$~

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

Reserved on: 24th July, 2020
Pronounced on: 27th November, 2020

\+ O.M.P. (I) (COMM.) 174/2020 & I.A. 5430/2020, I.A. 5467/2020 and I.A. 5468/2020

MUMBAI INTERNATIONAL AIRPORT LIMITED

..... Petitioner

Through: Dr. Abhishek Manu Singhvi and Mr. Ravi Sikri, Sr. Advs. with Mr.Kartik Nayar, Mr. Rishab Kumar, Mr.Ankur Chawla, Ms. Pallavi Langar, Mr.R.K. Mohit Gupta, Mr. Sarthak Malhotra and Mr. Chritarth Palli, Advs.

versus

AIRPORTS AUTHORITY OF INDIA & ANR.

.... Respondents

Through: Mr. Tushar Mehta, Solicitor General of India with Mr. Raghav Shankar and Mr. Karan Lahiri, Advs. for R-1
Mr. S.L. Gupta and Mr. Aditya Vikram Gupta, Advs. for R-2/SEBI

CORAM:
HON'BLE MR. JUSTICE C .HARI SHANKAR

% **J U D G M E N T**

1. Premised on the following recital of facts, the petitioner Mumbai International Airport Ltd. (hereinafter referred to as "MIAL") seeks pre-arbitral interim relief, under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Arbitration Act"):

(a) On 17th February, 2004, the respondent Airport Authority of India (hereinafter referred to as "AAI") issued an Invitation to Register Expression of Interest, inviting Joint Venture (JV) bidders, to partner with AAI, in MIAL, which had been incorporated for designing, developing, constructing, financing, managing, operating and maintaining the Chhatrapati Shivaji Maharaj International Airport at Mumbai, Maharashtra. A consortium comprising of M/s GVK Industries Ltd., GVK Airport Developers Pvt. Ltd., Bidvest Group Ltd., Bid Services Division (Proprietary) Ltd. and the Airport Company South Africa Ltd., emerged as the successful bidder. The members of the said consortium entered into an *inter se* Consortium Members' Agreement on 2nd April, 2006.

(b) MIAL and AAI executed an Operation, Management and Development Agreement (hereinafter referred to as the "OMDA") on 4th April, 2006. On the same day, MIAL, AAI, GVK Airport Holdings Pvt. Ltd., Bid Services Division (Mauritius) Ltd. and Airport Company South Africa Global Ltd. entered into a Shareholders Agreement, with which we are

not particularly concerned in the present case. The salient features of the OMDA may be set out thus:

(i) Under the OMDA, AAI leased, to MIAL, the areas stipulated in the Schedule to the OMDA – which, essentially, included the CSI Airport and associated areas. Concomitantly, MIAL was responsible for the operation and management of the Airport, and for the performance of all activities and services undertaken therein. AAI undertook to provide operational support to MIAL for three years, for which the Operation Support Cost was fixed at ₹ 95 crores. MIAL was required to "operate, maintain, develop, design, construct, upgrade, modernise, manage and keep in good operating repair and condition the Airport, in order to ensure that the Airport at all times meets the requirements of an international world class airport", and in accordance with internationally accepted standards.

(ii) Chapter III of the OMDA sets out the "Conditions Precedent", to be fulfilled by the JVC and AAI. Clause (iii) of Articles 3.1.1 and 3.1.2 required the AAI, and the JVC, to execute, and deliver to the other, a counterpart of the Escrow Agreement. "Escrow Agreement" is defined, in Article 1.1, as meaning "the escrow agreement to be entered into between the AAI, the JVC and a bank in the form set forth in Schedule 13" to the OMDA.

(iii) Chapter XI of the OMDA deals with "Fees". Article 11.1.1 requires MIAL to pay, to AAI, ₹1,150 crores as an "Upfront Fee", on or before the Effective Date, being the date of satisfaction, by MIAL, of the Conditions Precedent stipulated in the OMDA. This payment had been made by MIAL. Article 11.1.2 envisages an "Annual Fee". Sub-Articles 11.1.2.1 to 11.1.2.4 thereof read thus:

> "**11.1.2.1** The JVC shall also pay to the AAI an annual fee ("**AF**") for each Year during the Term of this Agreement of the amount set forth below:
>
> AF = 38.7% of **projected** Revenue for the said Year
>
> Where projected Revenue for each Year shall be as set forth in the Business Plan.
>
> **11.1.2.2** The AF shall be payable in twelve equal monthly instalments, each instalment (hereinafter referred to as "Monthly AF" or "MAF") to be paid on the first day of each calendar month. The JVC shall from time to time cause the Escrow Bank to make payment of the MAF to AAI in advance on or prior to the 7th day of each month by cheque drawn in favour of AAI. If AAI does not receive the payment of MAF due hereunder by the due date provided herein, the amount owed shall bear interest for the period starting on and including the due date for payment and ending on but excluding the date when payment is made calculated at State Bank of India Prime Lending Rate + 10% p.a. Notwithstanding anything contained herein, the JVC shall at all times be liable to pay the MAF in advance on or prior to the 7th day of each month.

11.1.2.3

(i) In the event that in any quarter the actual Revenue exceeds the projected Revenue, then JVC shall pay to AAI the additional AF attributable to such difference between the actual quarterly Revenue and the projected quarterly Revenue within 15 days of the commencement of the next quarter; and

(ii) in the event that the projected Revenue in any quarter exceeds the actual Revenue, then AAI shall pay to JVC such portion of the AF received as is attributable to the difference between the projected Revenue and the actual Revenue by way of an adjustment against the AF payable by the JVC to AAI in the current quarter; provided further that in the event the actual Revenue in any quarter is greater than 110% of the projected Revenue of such quarter, the JVC shall pay to AAI interest for difference between the actual Revenue and the projected Revenue at the rate of State Bank of India Prime Lending Rate plus 300bps in the following manner:

(i) interest of three (3) months on 1/3rd of the difference between the projected Revenue and the actual Revenue;

(ii) interest of two (2) months on 1/3rd of the difference between the projected Revenue and the actual Revenue;

(iii) Interest of one (1) month on 1/3rd of the difference between the projected Revenue and the actual Revenue.

It is clarified that if the projected quarterly Revenue is equal to or less than 110% of the actual quarterly Revenue, then no interest shall

be payable; interest shall only be payable on the difference between the actual quarterly Revenue and the projected quarterly Revenue in the event the actual quarterly Revenue is greater than 110% of the projected quarterly Revenue."

(iv) "Revenue" was defined, in the OMDA, thus:

" "Revenue" means all pre-tax gross revenue of JVC, excluding the following: (a) payments made by JVC, if any, for the activities undertaken by Relevant Authorities or payments received by JVC for provision of electricity, water, sewerage, or analogous utilities to the extent of amounts paid for such utilities to third party service providers; (b) insurance proceeds except insurance indemnification for loss of revenue; (c) any amount that accrues to JVC from sale of any capital assets or items; (d) payments and/or moneys collected by JVC for and on behalf of of any governmental authorities under Applicable Law (e) any bad debts written off provided these pertain to past revenues on which annual fee has been paid to AAI. It is clarified that annual fee payable to AAI pursuant to Article 11 and Operational Support Cost payable to AAI shall not be deducted from Revenue."

(v) Chapter XV of the OMDA deals with disputes and their resolution. Arbitration, by an Arbitral Tribunal comprising three arbitrators, is visualised, in Article 15.2, as the fallback option, in case the disputes were not amicably resolved in terms of Article 15.1.

(vi) Chapter XVI of the OMDA deals with "*Force Majeure*". Articles 16.1.1 and 16.1.2 (which is clumsily worded), thereunder, read thus:

> "**16.1 Force Majeure**
>
> 16.1.1 The JVC, or AAI, as the case may be, shall be entitled to suspend or excuse performance of its respective obligations under this Agreement to the extent that AAI or JVC, as the case may be, is unable to render such performance by an event of Force Majeure (a "**Force majeure**").
>
> 16.1.2 In this Agreement, "Force Majeure" means any event or circumstance or a combination of events and circumstances, which satisfies all the following conditions:
>
> (a) materially and adversely affects the performance of an obligation;
>
> (b) are beyond the reasonable control of the affected Party;
>
> (c) such Party could not have prevented or reasonably overcome with the exercise of Good Industry Practice or reasonable skill and care;
>
> (d) do not result from the negligence or misconduct of such Parties or the failure of such Parties to perform its obligations hereunder; and
>
> (e) (or any consequence of which), have an effect described in Article 16.1.1."

Article 16.1.2, thus, contains a general definition of "*Force Majeure*", setting out its various indicia. Article

16.1.3 enumerates various specific instances which would amount to "*Force Majeure*". "Epidemic or plague within India" is one of the circumstances which specifically amounts to "*Force Majeure*", *vide* Article 16.1.3(vii). Additionally, clause (x) of Article 16.1.3 covers "any events or circumstances of the nature analogous to any events set forth in paragraphs (i) to (viii) of this Article 16.1.3 above within India." It is obvious, therefore, that the COVID-2019 pandemic constitutes *force majeure*, within the meaning of the OMDA. Indeed, AAI has not sought to dispute this position.

(vii) Article 16.1.5 sets out the procedure to be followed, in the event of *force majeure*. Article 16.1.5(a) requires the parties, claiming relief on account of a *force majeure* event, to, immediately on becoming aware of the event, give Notice to the other party, setting out the particulars of the *force majeure* event, and the manner in which it affected the obligations of the claimant Party. Upon delivery of such notice, Article 16.1.5(b) to (d) stipulate thus:

> "(b) The affected Party shall have the right to suspend the performance of the obligation(s) affected as described in Article 16.1, upon delivery of the notice of the of occurrence of a Force Majeure event in accordance with sub-clause (a) above.

> (c) The time for performance by the affected Party of any obligation or compliance by the affected Party with any time limit affected by Force Majeure, and for the exercise of any right affected thereby, shall be extended by the period during which such Force Majeure continues and by such additional period thereafter as is necessary to enable the affected Party to achieve the level of activity prevailing before the event of Force Majeure.
>
> (d) The Party receiving the claim for relief under Force Majeure shall, if it wishes to dispute the claim, give written notice of dispute to the Party making the claim within 15 days of receiving the notice of claim. If the notice of claim is not contested within 15 days as stated above, all the Parties to this Agreement shall be deemed to have accepted the validity of the claim. If any Party disputes a claims, the Parties shall follow the procedures set forth in Article 15."

Continuation of the *force majeure* event for over 365 days may result in termination, *ipso facto*, of the OMDA, *vide* Article 16.1.7 thereof.

(viii) Chapter XVII of the OMDA deals with "Default". Article 17.1, thereunder, deals with "AAI's Event of Default", whereas Article 17.2 deals with "JVC Event of Default". These Events of Default, if committed by JVC, or AAI, and if not cured within the permitted time period, entitle the other party to terminate the Agreement in accordance with Article 17.3. However, the events enumerated in the various clauses of the said Articles were to be "Events of Default" to the extent not caused

by a default of the party alleging default *"or Force Majeure*".

