two appointed arbitrators shall appoint the Presiding Arbitrator.

b. When the amount involved is Rs. 50 crores and below shall be referred to a Sole Arbitrator to be appointed by Chairman/Member, AAI, after obtaining consent of the other party, as per format annexed at Appendix-IV.



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c. In both the above cases, the licensee shall have to deposit 50% of the disputed amount (in the form of BG (Additional Bank Guarantee with validity of minimum two years from the date of making such reference, and further extendable)/ DD/PO/RTGS/NEFT) with AAI as condition precedent before making reference to the Arbitration for adjudication of dispute.”

75. There could be no quarrel with the manner in which Arbitrators is to be appointed as provided for in sub-clause (a) and (b) of Clause 22.1.3. In case where the dispute involved exceeds Rs.50 Crores, each party to the contract would appoint one arbitrator and the two arbitrators so appointed would choose a third arbitrator and in case where the dispute involved is Rs.50 Crores and below, the Chairman/Member of AAI, after obtaining consent of the other party, would appoint an arbitrator.

76. The main grievance espoused by the petitioner is only with reference to the 50% deposit of the disputed amount as condition precedent for making a reference, which is assailed by the learned senior counsel for the petitioners by relying upon the decision of the Apex Court in *IComm case (supra)*, wherein the Apex Court has held thus :-



24. Further, it is also settled law that arbitration is an important alternative dispute resolution process which is to be encouraged because of high pendency of cases in courts and cost of litigation. Any requirement as to deposit would certainly amount to a clog on this process. Also, it is easy to visualize that often a deposit of 10% of a huge claim would be even greater than court fees that may be charged for filing a suit in a civil court. This Court in *State of J & K v. Dev Dutt Pandit*, MANU/SC/1024/1999 : (1999) 7 SCC 339, has held:

23. Arbitration is considered to be an important alternative disputes redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process. What happened in the present case is certainly a paradoxical situation which should be avoided. Total contract is for Rs. 12,23,500. When the contractor has done less than 50% of the work the contract is terminated. He has been paid Rs. 5,71,900. In a Section 20 petition he makes a claim of Rs. 39,47,000 and before the arbitrator the claim is inflated to Rs. 63,61,000. He gets away with Rs. 20,08,000 with interest at the rate of 10% per annum and penal interest at the rate of 18% per annum. Such type of arbitration becomes subject of witticism and do not help the institution of arbitration. Rather it brings a bad name to the arbitration process as a whole. When



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claims are inflated out of all proportions not only that heavy cost should be awarded to the other party but the party making such inflated claims should be deprived of the cost. We, therefore, set aside the award of cost of Rs. 7500 given in favour of the contractor and against the State of Jammu and Kashmir.

* * * * *

27. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive.”

77. The Apex Court, in the aforesaid decision has clearly highlighted the clog which would befall on the alternative dispute mechanism if pre-deposit is enforced as a condition precedent for invoking the arbitration process. It has been pointed out in the said decision that only to encourage the parties to amicably settle the matter with least wastage of time and resources and the parties being put in a win-win situation, resort to alternative dispute mechanism like arbitration is mooted out. However, if such fetters are put by way of pre-deposit as a condition precedent for resorting to the arbitration process then definitely the parties would not avail the alternative dispute mechanism, as



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knocking on the doors of the Courts would be far more economical than paying the pre-deposit. In the present case, pre-deposit of 50% of the disputed amount has been mandated for making reference for arbitration. If the disputed amount runs to about Rs.40 Crores and a reference for arbitration is sought and if the party/concessionaire is directed to make a pre-deposit of 50%, which would work to about Rs.20 Crores, then the party would definitely not opt for arbitration. Therefore, to that extent the condition prescribed in sub-clause (c) of clause 22.1.3 cannot be permitted, which along would be in line with the ratio laid down in *IComm case (supra)*.

78. However, would the severance of the said clauses, as held in Issue Nos.3 and 4 invalidate the RFP in totality is an ancillary question that falls for consideration. It is to be pointed out that even hereto, the decision in *IComm case* lays down the proposition that where the severability of certain clauses does not affect the remaining parts of the clause, then the said portion of the clauses alone could be severed. ***Following the ratio laid down above, sub-clause (c) of Clause 22.1.3 relating to Adjudication through Arbitration being severable as it does not affect the remaining parts of 22.1.3 the said sub-clause (c) of Clause***



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22.1.3 relating to Adjudication through Arbitration alone is struck down. Issue No.4 is answered accordingly.

ISSUE NO.5 :

Cross claims and set off

79. The last of the contention relates to cross claims and set off as provided in Clause 2.2 and Article 7.3 in and by which AAI had imposed a condition that a NIL due certificate across all AAI airports should be submitted so as to entitle the bidder to participate in the tender. Further, it also allows unilateral adjustment of security deposits against unrelated disputes. For better appreciation Article 7.3, which is crucial is quoted hereunder :-

“7.3.1 Set-Off Clause :

In the event of a default or breach in payment of license fee or interest amount or any other amount due with the licensee of whatever nature as per the provision of this contract, AAI is hereby authorized to adjust such amount from time to time to the fullest extent, with prior notice of 7 (seven) days to the licensee, by set off and apply any or all amount at any time held with AAI as security deposit or bank guarantee or any other amount as part of this contract or from any other expired/closed/terminated contracts of licensee with AAI. This



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is without prejudice to any rights and remedies available with AAI to recover the dues from licensee as prescribed by Law.