(ix) Schedule 13 to the OMDA sets out the draft Escrow Account Agreement, required to be executed between AAI and MIAL, as per the OMDA.

(c) As per the requirement of the OMDA, an Escrow Account Agreement (hereinafter referred to as "the Escrow Agreement") was executed, among MIAL, AAI and the UTI Bank Ltd., on 28th April, 2006. This Escrow Agreement was, later, substituted by a fresh Escrow Agreement, dated 18th April, 2018, among MIAL, AAI and the State Bank of India (SBI). Article 2.1 of the Escrow Agreement required the establishment of an Escrow Account, and read thus:

"**2.1 Establishment of the Accounts**

The Company and the Escrow Bank confirm that the Escrow Bank has established, in the name of the Company at the Escrow Bank's Industrial Finance Branch, Mumbai, an account titled the **"Escrow Account"**. There Escrow Account shall have the following sub accounts, maintained, controlled and operated by the Escrow Bank for the purposes of this Agreement, namely:

(a) a sub account maintained, controlled and operated by the Escrow Bank, titled the **"Proceeds Account"** which shall have the following sub accounts;

(b) a sub account maintained, controlled and operated by the Escrow Bank, titled the **"Proceeds Account"** which shall have the following sub- accounts:

(i) a sub-account maintained, controlled and operated by the Escrow Bank, titled the **"Statutory Dues Account"**;

(ii) a sub-account maintained, controlled and operated by the Escrow Bank, titled the **"AAI Fee Account"**; and

(iii) a sub-account maintained, controlled and operated by the Escrow Bank, titled the **"Surplus Account"**."

The manner in which the Escrow Account was to be operated was stipulated in Article 3 of the Escrow Agreement, which read thus:

"3. The Escrow Account

The Escrow Account shall comprise of the following sub-accounts:

3.1 Receivables Account

(A) Deposits to the Receivables Account

The Company hereby undertakes that it shall deposit into the Receivables Account all its Receivables immediately upon receipt thereof.

(B) Withdrawals from the Receivables Account

Immediately on receipt of moneys into the Receivables Account, the Escrow

Bank shall withdraw such moneys and deposit the same into the Proceeds Account.

3.2 Proceeds Account

The Proceeds Account shall be established by the Escrow Bank at its Mumbai branch in the name of the Company.

(A) Deposits into the Proceeds Account

(i) The Escrow Bank shall in accordance with Section 3.1 of this Agreement, immediately on such deposit. transfer moneys deposited in the Receivables Account, into the Proceeds Account.

(B) Withdrawals from the Proceeds Account

(a) As long as there is no Event of Default on any date, the Escrow Bank shall withdraw amounts deposited in the Proceeds Account only towards the following purposes and in the following order of priority (hereinafter the "**Priority Cash-flow Application"**):

(i) to pay amounts into the Statutory Dues Account such that by no later than the last day of any Month the amounts so transferred in that Month are equal to the monthly Statutory Dues for the following Month.

(ii) to pay amounts into the AAI Fee Account such that by no Later than the last day of any Month the amounts so transferred in that Month are equal to the monthly AAI Fee for the following Month.

(iii) To pay amounts other than AAI Fee, if any, payable by the JVC to AAI under the OMDA, as notified in writing by AAI to the Escrow Bank.

(iv) to pay any and all balance amounts into the Surplus Account.

(b) It is hereby expressly clarified that if, in any Month, the funds available in the Proceeds Account for transfer to any sub-account in accordance with Section 3.2(B)(a) are insufficient to pay the amount required to be paid in each of the sub-accounts in accordance with Section 3.2(B)(a), then the Escrow Bank shall transfer funds to the relevant sub-account in accordance with the Priority Cash-flow Application.

3.3 Statutory Dues Account

The Statutory Dues Account shall be established by the Escrow Bank at Mumbai in the name of the Company.

(A) Withdrawals from the Statutory Dues Account

On the deposit of any amounts in the Statutory Dues Account in accordance with Section 3.2(B)(a)(i), the Escrow Bank shall withdraw amounts from the Statutory Dues Account as are required by the Company to make payments of Statutory Dues as required under Applicable Law.

3.4 AAI Fee Account

The AAI Fee Account shall be established by the Escrow Bank at Mumbai in the name of Company.

(A) Withdrawals from the AA[Fee Account

On the deposit of any amounts in the AAI Fee Account in accordance with Section 3.2(B)(a)(ii), the Escrow Bank shall withdraw amounts from the AAI Fee Account as are required by the AAI.

3.5 Surplus Account

The Surplus Account shall be established by the Escrow Bank in the name of the Company.

(A) Withdrawals from the Surplus Account

The Escrow Bank shall pay, from time to time, to the Company, within three (3) days of receiving directions in this regard from the Company, such amounts from the Surplus Account as the Company may direct. Provided however, in the event of the Escrow Bank receiving directions from the Lenders or their agent/trustee, then the Escrow Bank shall follow the instructions of the Lenders (or their agents/trustee) in relation to the Surplus Account and amounts therein."

Article 8.7.2 required all disputes, which could not be amicably settled, to be referred to arbitration, and Article 8.7.3 envisaged the Arbitral Tribunal as consisting of three arbitrators, to be appointed as stipulated therein.

(d) MIAL points out, correctly, that the Escrow Agreement and the OMDA were inextricably interlinked and that, in fact, the Escrow Agreement was merely a Schedule to the OMDA.

(e) Till 2020, MIAL claims to have paid, promptly and as per the specified covenants of the OMDA, the MAF, as well as to have fulfilled all other obligations, cast on MIAL by the OMDA. The sudden COVID-2019 pandemic, however, it is claimed, resulted in a near complete cessation of the activities of MIAL, and severe debilitation of its financial resources. The "pre-tax gross revenue" of MIAL, as a result of the pandemic, it is claimed, was less than the amounts which MIAL had unavoidably to expend to comply with its legal and statutory obligations and commitments, resulting in it becoming impossible for MIAL to abide by its commitment to pay MAF, promptly, as required by the OMDA. MIAL highlights the following events, including advisories and instructions issued by the Central Government and the Government of Maharashtra, which resulted in a situation of financial impossibility, so far as honouring, by MIAL, of its obligations under the OMDA, were concerned:

(i) In view of the spurt of COVID-2019 cases being reported from China, the Central Government issued a Travel Advisory dated 5th February, 2020, making existing Visas inapplicable for any foreign national travelling from China, and requiring people, travelling to China, to be quarantined on return.

(ii) On 26th February, 2020, a Consolidated Travel advisory was issued by the Ministry of Health and

Family Welfare (MoHFW) in which, besides reiterating the restrictions already imposed by the earlier Travel Advisory dated 5th February, 2020, Indian citizens were advised to refrain from non-essential travel to Singapore, Republic of Korea, Iran and Italy. It was further stipulated that persons coming from the Republic of Korea, Iran or Italy, or having a history of travel to these countries, would be quarantined for 14 days on arrival in India.

(iii) This Consolidated Travel advisory was revised, by the MoHFW, on 2nd March, 2020, extending the advice, not to travel, to Japan, apart from China, Republic of Korea, Iran and Italy. It was further stipulated that persons coming from any of these countries to India would be quarantined. Further, existing Visas were no longer to remain valid for any foreign national travelling from these countries and, in the case of compelling reasons, intending visitors were required to contact the Indian Embassy in the said countries and apply afresh for an Indian visa.

(iv) An additional Travel Advisory was issued, on 5th March, 2020, by the Central Government, to the effect that passengers travelling from, or who had visited Italy or the Republic of Korea, and were desirous of entering India, would need a certificate of having tested negative for the COVID-2019 virus from designated laboratories

authorised by the health authorities of those countries. This directive was made applicable from the midnight of 10th March, 2020, to remain in force till the subsiding of cases of COVID-2019 – which, sadly, is yet to take place.

(v) Further, with effect from 18th March, 2020, prohibition on travel, to India, from the countries of the European Union, the European Free Trade Association, Turkey and the United Kingdom, was also imposed.

(vi) In the meanwhile, on 13th March, 2020, the Government of Maharashtra invoked provisions of the Epidemic Diseases Act, 1897. This exacerbated the situation, as it indicated that the state was in the throes of an epidemic, and in a state of a public health emergency.

(vii) A cascading effect, of these developments, was that various concessionaires, located at the CSI Airport, from whom MIAL used to earn revenues, conveyed their inability to make payments, under the respective concession agreements. This further debilitated the financial position of MIAL.

(viii) Consequent to the imposition of lockdown, by the Central Government and the Government of Maharashtra, with effect from 28th March, 2020, operations in the CSI Airport came to a complete

standstill. Opportunities for earning revenue, by MIAL, were, consequently, brought to a halt.

(f) On 17th March, 2020, MIAL wrote to AAI, under Article 16.1.5(b) of the OMDA, stating that a *force majeure* event, within the meaning of Article 16.1.3, had occurred with effect from 13th March, 2020, when the notification was issued by the Government of Maharashtra under the Epidemic Diseases Act, 1897. The scourge of the COVID-2019 pandemic was, it was pointed out, increasing in intensity, and the situation of *force majeure* would, therefore, cease only on revocation, by the Government of Maharashtra, of the notification issued by or under the Epidemic Diseases Act. It was submitted that, in the circumstances, all indicia, for the existence of a *force majeure* event, as envisaged by Article 16.1.2 of the OMDA, existed. MIAL, therefore, informed AAI that it was suspending its obligation towards the payment of AF/MAF, and that it had instructed the SBI, as the Escrow Bank, not to transfer any amount to the AAI Fee account, commencing April 2020. AAI was also requested to recommend providing of financial assistance to MIAL, by the Government of India.

(g) The situation, thereafter, progressively worsened, with the following developments:

(i) Further stringency, in the restrictions relating to travel by air passengers in the wake of the COVID-2019 pandemic, were introduced by Circular, dated 19th

March, 2020, issued by the Director General of Civil Aviation (DGCA), which stipulated, *inter alia*, thus:

> "(i) No scheduled international commercial passenger aircraft shall take off from any foreign airport for any airport in India, after 0001 hours GMT of March 22, 2020 (0530 hrs Indian Standard Time (IST) of March 22, 2020). These instructions shall remain in force till 0001 hrs GMT of March 29, 2020.
>
> (ii) A maximum travel time of 20 hours is permissible for such commercial passenger aircraft to land in India.
>
> (iii) As such, no incoming scheduled international commercial passenger aircraft shall be allowed to disembark its passengers on Indian soil (Foreigner or Indian) after 2001 hrs GMT of March 22 (0131 hrs IST of March 23, 2020)."

(ii) *Vide* order dated 23rd March, 2020, the Ministry of Civil Aviation directed the discontinuance of all scheduled and non-scheduled domestic flights, except all-cargo flights, w.e.f. 2359 hours IST on 24th March, 2020. Airports were, however, to continue to function, for handling permitted flight operations, such as medical evacuation flights or other flights specifically approved by the DGCA.

(iii) The Municipal authorities in the city of Mumbai also issued consequential directions. On 20th March, 2020, the Municipal Corporation of Greater Mumbai (the MCGM) issued an Order, closing all schools, cinema

halls, swimming pools, gyms, malls, mill compounds, spas, clubs, pubs, discotheques, amusement parks, and private and corporate establishments. Eating outlets were permitted to function at 50% customer capacity, and only establishments providing essential services were excluded from the lockdown. Additionally, vehicular movement was restricted in areas of isolation centres and quarantine centres.

(iv) This was closely followed, on 20th March, 2020, by a Prohibitory Order, issued by the Commissioner of Police, Greater Mumbai under Section 144 of the Code of Criminal Procedure, 1973 (the CrPC), prohibiting the presence or movement of five or more persons in public or private places, including religious places as well as vehicles carrying five or more persons, for any reason whatsoever, except to certain exempted entities, w.e.f. 05.01 hours on 23rd March 2020, till 24.00 hours on 31st March, 2020.

(v) With effect from 22nd March, 2020, the Central Government declared a "*Janata* curfew", followed by a nationwide lockdown on 24th March, 2020, prohibiting movement all over the country, and bringing, to a halt, all vehicular movement in the country.

(h) In the circumstances, MIAL wrote, on 24th March, 2020, to AAI drawing attention to its earlier letter dated 17th March,

2020 and pointing out that, with the discontinuance of all international and domestic flights, without any reduction in operating expenditure of the Airport, the situation had resulted in the cash flow of MIAL turning negative. As a result, it was pointed out that MIAL had no funds left, with it, to meet its immediate requirements, except the moneys in the AAI Fee Account. Pointing out that the Central Government had directed prompt payments of salaries and wages and had prohibited the discontinuance of service of any workman or employee, huge amounts of expenses were, it was submitted, required to be disbursed by MIAL, without any financial inflow. Maintenance of the CSI Airport, moreover, also entailed other incidental expenses such as payments to be made for utilities, maintenance, running of offices, etc., so that the airport would remain in a working condition. With the moneys available with it, it was submitted that it was impossible for MIAL to meet these expenses. In the circumstances, AAI was requested to write to the SBI, directing it not to transfer any amount from the Proceeds Account to the AAI Fee Account, and to transfer the funds lying in the AAI Fee Account to the Surplus Account, so that the said funds could be utilised by MIAL to meet its immediate requirements, towards the payment of salaries and wages, utilities, airport maintenance expenses, etc.

(i) AAI responded *vide* email dated 24th March, 2020, stating that it had noted the contents of the letter dated 22nd

March, 2020 *supra*, addressed by MIAL, and calling upon MIAL to provide AAI a provisional Business Plan for the 2020-2021 Financial Year, on or before 31st March, 2020, "factoring in the prevailing situation (based on an impact analysis), so that necessary consequential action can be taken". This request was reiterated by AAI *vide* a second communication, dated 25th March, 2020, in which MIAL was also asked to corroborate its assertion that its cash flow had become negative, that inflow of revenue had completely stopped and that it had no funds, to meet its immediate obligations.

(j) MIAL responded, on 26th March, 2020. It was pointed out that the unpredictable nature of the pandemic, and the uncertain future situation, made it impossible to provide any provisional Business Plan. Besides, preparation of any such Business Plan required presence of personnel at the site of MIAL, and there were no staff available. MIAL provided, however, with the said letter, its fund position as on 26th March, 2020, as well as the payments required, mandatorily, to be made by or before 31st March, 2020. This Annexure indicated that the total funds available with MIAL, as on 26th March 2020, was₹ 122 crores, whereas it was required to make payments of ₹ 132 crores on or before 31st March, 2020. It was further submitted, in the said response, that, towards AF for the month of March, 2020, MIAL had already paid₹ 124 crores to AAI on 7th March, 2020. This payment, it was pointed out, was based on the Business Plan for the 2020 Financial year, which

had estimated the revenue, which would be earned in March, 2020, to be ₹ 297 crores. Owing to the COVID -2019 pandemic, and the situation that has arisen as a result thereof, however, the actual revenue earned during the month of March, 2020, was only ₹ 100 crores. MAF payable, thereon, was only ₹ 42 crores, so that, for the month of March, 2020, MIAL had paid excess MAF of ₹ 82 crores to AAI. The balance, it was submitted, had to be treated as advance AF for the month of April, 2020 which, therefore, already stood deposited in the AAI Fee Account. As there was no likelihood of any revenue generation during the month of April, 2020, it was requested that, in order to enable MIAL to meet its expenses, directions be issued to SBI to transfer the amount in the AAI Fee Account to the Surplus Account. In this context, MIAL reiterated the fact that payment, to its employees and workers, was mandatory, in view of the guidelines issued by the Central Government. Besides, it was pointed out, MIAL had also to meet its debt service obligations, failing which there was a possibility of its account being classified as a Non-Performing Asset (NPA), and recalling of loans by the lenders. Transfer of the money deposited in the AAI Fee Account to the Surplus Account, submitted MIAL, would not amount to transfer of public money, as no AF was payable by MIAL, owing to the suspension of its obligations under the OMDA during the period of *force majeure*.

(k) In response, AAI, *vide* communication dated 26th March, 2020, required MIAL to provide the Board Resolution, whereunder it had been decided to invoke the *force majeure* clause in the OMDA.

(l) MIAL provided the Board Resolution, *vide* response dated 30th March, 2020, addressed to AAI.

(m) The response of AAI, dated 30th March, 2020, deserves to be reproduced in extenso:

> "**Sent:** Monday, March 30, 2020 6:52 pm
>
> **Subject:** RE: Balance in AAI Fee account
>
> Sir
>
> *In view of the prevailing circumstances due to COVID 19*, AAI has permitted deferral of MIAL's obligation under Article 11.1.2.2 to make Monthly Annual Fee payments for a period of three (3) months (April 2020 to June 2020) *on account of Force Majeure event under the provisions of OMDA*. At the end of this three-month period, the cumulative Annual Fee amount for the months of April, May and June 2020 (computed on actuals) shall be paid to AAI by 15.07.2020.
>
> The MAF for the month of July 2020 onwards would be paid as per OMDA to AAI by the 7th of the month.
>
> In view of the above *you are requested to transfer the funds of approx. Rs. 82 crores as confirmed in your trailing mail pertaining to the Month of April 2020 lying in the AAI Fee account to Surplus account and also not to transfer funds from the Proceeds account to AAI Fee account for the period up to 6 June 2020.* Beyond this period, the amount would continue to be transferred from the Proceeds account to AAI Fee

account as normally done until any further communication from AAI in this regard.

Regards
V. Vidya
General Manager JVC
Airports Authority of India
New Delhi."
Mob:9958676464"

(Emphasis supplied)

MIAL contends that the fixing of the *terminus ad quem*, up to which AAI extended to it the benefit of the *force majeure* dispensation contained in the OMDA, as 15th July, 2020, was arbitrary. In any event, if the *force majeure* continued beyond 15th July, 2020, it is submitted that, AAI having recognised the existence of *force majeure*, as a consequence of the COVID-2019 pandemic, the benefit of the *force majeure* dispensation, under the OMDA, was also required to be continued. It is further submitted that, in issuing the above directions to the SBI, AAI failed to notice the fact that, as per the OMDA, contractual obligations ceased during the period of *force majeure*.

(n) MIAL wrote, in the circumstances, to AAI on 17th April, 2020 pointing out that, even as on that date, the closure of scheduled international commercial passenger services had been extended till 1830 hours (GMT) on 3rd May, 2020. It was also submitted that the covenants of the OMDA entitled MIAL to suspend or excuse performance of its obligations, thereunder – which included payment of MAF – to the extent such

obligations could not be performed owing to *force majeure*. As such, it was submitted that no MAF was payable during the period of *force majeure*. Where the pre-tax gross revenue earned by MIAL, in any particular month, was less than the unavoidable costs and cash outgo required to be borne by it, it was submitted that MIAL could not be regarded as liable to pay AF, and that any such insistence would be contrary to Article 16.1.1 of the OMDA. Reliance was placed on the judgement of the Supreme Court in ***Nabha Power Ltd v. Punjab State Power Corporation Ltd***[1] , submitting, on the strength thereof, that all commercial contracts were required to be interpreted by applying the test of business efficacy, to ascertain what a reasonable person would have commercially intended, while entering into the contract. In a revenue sharing agreement, such as that contemplated by the OMDA, it was submitted that the concessionaire, i.e. MIAL, could not be expected to fund the deficit from its own pocket and, thereby, subsidise AAI by paying AF, even where the revenue earned by the airport was not sufficient to meet unavoidable costs and expenses. In such a circumstance, it was submitted that the revenues of the airport would first have to be applied to the committed and unavoidable costs required to be borne by MIAL, including servicing of debts. As such, it was submitted that MIAL was entitled to the benefit of the *force majeure* clause, in the OMDA, for the entire period during which the Covid-2019 pandemic subsisted, i.e., till operations were restored to the

[1] **2018) 11 SCC 508**

situation which prevailed prior to the *force majeure* event. It was reiterated that the OMDA never contemplated MIAL funding the deficit from its own pocket, i.e. from monies which were other than the revenues earned from the airport. This, it was submitted, militated against the concept of revenue sharing, especially when MIAL was admittedly unable to bear the expenses during the currency of the *force majeure* event. It was emphasised that Article 16.1.5(c) of the OMDA visualised extension, of the time for performance by the parties affected by *force majeure*, of its obligation, as also the exercise, by the other party, of its rights under the OMDA, by the period during which the *force majeure* continued and by such additional period thereafter "as is necessary to enable the affected party to achieve the level of activity prevailing before the event of *Force Majeure*". The suspension of the obligations of MIAL, therefore, it was submitted, would continue during the entire period of the COVID-2019 pandemic, till MIAL was able to achieve its pre-COVID status. During this period, therefore, MIAL disowned any responsibility to pay AF, subject to a reconciliation of the accounts once the situation normalised.

(o) On 30th April, 2020, AAI addressed a detailed communication to MIAL, in response to the aforesaid e-mail dated 17th April, 2020. Reliance was placed, in the said communication, on the stipulation, in Article 16.1.1 of the OMDA, to the effect that MIAL was entitled to suspend or excuse performance of its obligations, thereunder, only "to the

extent that… (MIAL) is unable to render such performance by an event of *Force Majeure*". As such, it was asserted that the mere existence of a *force majeure* event was not enough to suspend the obligations of MIAL, where performance of the obligation was not rendered impossible thereby. The obligation to pay AF, irrespective of the quantum thereof, it was submitted, remained capable of performance, as revenue was generated even during the period of *force majeure*. As such, this obligation was not suspended by the *force majeure* event. It was pointed out that MIAL had not denied the fact that it was generating revenues even during the subsistence of the *force majeure* event. Towards the conclusion of the communication, it was stated that, in case MIAL was unwilling to accede to its liability to pay MAF after 15th July, 2020, as well as to liquidate its outstanding MAF liabilities, the communication be treated as a Notice of Dispute, under Article 15.1.1 of the OMDA. MIAL was, therefore, invited to initiate discussions with AAI to explore the possibility of an amicable settlement.