Explanation 1: - *For the purposes of this agreement, set off means adjustment of any outstanding due(s) of Licensee, with any amount in form of BG /SD or otherwise, held by AAI in relation to any other agreement, at any AAI airport/airport premises.*

Explanation 2 - *Outstanding dues shall mean and include any amount accrued /due against the licensee under this or any other agreement at any of AAI airport /airport premises.”*

80. Vide the aforesaid clause, AAI has been vested with unbridled powers to adjust any or all amount at any time held with AAI as security deposit or bank guarantee or any other amount as part of this contract or from any other expired/closed/terminated contracts of licensee with AAI. Explanation 1 to the said clause clearly prescribes that any amount in the form of Bank Guarantee/Security Deposit held by AAI in relation to any other agreement at any other AAI Airport/airport premises could be adjusted by AAI with respect to dues payable by a licensee. This clause, according to the petitioner gives power to AAI to adjust any amount, even if in dispute and referred for arbitration or otherwise, without the concurrence of the licensee, which is alien to the law of contracts and, therefore, the same is impermissible.



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81. The decision in *Gangotri Enterprises case (supra)* relied on by the petitioner would have a bearing on deciding the present issue and, therefore, the relevant portion of the said decision is quoted hereunder :-

“40. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the Respondents from the Appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the Respondents from the Appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the Respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the Respondents, they had no right to encash the Bank Guarantee.”



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82. First of all, for AAI to claim a sum by means of adjustment, there should be an adjudicated sum, which has been adjudicated by a court of law or any judicial proceeding barring an admitted sum and in the absence of such adjudication, the same cannot be set-off or adjusted by AAI. Furthermore, for adjusting admitted/adjudicated sum, from the bank guarantee/security deposit of an earlier contract, the present contract as well as the earlier contract should have identical clauses which provides for adjustment of any sum from the bank guarantee/security deposit. In short, a works contract is a closed contract, which cannot be elongated to the next contract so as to suit the convenience of one party. Even if such elongation is permitted, in such case, the contracts from which adjustment is to be made in respect of such admitted/adjudicated sums should have similar clause as is provided in the current contract, which alone would provide a leverage for the licensor to seek for such adjustment and in the absence of such a clause, a contract is guided by its specific terms and it is binding on the parties and no extension of the same could be made between two contracts so as to realise amounts, which are allegedly due to a licensor. Therefore, to that extent the Article 7.3 of RFP, which permits AAI to set-off/adjust the amounts from the bank guarantee/security deposit paid by a licensor in an earlier contract to be made available for making payment to the



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present contract is impermissible in the absence of equivalent clauses in both the contracts.

83. Insofar as set-off is concerned, which enures to the benefit of the concessionaire, such set-off is permissible only in the event of Force Majeure situations, where the concessionaire is prevented to perform its obligations under the contract, which situations as specifically spelt out under Article 17 of the RFP. Barring the aforesaid situations, any other situation, which does not have a direct bearing on affecting the execution of the work by the concessionaire could be brought within the ambit of Force Majeure situation so as to enable the concessionaire to seek for set-off. Therefore, set-off is permissible only as per the situations envisaged under Article 17 and not otherwise.

84. *Accordingly, Article 7.3 of RFP, is clarified that where the earlier contract and the present contract between AAI and the very same concessionaire provides for a similar clause in both the contracts, then AAI would be entitled to enforce the bank guarantee/security deposit of the earlier contract for the purpose of adjustment in the later contract and if such similar clause is not*



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available in both the contracts, then the security deposit/bank guarantee given in an earlier contract cannot be used for adjustment of amounts payable by the concessionaire in the present contract. Likewise, set-off is permissible only on account of the situations envisaged under Article 17 of the RFP and not otherwise. Issue No.5 is answered accordingly.

85. For the reasons aforesaid this writ petition is disposed of with the aforesaid abovesaid observations and directions. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

10.03.2026

Index : Yes / No

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To

1. The Secretary
Ministry of Civil Aviation
Government of India, Block 'B'
Rajiv Gandhi Bhawan
Safdarjung Airport Area
New Delhi 110 003.
2. The Chairman
Airports Authority of India
Rajiv Gandhi Bhawan
Opp: Safdarjung Airport Area
New Delhi 110 003.
3. The Airport Director
Airports Authority of India, Chennai
Chennai International Airport
Chennai – Trichy Highway, Tambaram
Meenambakkam, Chennai 600 027.



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M.DHANDAPANI, J.

GLN

**PRE-DELIVERY ORDER IN
W.P. NO.5851 OF 2026**

**Pronounced on
10.03.2026**