(p) In view of the continued insistence of AAI that MIAL was liable to pay AF, based on its pre-tax gross revenue, MIAL, *vide* letter dated 26th May, 2020 addressed to AAI, reiterated that the situation that had arisen as a consequence to the COVID-2019 pandemic satisfied all the indicia of *force majeure*, contemplated by Article 16.1.2 of the OMDA. Moreover, apart from the fact that the existence of an epidemic was specifically visualised, in Article 16.1.3 of the OMDA, as a

force majeure event, the said Article further covered "any event or circumstances of the nature and analogous to any events set forth in paragraphs (i) to (viii) of this Article 16.1.3 above within India". This residuary clause, it was submitted, would cover the lockdown imposed, consequent to the COVID-2019 pandemic. It was highlighted that AAI had not alleged any deficiency, on the part of MIAL, in meeting its obligations under the OMDA. The attention of AAI was also invited, in the said communication, to Article 16.1.5(c) of the OMDA, which extended the time, for performance by the parties, affected by the *force majeure*, of any obligation or compliance cast on it by the OMDA, by the period during which the *force majeure* continued "and by such additional period thereafter as is necessary to enable the affected Party to achieve the level of activity prevailing before the event of Force Majeure". The insistence, by AAI, that MIAL clear all cumulative Annual Fee liabilities not later than 15th July, 2020, it was submitted, was contrary to this contractual stipulation. In fact, MIAL reiterated that the very fixation of 15th July, 2020, as the date to which the benefit of the *force majeure* dispensation, in the OMDA, was being extended by AAI, was itself arbitrary.

(q) The above suggestions were reiterated by MIAL, *vide* its letter dated 25th June, 2020.

(r) AAI, *vide* its response, dated 25th June, 2020, reiterated the contentions advanced in its earlier communications, and

rejected, once again, MIAL's offer, contained in its letter dated 26th May, 2020, as well as the interim arrangement proposed in its letter dated 19th June, 2020. The attention of MIAL was invited to the fact that Article 15.1.1 of the OMDA envisaged a 60 days period for the amicable resolution of the disputes. MIAL was called upon, once again, to submit its business plan by 30th June, 2020 and to pay MAF for the months of April, May and June, 2020 by 15th July, 2020. In default, AAI stated that it would proceed in accordance with Article 15.2.1 of the OMDA, to appoint its nominee arbitrator.

(s) MIAL responded, *vide* communication dated 1st July, 2020, reiterating its earlier contentions, and pointing out, further, that its application to pay AF to AAI was in consideration of its being able to commercially utilize its Grant under Article 11.2 of the OMDA. In the event that MIAL was unable to exercise its exclusive commercial rights available as part of the Grant including the right to collect, retain and appropriate charges from users of the Airport, MIAL could not be obligated to pay AF to AAI. MIAL attached, with the letter, its Business Plan for the period of July, 2020 to March, 2021, without prejudice to its contention that the situation of *force majeure* was still continuing. It was pointed out that there was a difference between the projected revenue as per the business plan and the actual revenue generated by MIAL, during the currency of the COVID-2019 pandemic.

(t) *Vide* a subsequent communication dated 7th July, 2020, MIAL pointed out that its negative cash flow had increased from ₹ 1585.41 crores to ₹ 1626.78 crores.

(u) In this manner, MIAL, which was having to run the CSI Airport without any significant revenue inflow, was, it is emphasized, placed in severe financial doldrums. It is also pointed out that, during the period April to May, 2020, commercial activity at the airport was negligible.

(v) On the direction of AAI, the SBI transferred an amount of ₹ 29.07 crores from the Proceeds Account to the AAI Fee Account on 7th July, 2020, purportedly towards MAF payable by MIAL for the month of July, 2020. The petitioner expresses an apprehension that this pattern of action is likely to continue in future.

2. Premised on the above factual recital, the petitioner has approached this Court for pre-arbitral interim relief under Section 9 of the 1996 Arbitration Act, seeking an injunction against AAI from transferring any amount from the Proceeds Account to the AAI Fee Account, and to transfer moneys from the AAI Fee Account to the Surplus Account, so that the petitioner is in a position to run the airport. The prayer clause in the present petition, reads as under:

> "It is submitted that in the circumstances mentioned above, it is just and necessary that this Hon'ble Court may be pleased to pass appropriate orders as prayed for below:

(i) Restrain the Respondents from transferring or causing to be transferred in any manner whatsoever any funds from the Proceeds Account to the AAI Fee Account;

(ii) Restrain the Respondent No. 1 from appropriating the funds lying in the AAI Fee Account in any manner whatsoever except for the purposes of transferring the amounts to the Surplus Account;

(iii) Stay the operation of the letters dated 30.03.2020 and 25.06.2020 of the Respondent No. 1 insofar as the same seek transferring of any funds from the Proceeds Account to the AAI Fee Account;

(iv) Direct the Respondents to continue to act in furtherance of the Respondent No. 1 letter dated 30.03.2020 wherein the Respondent No. 1 has agreed to not draw funds from the Proceeds Account and has agreed to deposit funds from the AAI Fee Account to the Surplus Account and to continue the said arrangement till the end of Force Majeure events and the additional period in terms of Clause 16.1.5(c) of OMDA;

(v) Restrain the Respondent No. 1 from taking any coercive and/or precipitative steps against the Petitioner under the OMDA including in terms of the Respondent No. 1's letters dated 30.03.2020 and 25.06.2020;

(vi) Direct the Respondent No. 1 to forthwith refund the excess Annual Fee of Rs.79.13 crores to the Petitioner;

(vii) Direct the Respondents to transfer the total amount in the Proceeds Account to the Surplus Account so as to ensure that the Petitioner can discharge its payment obligations;

(viii) In the alternative to (vi) above, Direct the Respondent No. 2 to forthwith transfer the funds in the Proceeds Account to the Surplus Account atleast in respect of the excess Annual Fee of Rs.79.13 as has been paid by the Petitioner to the Respondent No. 1;

(ix) Restrain the Respondent Nos. 1 and 2 from interfering with the moneys as ought to be deposited in the Surplus

Account as per the Petitioner's Business Plan dated 01.07.2020 pursuant to which there is no Revenue Share payable to the Respondent No. 1;

(x) Direct the Respondents to forthwith re-transfer the funds in the AAI Fee Account to the Surplus Account atleast in respect of Rs.29.07 crores wrongly appropriated by the Respondent No. 1 towards the AF of July 2020;

(xi) Direct and declare that pending the hearing and final disposal of the arbitration proceedings and the making and implementation of the Award therein, the obligation to make the Annual Fee payments under the Operation, Management and Development Agreement (OMDA) shall stand suspended;

(xii) Pass any such ad-interim orders in terms of the above;

(xiii) Pass any such further orders or directions as this Hon'ble Court deems fit to grant in the facts and circumstances of the case."

3. I have heard Dr. Abhishek Manu Singhvi, learned Senior Counsel for MIAL, Mr. Tushar Mehta, learned Solicitor General for AAI and Mr. S.L. Gupta for SBI. After conclusion of arguments, learned Counsel for the parties agreed, *ad idem*, on 24th July, 2020, to the final disposal of the present petition, without any exchange of pleadings. Written submissions were also filed by both parties. Dr. Singhvi, arguing for MIAL, took me through the written submissions filed by him.

4. Copious written submissions were filed by learned counsel for both sides, and lengthy arguments were advanced at the Bar. It would be appropriate to enumerate the submissions advanced by learned Senior Counsel for both sides, for facility of reference.

5. Dr. Singhvi advancing initial arguments on behalf of the petitioner MIAL contended, *inter alia*, as under;

(i) Article 16 of the OMDA operated to exempt MIAL from its obligations to pay AF during the currency of the COVID-2019 pandemic.

(ii) Even otherwise, given the financial situation in which MIAL found itself as a consequence of the pandemic, it was impossible for it to pay MAF, in accordance with the OMDA.

(iii) AAI had accepted the existence of *force majeure* in its various communications. Specific attention was invited, in this context, to the e-mails dated 30th March, 2020 (*supra*) and 25th June, 2020 (*supra*), addressed by AAI to MIAL as well as the e-mail dated 30th March, 2020 (*supra*) from AAI to the SBI. Paras 5 and 6 of the letter dated 30th March, 2020 from AAI to MIAL are as under:

> "5. AAI is however cognizant of the extraordinary nature of the events that have transpired in the past weeks. Keeping these in view, AAI is willing to grant favourable consideration to deferral for a period of three (3) months of MIAL's obligation under Article 11.1.2.2 to make Monthly Annual Fee payments against its Annual Fee obligation. At the end of this three-month period, the cumulative Annual Fee amount for the months of April, May and June 2020 (computed on actuals) may be paid to AAI by 15.07.2020.

> 6. Reference in this regard may be had to Clause 16.1.5(c), which stipulates that *"the time for performance by the affected Party of any obligation or compliance by the affected Party with any time limit affected by Force Majeure, and for the exercise of any right affected thereby, shall be extended by the period during which such Force Majeure continues and by such additional period thereafter as is necessary to enable the affected party to achieve the level of activity prevailing before the event of Force Majeure"*. AAI is willing to have recourse to Clause 16.1.5(c) to extend the time for payment of MAF for the months of April, May and June 2020 *till 15.07.2020* without levy of interest under Clause 11.1.2.2 for this period. Such extension of time for payment of Monthly Annual Fee is of course without prejudice to AAI's rights under the OMDA and cannot be construed as a waiver, modification or alteration of any of the said rights, including AAI's right to receive Annual Fee computed at 38.7% of Revenue under the OMDA for this period. It is also clarified that such extension of time is in the nature of a dispensation limited to the present facts and circumstances and cannot be construed as creating any precedent in this regard *inter se* the parties to the OMDA."

(iv) Similarly, the communication, dated 25th June, 2020, from AAI to MIAL, at the outset, reiterated the contents of the earlier communications of AAI. Additionally, in the email, dated 30th March, 2020, addressed to the Bank, it was specifically stated that AAI had permitted deferral of the obligations of MIAL under Article 11.1.2.2 *"in view of the prevailing circumstances due to COVID-19.... on account of Force Majeure event under provisions of OMDA."*

(v) As such, the fact that the situation of *force majeure* within the meaning of Article 11.1.2.2 of the OMDA, having come into being as a result of the COVID-2019, was not refutable. The controversy in the present petition relates only to the effect thereof.

(vi) Once the existence of the applicability of *force majeure* was accepted, the outflow of funds from the Proceeds Account had necessarily to be stopped and the amount in the Proceeds Account was required to be used only for the purposes of operating the Airport. It was for this reason that MIAL sought the transfer of moneys from the Proceeds Account to the Surplus Account, so as to enable MIAL to run the Airport and the operations therein. I may note that, during the course of arguments, Dr. Singhvi, presented, essentially, the prayer for the transfer of the funds in the Proceeds Account to the Surplus Account, without insisting on the alternative prayer for transfer of the moneys lying in the AAI Fee Account to the Surplus Account.

(vii) Article 16.1.1 of the OMDA specifically entitled MIAL or AAI, as the case may be, from suspending or excusing the performance of its obligations under the OMDA, to the extent, it had been rendered unable to perform as a result of the *force majeure* events. Once the existence of *force majeure* was accepted, therefore, all that had to be seen, was whether it continued to exist or not. During the entire currency of the said

period, both parties would, by virtue of Article 16.1.1, be entitled to suspend performance of its obligations under the OMDA.

(viii) Inability to perform the obligations under the OMDA arose in the case of MIAL, as a consequence of the mandatory obligations, which it had to otherwise discharge in law, such as servicing its debts, paying wages to its employees and staff, maintaining the Airport, and such other activities. In such circumstances, MIAL was not in a position to share revenue with the AAI.

(ix) The stand adopted by AAI was paradoxical and contradictory in terms, as even while accepting the existence of *force majeure*, no benefit, thereof, had been extended to MIAL, This, in fact, rendered the *force majeure* provisions, contained in Chapter XVI of the OMDA, otiose.

(x) Prior to the COVID-2019 pandemic, the revenue earned by MIAL, during the month of February, 2020, was to the tune of ₹ 288.97 crores. As against this, in April, 2020, the revenue earned by MIAL was only ₹ 66 crores, which was insufficient to meet basic operating costs, obligations towards lenders, who had extended debts, etc. In that view of the matter, the demand, by AAI, to MIAL, of AF, on the basis of the revenue generated, amounted to a sterile and stagnant insistence of a purported fixed percentage share in the revenue.

(xi) It was in these circumstances that MIAL was seeking a *status quo* on the transfer of funds from the Proceeds Account to the AAI Fee Account, and was requesting for the transfer of funds from the Proceeds Account to the Surplus Account. Additionally, the petitioner seeks that the moneys which were appropriated, by AAI, from the AAI Fee Account, be returned to MIAL.

(xii) Dr. Singhvi has invited my attention, in the above context, to the communications dated 24th March, 2020 and 25th March, 2020, whereby AAI sought details from MIAL, alongwith the provisional Business Plan for FY 2020-2021, to establish whether the cash flow of MIAL had been hit as badly as it chose to submit and that it was financially not in a position to meet its mandatory obligations. In the letter dated 25th March, 2020, AAI had stated thus:

> "At the very least, we would require you to provide us with material that would establish MIAL's current financial position, as well as corroborate with relevant documentation your assertions that MIAL's cash flow has turned negative, revenue inflow has completely stopped and that NIL funds are available with MIAL to meet its immediate obligations.
>
> You would appreciate that such information is not only relevant but necessary for us to determine the way forward in the present matter, since MIAL is not only seeking to suspend its MAF payment obligations under the OMDA, but is additionally calling upon AAI to transfer public moneys to MIAL (which is nowhere contemplated in the OMDA)."

(xiii) The details sought by AAI were duly furnished by the MIAL. Dr. Singhvi points out that these details, when perused, make it clear that the COVID-2019 pandemic, and the restrictions imposed as a sequel thereto, had, in fact, seriously depleted the financial position of MIAL and rendered its cash flow negative, leaving it with no money to meet its essential obligations. The statement of the costs and expenses incurred by MIAL, as provided to AAI, clearly disclosed that, by 31st March, 2020, MIAL was required to make payments of ₹ 132 crores, whereas it had only ₹122 crores in its account.

(xiv) Compared with its projected revenues for the month of March, 2020, MIAL had paid ₹ 82 crores excess AF to AAI for the said month. Article 11 of the OMDA required the differential AF of ₹ 82 crores, paid for the month of March, 2020, to be adjusted and returned to MIAL. *Vide* its e-mail dated 30th March, 2020, AAI agreed to issue instructions to the Bank, to the said effect. In its letter dated 30th March, 2020, addressed to MIAL, AAI, acknowledging the financial hardship in which MIAL was placed, undertook to issue necessary instructions to the Bank to transfer ₹ 82 crores, pertaining to the month of April, 2020, lying in the AAI Fee Account to the Surplus Account and not to transfer funds from the Proceeds Account to the AAI Fee Account for the period up to 6th June, 2020. As is noted in the recital of facts hereinabove, such

instructions, were in fact, specifically issued by MIAL to AAI, *vide* letter dated 30th March, 2020.

(xv) Even while doing so, AAI, without any rational justification, fixed the *terminus ad quem*, for the *force majeure* period, as 30th June 2020. There was no justification for fixing this date. Dr. Singhvi emphasises the fact that, even after 15th July, 2020, the situation of *force majeure* continued, unabated, and, in fact, increased in severity.

(xvi) Drawing attention, once again, to the fact that ₹ 29.07 crores had been, allegedly without justification, appropriated by AAI from the Proceeds Account to the AAI Fee account purportedly towards AF for the month of July, 2020, MIAL apprehends that, for succeeding months, too, similar action may be taken by AAI. This, it is submitted, would result in MIAL being left with no funds to meet its necessary expenses.

(xvii) Not granting the relief prayed in the petition, it is emphasised, would result in irreparable prejudice to MIAL, which would be obligated to incur necessary expenditure, without corresponding revenue inflow.

(xviii) Any transfer of the amount, contained in the Proceeds Account to the AAI Fee Account, or if the amount contained in the Proceeds Account is not transferred to the Surplus Account, the petitioner would not be able to meet the necessary expenses,

to run its operations and manage the Airport, as required by the OMDA.

(xix) On the other hand, if the transfer of moneys of Proceeds Account to the AAI Fee Account, is injuncted as an interim measure, no harm would ensue to AAI which could, were it to succeed in the arbitral proceedings, always recover the money at a later stage.

(xx) Article 11.1 of the OMDA obligated MIAL to pay AF only if it was able to commercially utilize the Grant, extended to it under Chapter II of the OMDA, which included, particularly, the commercial right to collect, retain and appropriate charges from the users of the Airport under Article 2.1.2(iii) of the OMDA. If it was not possible for MIAL to collect the said charges, there could, equally, be no obligation, on MIAL, to pay AF to AAI.

(xxi) The contention, of AAI, that the OMDA was in the nature of a revenue sharing arrangement, also militated against any liability, of MIAL, to pay AF to AAI, during the currency of the *force majeure* situation. Sharing of revenue necessarily predicated earning of revenue in the first place. Where the revenue earned by MIAL was insufficient even to cover unavoidable costs and expenses required to be borne by MIAL, it could not be said that any revenue was required to be shared by MIAL with AAI, in the form of AF.

(xxii) The letter, dated 7th July, 2020, from MIAL to AAI, contained details of the negative Cash Flow of MIAL, during the period April to June, 2020.

(xxiii) The stand adopted by AAI was directly contrary to the *force majeure* dispensation contained in the OMDA. Even while recognizing that the pandemic and the lockdown restrictions imposed as a consequence thereof, were *force majeure* events, AAI was insisting on the payment of AF by MIAL for the period April to June, 2020, on or before 15th July, 2020. This effectively rewrote the *force majeure* covenant, as contained in OMDA.

6. Resultantly, it was sought to be contended, by MIAL, that, in order to enable MIAL to continue to run the Airport, as well as in order to ensure that the arbitral proceedings, to be initiated, were not rendered futile even before they took off, grant of interim reliefs, as sought in the petition, was necessary.

7. AAI, in its written submissions filed by way of response to the initial written submissions of MIAL, has contended thus:

(i) The short issue involved in the present case was whether invocation of *force majeure* under the OMDA suspends the obligations of MIAL to pay the revenue share to AAI, on the revenue actually generated by it during the period of issue, and whether such invocation permits a rewriting of the "priority cash flow application" under Article 3 of the Escrow

Agreement. The very first paragraph of the written submissions delineates the issue in controversies thus.

(ii) "Revenue" was defined, in the OMDA, as including all pre tax gross revenue. The case of MIAL did not come within any of the specified exceptions to the definition of "revenue".

(iii) MIAL had admitted that, during the period April to June, 2020, it had generated a revenue of ₹ 227 crores. Further, for the financial year 2020-2021, MIAL had projected a revenue generation of ₹ 626 crores. The AF obligation of MIAL, under Clause 11.1.2.1 of the OMDA, for the period April to June, 2020 was, therefore, approximately ₹ 88 crores, being 38.7% of ₹ 227 crores. This liability also, therefore, stood admitted.

(iv) Despite having admitted the said liability, MIAL was seeking to contend that, in view of Chapter XVI of the OMDA, which contained the *force majeure* clauses, the obligations of MIAL, to pay AF, stood indefinitely suspended, till its financial position revived to a threshold, which permitted recommencing of the payments. This was an "absurd proposition", which found no support in the OMDA and effectively altered the revenue sharing model contemplated therein, into a profit sharing model.

(v) Chapter XVI of the OMDA, which contained the *force majeure*, applied only to "this agreement", i.e. the OMDA. It

did not extend to or suspend, performance of the obligations of MIAL under the other project agreements, including the Escrow Agreement. The Escrow Agreement did not contain any *force majeure* clause. The interim relief sought by MIAL, therefore, rewrote the Escrow Agreement.

(vi) The Grant advanced to MIAL, within the meaning of Article 2.1 of the OMDA, continued to subsist, with all benefits thereunder. This included, under Article 2.1.2(ii), complete and uninterrupted possession and control of the CSI Airport. MIAL was, admittedly, running the Airport and generating revenue therefrom.

(vii) The contention of MIAL, that the factum and applicability of the *force majeure* provisions stood explained by AAI *vide* its letter, dated 30th March, 2020, was denied. A plain reading of the letter revealed that AAI disputed the position, taken by MIAL, that no AF was payable by it due to suspension of the obligations of MIAL on account of the *force majeure* event. Rather, the obligation to pay MAF under Article 11.1.2.2 of the OMDA applied "notwithstanding anything contained herein", which covered the entire OMDA.

(viii) In so far as the accommodation, extended to MIAL till 30th June, 2020, was concerned, it was only because of the difficulty expressed by MIAL in submitting its Business Plan by 31st March, 2020, owing to the non-availability of personnel.

Consequently, and as a one time limited dispensation, AAI agreed to extend the time for payment of MAF for the period April to June, 2020 till 15th July, 2020, without levying any interest. This was done on a without prejudice basis, and was relatable to Article 16.1.5(c) of the OMDA, which empowered AAI to extend the time for performance of any compliance, impacted by a *force majeure* event, during the subsistence of such event and for any such additional, period as was necessary, for normal activity to resume.

(ix) Though MIAL had, with its letter, dated 7th July, 2020, quantified its AF obligations for the year 2020-2021, based on the calculations provided in the Business Plan, MIAL claimed that it was exempted altogether, from payment of AF, not only during the period of *force majeure*, but for such indeterminate additional period, as was necessary for MIAL to achieve the level of activity as prevailing before the event of *force majeure*, i.e. till normalcy in the Airport operations was restored.

(x) The dispute was, therefore, "whether MIAL's obligations for payment of Annual Fee is excused or suspended during continuance of *force majeure*" (as identified in para 10 of the written submissions of AAI).

(xi) AAI had invoked the dispute resolution clause as far back as on 30th April, 2020. MIAL had, however, instead of proceeding thereunder and appointing an arbitrator, moved this

Court under Section 9 of the 1996 Arbitration Act. The purported exigent circumstances, which necessitated approaching this Court by MIAL, were entirely of its own making. MIAL was, therefore, attempting to obtain interim relief by falsely portraying a situation of immediate financial distress. In fact, the present petition was an attempt at circumventing Article 15.3 of the OMDA, whereunder MIAL was obligated to continue to perform all its obligations under the OMDA, during the pendency of the dispute resolution process under Chapter XV thereof.

(xii) The claim, of MIAL, that the funds available with it were insufficient to permit sharing of revenue with AAI, was also factually disputable. Despite requests, by it, to MIAL, to provide the relevant accounting records, *vide* letters dated 25th March, 2020, 30th March, 2020, 30th April, 2020 and 25th June, 2020, MIAL had not done so. MIAL had also not provided its accounts to the Independent Auditor jointly appointed by the parties under OMDA, who could verify the assertions of MIAL regarding its financial position.

(xiii) MIAL had claimed financial distress, for meeting its immediate requirements, as early as on 24th March, 2020. This was prior to suspending of domestic air operations, which happened on 25th March, 2020. International air operations had been suspended only on 23rd March, 2020. As such, the alleged financial distress, faced by MIAL, was relatable, not to the

COVID-2019 pandemic or the lockdown that followed, but pre-dated the pandemic.

(xiv) MIAL had contended, in its petition, that it had generated profits in excess of ₹ 1200 crores, since its inception in 2006. It became questionable, therefore, as to how MIAL had applied these past profits which, if properly utilized would have enabled it to tide over the period of the pandemic.

(xv) Permitting MIAL to utilize, by way of interim relief in the present petition, moneys which were payable to AAI by way of AF, would result in any final award, if passed in favour of AAI in respect of AF, unenforceable, as MIAL would not be in a position to satisfy the award.

(xvi) An overwhelming element of public interest was also involved. AAI was using the funds, received by it from revenue share agreements such as the OMDA, for managing and running airports across the country. The alleged financial hardship, caused to a single private entity, was, therefore, required to be balanced against the consideration of public interest. Impairment of the AF mechanism was likely to force AAI to scale back its operations, jeopardizing the efforts of the Government to connect parts of the country, which were unreachable by air and to allow common citizens to fly.

(xvii) The claim of MIAL, for a refund of ₹ 79.13 crores, purportedly representing excess AF paid by it for the month of March, 2020 was contrary to Article 11.1.2.3(ii) of the OMDA, whereunder excess AF was required to be adjusted by AAI against future AF payments. There was no question of any refund, by AAI, to MIAL, of any excess AF paid by it.

(xviii) Once the Independent Auditor verified whether any excess AF had been paid, such excess payment would be dealt with, in accordance with the clauses of the OMDA. It had not been possible to carry out this exercise for the financial year 2019-2020 only because MIAL delayed submitting its accounts to the Independent Auditor despite numerous requests from AAI.

(xix) The annual fee payment for July, 2020 already stood remitted into the bank account of AAI, from the AAI Fee Account. MIAL had itself offered to start paying MAF from September, 2020. The only issue involved was, therefore, whether MIAL was required to pay the August instalment of MAF. In the circumstances, it would be advisable for the Arbitral Tribunal to be constituted expeditiously and for the present Section 9 petition to be treated as a Section 17 petition, to be decided by the Arbitral Tribunal.

(xx) Without prejudice, and strictly in the alternative, the SBI could be directed to maintain a minimum balance equivalent of

₹ 88 crores in the Escrow Account, till such time such order was varied, vacated or modified by the Arbitral Tribunal. This would balance the interest of both the parties and ensure that public moneys were secured pending the resolution of the dispute.

AAI has also, in its written submissions filed in response to the initial written submissions of MIAL, made certain averments regarding an investigation against MIAL by the Central Bureau of Investigation (CBI). I am not inclined, for the purposes of the present petition, to enter into that dispute.

8. MIAL has filed a rejoinder note to the aforesaid reply written submissions of AAI, in which it has been contended, *inter alia*, thus:

(i) AAI had failed to notice that the present petition was filed seeking prayers necessary for the preservation of the substratum of the arbitration proceedings, which was the continuous and smooth functioning of the CSI Airport. If funds were not transferred from the Proceeds Account to the Surplus Account, as prayed by MIAL, no moneys would remain with MIAL, to enable it to discharge its obligations, and to make necessary payments for the operation and maintenance of the airport. MIAL was, in any event, entitled to receive 61.3% of the moneys deposited in the Proceeds Account, as only 38.7% thereof accrued to the share of AAI. However, AAI had blocked even the transfer of the said 61.3% which was the

legitimate entitlement of MIAL, and necessary to enable MIAL to carry out operations at the airport.

(ii) It had been wrongly contended by AAI that the substratum of the arbitral proceedings was the AF and not the operations at the airport. The intent of the present Section 9 petition, as preferred by MIAL, was for passing of orders preserving the operations at the airport, which had been rendered impossible owing to the *force majeure* events as detailed in the petition. It had always been the case of MIAL that, were it forced to pay MAF during the period of *force majeure*, it would not be able to continue to run the CSI Airport, as its basic costs and expenses were more than the actual revenue being received by the airport operations. The balance of convenience was, therefore, in favour of MIAL.

(iii) In proceedings under Section 9 of the 1996 Arbitration Act, the Court was not expected or required to adjudicate on the merits of the controversy between the parties. Proceedings under Section 9 were concerned only with preservation of the property forming subject matter of arbitration, so as to ensure that no irreparable loss or damage ensued till the arbitration resulted in the redressal of the dispute. Reliance has been placed, for the said proposition, on the judgments of the Supreme Court in ***Transmission Corporation of A.P. Ltd. v. Lanco Kondapalli Power Pvt. Ltd***[2] and of this Court in ***Modi***

[2] **(2006) 1 SCC 540**

Rubber Ltd. V. Guardian International Corporation[3]. As such, while adjudicating the present petition, this Court was not required to decide the issues relating to the interpretation of the OMDA, or to examine the merits of the rival stands of MIAL and AAI. It was only required to pass appropriate measures of interim protection, so as to protect the substratum of the arbitral proceedings. As regards the submission, of AAI, that MIAL had defaulted in providing details to the Independent Auditor, it is contended, by MIAL thus:

> (a) AAI was aware that MIAL had always submitted its revenue details to the Independent Auditor for verification, as required by Article 11.1.2.4 of the OMDA. These details were, however, normally provided to the Independent Auditor after approval of the accounts for the quarter by the Board of MIAL. In the present instance, however, preparation of accounts and meetings of the Board of MIAL were delayed owing to the on-going pandemic crisis, resulting in a delay in submission of the details to the Independent Auditor.
>
> (b) In the past thirteen years, however, there was never any difference in the figures sent by MIAL to AAI and as certified by the Independent Auditor.
>
> (c) The excess payment of ₹ 79.13 crores, by MIAL to AAI, for the month of March, 2020, was an admitted

[3] **2007 SCC OnLine Del 502**

amount. This had resulted because the AF was paid on the basis of speculative projections subject to final determination.

(d) The contention, of AAI, that financial distress, as suffered by MIAL, was not attributable to *force majeure*, as it pre-dated the pandemic, was also incorrect. Attention has been invited, in this context, to the various advisories issued by the Government of India, for the control of the pandemic, as also the invocation, by the Government of Maharashtra, of the Epidemic Diseases Act,1897 on 13th March, 2020. In any event, it is submitted that, if AAI was not satisfied with the invocation, by MIAL, of the *force majeure* provision in the OMDA, it would not have issued its letter dated 30th March, 2020, accepting the existence of *force majeure*.

(e) That the financial distress suffered by MIAL was directly attributable to *force majeure* that had resulted from the COVID-2019 pandemic, was also apparent from the fact that, against the projected revenue of ₹ 288.97 crores for February, 2020, MIAL had billed only ₹66 crores for the month of April, 2020.

(f) The liability to pay AF to AAI arose only where MIAL had earned the bare minimum revenue for meeting its basic unavoidable expenses.

(g) MIAL had never defaulted on its AF obligations to AAI in the past. In fact, MIAL had paid nearly ₹ 11,000 crores to AAI towards AF. As such, the contention, of AAI, that MIAL was in financial distress even prior to the *force majeure* events, was incorrect.

(h) The contention that, instead of seeking recourse to arbitration, MIAL has, without due justification, invoked Section 9 of the 1996 Arbitration Act, was also disputed. It was pointed out that the letter dated 30th April, 2020, from AAI to MIAL, invoked the dispute resolution provision under Article 15.1.1 of the OMDA, and was not in the nature of a Notice invoking arbitration. Article 15.1.1 required all disputes to, in the first instance, be attempted to be resolved by amicable discussion within 60 days. Prior thereto, therefore, it was not possible for MIAL to seek recourse to arbitration. The said period of 60 days, at the earliest, expired on 01st July, 2020. Despite this, MIAL contended that it was in the process of appointing its nominee arbitrator.

(i) For its letter dated 30th March, 2020, AAI had itself permitted MIAL to pay the cumulative AF amount, for the period April to June, 2020, on or before 15th July, 2020, computed on actuals. As such, AF was payable based on actual receipts. The contention, of AAI, that MIAL was liable to pay AF on an accrual basis, was,

therefore, not correct. The projected revenue of ₹ 227 crores, for the period April to June, 2020, was based on the actual billing in MIAL's books of accounts. However, against this, actual collection had been possible, by MIAL of only ₹ 30 crores. AF payable by MIAL could not, therefore, be reckoned on the basis of the billed amount of ₹ 227 crores.

(j) The manner in which AAI was seeking to interpret Article 16 of the OMDA, which dealt with *force majeure*, was commercially unsustainable, unreasonable and contrary to the principles of business efficacy. All commercial documents were required to be interpreted in accordance with business efficacy, as held by the Supreme Court in ***Union of India v. D.N. Revri & Co.***[4]. AAI was seeking to contend that, despite the ongoing pandemic and subsistence of *force majeure*, resulting in both revenue accruals/billing and actual receipt of payments thereagainst being prejudicially impacted, AAI was insisting on payment, by MIAL of AF for the period April to June, 2020 on or before 15th July, 2020. This was a pedantic and unreasonable manner of interpretation of the OMDA. It effectively rendered the *force majeure* clause otiose. It also militated against the specific covenant, in Article 16.1.5(b) of the OMDA, permitting suspension of obligations under the OMDA during the

[4] **(1961) 3 SCR 1020**

currency of the *force majeure* and till normalcy, as it existed prior to the *force majeure,* was restored. AAI was, effectively, insisting on payment, by MIAL, of the alleged AF for the months of April to June 2020, without receipt, by MIAL, of the accrued/billed amount for the said period.

(k) In fact, though the MAF ₹of 88 crores being demanded by AAI for the period April to June, 2020, was on the basis of the total billed amount of ₹ 227 crores, the Proceeds Account, as on the date of conclusion of the present proceedings, before this Court, did not contain sufficient funds to pay the AF of₹ 88 crores. This itself acted as a pointer to the adverse financial impact of the prevailing *force majeure*. It had to be borne in mind, in this context, that actual receipts were not even 50% of the billed amount.

(l) On the basis of actual receipts, AF payable by MIAL to AAI, for the period April to June, 2020, was only ₹ 11.61 crores, being 38.7% of the actual payment received of₹ 30 crores, against the billed amount of₹ 227 crores. As ₹ 29.07 crores already stood appropriated by AAI on 7th July, 2020, its interests, *qua* the AF payable for the period April to June, 2020, stood secured.

(m) As such, keeping the aforesaid amount of₹ 11.61

crores in the Proceeds Account, securing the interests of AAI, MIAL has suggested that the disputes could be referred to arbitration. In the concluding para 17 of its written submissions in rejoinder, MIAL has suggested the following interim arrangement, pending the resolution of disputes by arbitration:

> "17. Infact, the disputes can be settled by the Parties proceeding to arbitration subject to the following 'without prejudice' interim arrangement:
>
> (a) The Respondent No. 1 to allow that as and when the said sums of Rs.279.59 crores are deposited in the Proceeds Account [basis the amounts of Rs.79.13 crores-the excess AF and Rs.75.12 crores in view of the 29.07 crores appropriated by AAI] the same to be transferred to the Surplus Account.
>
> (b) Upon receipt of these, amounts, the Parties can agree to keep sums to continue to remain deposited in the Escrow Account (Proceeds Account) to the tune of 38.7% of the Petitioner's actual receipts in respect of the operations from April 2020 onwards.
>
> (c) Save and except the aforesaid, the remaining amounts in the Proceeds Account will be transferred to the Surplus Account to enable Petitioner to continue operating the Airport.
>
> (d) The aforesaid directions will ensure that the Respondent No. 1's alleged claim for Annual Fee for April-June 2020 and even thereafter is secure (without prejudice to the Petitioner's

contentions) and that the same remains deposited in the Proceeds Account and shall also ensure that the Petitioner will get access to the necessary funds for operating the Airport so as to ensure that the sub-stratum of the arbitral proceedings can remain.

(e) The substratum of the arbitration ought to be preserved in the aforesaid terms. The Petitioner is in any event entitled to receive 61.3% of revenue as stated above. However, the Petitioner is currently not receiving any funds in the surplus account for carrying out the Airport operations.

(f) The Parties with this interim arrangement in place can seek to take steps for the commencement of the arbitral proceedings."

9. AAI has filed a note by way of surrejoinder to the rejoinder note of MIAL. While reiterating, broadly, the contentions advanced in its earlier note, it has been sought to be emphasised that the amount of ₹ 227 crores, disclosed by MIAL to be its revenue, within the meaning of the OMDA, for the period April to June 2020, was "on "actuals", i.e., this amount is the "actual billed revenue" of MIAL for this period". It is also emphasised that, in the Business Plan, dated 7th July, 2020 of MIAL, 100% recovery of the said amount was anticipated. Reliance has also been placed, by AAI, on Section 128(1) of the Companies Act, 2013, which requires the books of accounts of companies to be kept on an accrual basis. In its Business Plan, therefore, it is contended that MIAL has accounted for the "actuals"

for the months of April, May and June, 2020, as being ₹ 227 crores, by resorting to the accrual basis of accounting. It was not permissible, therefore, according to AAI, for MIAL to seek relief on the basis of actuals, following the cash system of accounting. Effectively, it is submitted, MIAL was seeking to rewrite the OMDA as well as the Escrow Account Agreement, and to depart from the consistent practice followed over a period of fifteen years, which was contrary to the law laid down by the Supreme Court in ***Transmission Corporation of A.P. Ltd.***[2].

10. AAI has also contended, in its surrejoinder note, that, as early as May 2020, MIAL had come to the decision not to satisfy the requirements of the OMDA and the Escrow Account Agreement, resulting in a dispute having arisen between MIAL and AAI. This could have been referred to arbitration, in terms of Article 15.2.1 of the OMDA. MIAL, however, it is submitted, did not communicate this position to AAI, or take steps to refer the dispute to arbitration.

11. Finally, AAI submits that the disbursal of amounts from the Escrow Account should strictly be as per the priority cash flow stipulated in Clause 3.2(B) of the Escrow Agreement, and it would not be appropriate for this Court to interfere with this contractual dispensation at an interim stage.

Analysis

12. In my considered opinion, despite the extremely erudite and enlightening submissions advanced by learned Senior Counsel, I am not required to adjudicate on most of the submissions, for the simple reason that I am not arbitrating on the dispute between the parties.

13. That an arbitral dispute exists, between MIAL and AAI, is admitted by both sides. In fact, AAI has criticised MIAL for being less than enthusiastic in referring the dispute to arbitration; the written submissions of AAI specifically averred that, had MIAL done so, "the parties would have had over 60 days to constitute a Tribunal and refer the dispute to the Tribunal for appropriate reliefs (including at the interim stage)." There is, therefore, admittedly an arbitral dispute, between MIAL and AAI. MIAL contends, on the basis of Chapter XVI of the OMDA, with especial reliance on Clauses 16.1.1 and 16.1.5(b) and (c), that the restrictions imposed, consequent on the COVID-2019 pandemic constitute "*force majeure*", resulting in MIAL being entitled to a restraint on the transfer of the amounts deposited in the Proceeds Account to the AAI Fee Account, and to the transfer of the amounts in the AAI Fee Account to the Surplus Account, till such time as the situation of *force majeure* continues and, thereafter, till MIAL is able to achieve the level of activity prevailing before the event of *force majeure*. AAI disputes this entitlement of MIAL. This, in essence, is the dispute between MIAL and AAI.

14. Once an arbitrable dispute exists, the parties to the dispute are entitled, as of right, conferred by the arbitration agreement between

them read with the 1996 Arbitration Act, to have the dispute resolved by arbitration. The Court is proscribed, completely, from usurping this jurisdiction, of the arbitrator, or the Arbitral Tribunal, as the case may be. Fostering of arbitration, as a viable alternate dispute resolution mechanism, and providing for all steps in the aid of the arbitral process, constitutes the very *raison d'être* of the 1996 Arbitration Act. The duties cast on the civil court, by the 1996 Arbitration Act, are required to conform to this discipline. In exercise of such duties, the Court cannot usurp the jurisdiction of the arbitrator, and arbitrate on the dispute between the parties.

15. The "pre-arbitral" Section 9 court is essentially concerned with whether a case, for "protecting" the corpus of the arbitral dispute, before the parties embark on the arbitral journey, or for granting such other interim measure of protection, as would aid the arbitral process and assist it in reaching fruition, does, or does not, exist. The prevailing judicial decisions on the point have held the principles governing Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC), to also govern the grant of "interim protection" under Section 9 of the 1996 Arbitration Act. At the same time, while the principles governing Order XXXIX also apply to Section 9, the Section 9 court must not regard itself as a court granting interim relief under Order XXXIX. Distinct, and independent, jurisdiction to grant interim relief, protecting the subject matter of arbitration, during the arbitral proceedings, stands vested in the Arbitral Tribunal by Section 17 of the 1996 Arbitration Act which, after its amendment by Section 10 of the Arbitration and Conciliation

(Amendment) Act, 2016, has been brought at par with Section 9. To reiterate, the Section 9 court is concerned more with the necessity to preserve the *status quo*, so as to facilitate the arbitral process, to be initiated by the parties. For this reason, it is also open to the Section 9 court to, while passing pre-arbitral interim measures of protection under Section 9, condition such grant by requiring the parties benefiting therefrom, to institute arbitral proceedings within a specified timeframe.

16. This Court has had the occasion, recently, to examine the scope and ambit of Section 9, in the light of the judicial pronouncements on the issue, in ***Avantha Holdings v. Vistra ITCL India Limited***[5], ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Ltd.***[6], ***Pearl Hospitality & Events Pvt. Ltd. v. OYO Hotels and Homes Pvt. Ltd***[7]**,** and ***Big Charter Pvt. Ltd. v. Ezen Aviation Pty. Ltd.*** [8]**.**

17. Viewed thus, the outcome of the present case appears pre-ordained.

18. The first question to be addressed is as to whether a situation of *force majeure* existed, or not. For this, one has to refer to Articles 16.1.2 and 16.1.3 of the OMDA.

[5] **MANU/DE/1548/2020**
[6] **MANU/DE/1803/2020**
[7] **MANU/DE/1946/2020**
[8] **MANU/DE/1916/2020**

19. Article 16.1.2 states that "*Force Majeure*" means any event or circumstance which (a) materially and adversely affected the performance of an obligation under the OMDA, (b) was beyond the reasonable control of the affected party, (c) could not have been prevented or reasonably been overcome by the party with the exercise of good industry practice or reasonable skill and care, (d) did not result from the negligence or misconduct of the said party, or its failure to perform its obligations under the OMDA and (e) (or any consequence of which) had an effect described in Article 16.1.1.

20. Article 16.1.3 includes certain specific circumstances and events within the ambit of the definition of "*Force Majeure*", to the extent such circumstances/events, *or their consequences*, satisfy the requirements of Articles 16.1.1 and 16.1.2. Among the events/circumstances so enumerated is "epidemic or plague within India". Events and circumstances analogous to the events and circumstances enumerated in clauses (i) to (viii) of Article 16.1.3 within India are also to be regarded as "*Force Majeure*", under clause (x). The COVID-2019 pandemic was, undisputedly, an "epidemic or plague within India". The resultant restrictions, lockdowns and advisories issued by the Central and State Governments and Authorities also, in my view, qualify as an "event or circumstance of a nature analogous" to the events set forth in clauses (i) to (viii) of Article 16.1.3 and are also, therefore, "*Force Majeure*". Even if one were not to seek recourse to clause (x), the said restrictions, lockdowns and advisories undoubtedly constituted "consequences" of

the COVID-2019 pandemic which, too, are specifically covered by Article 16.1.3.

21. The COVID-2019 pandemic, as well as the resulting lockdowns, advisories and restrictions, imposed by the Government authorities would, however, be eligible to be regarded as "*Force Majeure*", even for the purposes of Article 16.1.3, only to the extent they "satisfy the requirements set forth in Article 16.1.1 and Article 16.1.2". We, therefore, have to refer back to the said Articles.

22. Did the COVID-2019 pandemic satisfy the indicia laid down in Article 16.1.2?

23. The COVID-2019 pandemic, and its sequelae in the form of the various restrictions imposed by the Governmental authorities, on which MIAL relies, were clearly beyond the reasonable control of MIAL. It cannot be said that MIAL could, with the exercise of good industry practice or reasonable skill and care, have avoided either the COVID-2019 pandemic, or the imposition of the restrictions and lockdown that followed thereupon. Nor could it be said that the COVID-2019 pandemic, or the resulting restrictions and lockdowns, resulted from any negligence or misconduct of MIAL, or the failure of MIAL to perform its obligations under the OMDA. Conditions (b), (c) and (d) of "*force majeure*", as set out in Article 16.1.2 of the OMDA, therefore, stand satisfied in the present case.

24. Conditions (a) and (e) essentially relate to whether these circumstances materially and adversely affected the performance, by MIAL, of its obligations under the OMDA. I deem it appropriate to reiterate that, while this issue is hotly debated between the parties, this Court is, for the purposes of the present petition, required only to examine it *prima facie*. Undisputedly, the extent to which the satisfaction of the obligations of MIAL were adversely affected by the COVID-2019 pandemic, and the resultant restrictions imposed by the Government authorities, would be one of the principal issues to be considered in the arbitral proceedings which are to follow. Proffering of any conclusive opinion, on these aspects by this Court would, therefore, transgress the authority of the Arbitral Tribunal.

25. Payment of AF @ 38.7% of the projected Revenue for each year was, undisputedly, one of the obligations of MIAL, under Article 11.1.2.1. Article 11.1.2.2 required such AF to be payable in twelve equal monthly instalments, i.e. twelve equal MAFs. Article 11.1.2.2 also required MIAL to "cause the Escrow Bank to make payment of the MAF to AAI in advance on or prior to the 7th day of each month". Additionally, Article 3.1.1 also included, among the obligations of MIAL, the obligation to execute the Escrow Agreement. There can, in my view, be no dispute about the proposition that the Escrow Agreement, the draft of which specifically constituted a Schedule to the OMDA, was part of the OMDA. This is also clear from the stipulation, in the Escrow Agreement, that it "sets forth the detailed mandates, terms and conditions and operating procedures" for the Escrow Account to be maintained in terms of the OMDA. Clauses (d)

and (e), in the Escrow Agreement, are of pre-eminent significance in appreciating the present controversy and deserve, therefore, in my view, to be reproduced, thus:

> "(d) *Under the terms of the OMDA*, it has been stipulated that all Receivables (as defined hereunder) of the Company *shall be deposited by the Company into an escrow account and disseminated therefrom in a particular priority order.*
>
> (e) This Agreement sets forth the detailed mandates, terms and conditions and operating procedures *for such escrow account.*"
>
> (Emphasis supplied)

Clause (d) states that *the terms of the OMDA* stipulate that the receivables of MIAL shall be deposited by MIAL into an Escrow Account and disseminated therefrom in a particular priority order. A reading of the covenants of the OMDA, *without reference to the Schedules thereto*, fails to reveal any requirement, of MIAL, either to deposit its receivables in the Escrow Account, or to disseminate such proceeds from the said account in any particular priority order. All that was stipulated, in Article 3.1.1 and 11.1.2.2 of the OMDA, was that MIAL would execute the Escrow Agreement, and would cause the Escrow Bank to make payment, of MAF, to AAI, by the 7th day of each month. The requirements of depositing the receivables in the Proceeds Account in the Escrow Account, and the manner in which these receivables were to be disseminated from the Proceeds Account, as well as the priority thereof, are to be found, not in the covenants of the OMDA as such, but in the covenants of the Draft Escrow Agreement, which constitutes Schedule 13 to the OMDA. Clause (d) in the Escrow Agreement, extracted hereinabove, however, states that the deposit of the receivables of MIAL in the Escrow Account, as well

as the dissemination of the said deposits from the Escrow Account, and the priority in which such dissemination is to take place, are all stipulated "under the terms of the OMDA". The combined effect of Articles 3.1.1 and 11.1.2.2 of the OMDA, Schedule 13 thereof and clause (d) of the Escrow Agreement (extracted hereinabove) is, therefore, to render the Escrow Agreement, wholly, a part of the OMDA. *In other words, the obligation to deposit the receivables of MIAL in the Escrow Account, as well as to cause the Escrow Bank to disseminate, from the said Account, the proceeds in a particular priority manner, are all obligations of MIAL under the OMDA.*

26. I am not, therefore, able to accept the contention, of the learned Solicitor General, that the obligations under the Escrow Agreement should be seen independently of the obligations under the OMDA, or that these two agreements are required to be independently appreciated.

27. Which takes us to the next question, of whether MIAL had been unable to render performance of these obligations, or such performance was "materially and adversely affected", by the event of *force majeure*, i.e. by the COVID-2019 pandemic, and the resulting restrictions and lockdowns imposed by the Government authorities.

28. Considerable submissions were advanced, before me, by the learned Solicitor General, both orally as well as in writing, regarding the manner of accounting to be adopted by MIAL under the OMDA, whether it was to be on accrual basis or on actuals, i.e. on the basis of

cash actually earned, the fine distinction between these two systems of accounting, and even Section 128 of the Companies Act, 2013. In my *prima facie* view, these issues are really tangential to the controversy before me. I am not required, for the purpose of deciding this Section 9 application, to enter into the subtle niceties of the obligations of MIAL under the OMDA. I proceed, *arguendo*, on the basis that the learned Solicitor General is correct and that, in fact, MIAL would be *obligated, under the OMDA*, to pay MAF on the basis of its projected and billed revenue, irrespective of actual earnings therefrom. In my view, *that makes no difference* as, if MIAL is entitled to the benefit of Article 16.1.1 and 16.1.5(b) of the OMDA, MIAL would equally be entitled to suspend or excuse the performance of the said obligations, to the extent it is unable to render such performance by the event of *force majeure*.

29. The only issue that is required to be considered, therefore, is whether MIAL was unable to render the performance of its obligation to pay MAF, as claimed by AAI, as a result of the COVID-2019 pandemic, and the resultant lockdowns and restrictions imposed by the Central and State Government authorities.

30. AAI has, in its written submissions, sought to contend that the lockdowns, restrictions and travel advisories, issued and imposed consequent to the COVID-2019 pandemic, "have no bearing on the issue". Instead, contends AAI, what has to be seen is whether the obligations of MIAL, to pay MAF, are to be determined on an accrual basis, based on billings, or on the basis of receipts. I am unable to

agree. In my view, in fact, the actual position is the reverse. What matters, for deciding the present petition, are not the obligations of MIAL under the OMDA, but whether such obligations were rendered incapable of performance, as a consequence of the *force majeure* situation that existed, i.e. as a consequence of the lockdowns, travel advisories and other restrictions imposed by the Government authorities in the wake of the COVID-2019 pandemic.

31. On this aspect, in my view, no independent analytical exercise is required, at least at this stage, as a *prima facie* case, in favour of MIAL, is made out even on the basis of the e-mail, dated 30th March, 2020, addressed by AAI to the SBI, with a copy marked to MIAL. Though AAI has sought to downplay the effect of this communication, it is too unequivocal, in my opinion, to maintain any such attempt. It is clearly stated by AAI, in the said letter that "deferral of MIAL's obligation under Article 11.1.2.2 to make Monthly Annual Fee payments", albeit for a period of three months from April to June 2020, was permitted, by AAI, *"in view of the prevailing circumstances due to COVID 19 … on account of Force Majeure event under the provisions of OMDA"*. I deem it appropriate to reproduce, at the cost of repetition, the first para of the said communication, thus:

> "In view of the prevailing circumstances due to COVID 19, AAI has permitted deferral of MIAL's obligation under Article 11.1.2.2 to make Monthly Annual Fee payments for a period of three (3) months (April 2020 to June 2020) on account of Force Majeure event under the provisions of OMDA. At the end of this three-month period, the cumulative Annual Fee amount for the months of April, May

and June 2020 (computed on actuals) shall be paid to AAI by 15.07.2020."

There is no wishing away the effects of this passage. *AAI has, in so many words, accepted (i) the existence of force majeure, as a consequence to the COVID 2019 pandemic, (ii) the fact that, as a consequence thereof, performance of the obligation, of MIAL, to pay MAF has, at the very least, been severely impacted and (iii) in view thereof, deferral of such obligations was the appropriate step to take, and was justified*. In my view, in fact, the issuance of this letter, in a way, completely satisfies the requirement of the existence of a clear *prima facie* case in favour of MIAL. The submission of MIAL is that, while the beneficial dispensation, as extended by the aforesaid letter dated 30th March, 2020, was welcome, AAI was in error in limiting the period of *force majeure* for the months of April, May and June, 2020, i.e. till 30th June, 2020, and in requiring the MAF, for these three months, to be cumulatively deposited on or before 15th July, 2020.

32. The reference to the "provisions of OMDA", under which the said decision has been taken, obviously includes Article 16.1.1, read with Article 16.1.5 (b), of the OMDA – which are essentially the same. Under these covenants, if either party is unable to render performance of its obligations, under the OMDA, by the *force majeure* event, it shall be entitled to *suspend or excuse* performance of such obligations. I may observe, here, that the expression "suspend or excuse" – especially the word "excuse" – is of wide, and somewhat ambiguous, amplitude. The word "excuse", in my *prima facie*

opinion, is wider than the word "suspend". It may be necessary to consider whether "excusing" of the obligation does not do away with the necessity of performance of the obligation altogether. "Excuse", according to P. Ramanatha Aiyar, in his classic Advanced Law Lexicon, "presupposes the imposition of a duty and the qualification to perform it". If, therefore, the imposition of the duty to perform the obligation, to remit all receivables to the Proceeds Account, and disseminate the receivables in the priority sequence contemplated by the OMDA read with the Escrow Agreement, stands excused, it may be open to debate as to whether this duty could be revived after the *force majeure* ceases. I do not venture to give any final opinion on this issue; firstly, because this is essentially a matter to be considered by the Arbitral Tribunal, to be constituted in that regard, if raised before it, and, secondly, because the determination of this issue is not necessary, to dispose of the proceedings before me.

33. The principal submission of MIAL is, however, that AAI was not justified in fixing the *terminus ad quem*, for the existence of the *force majeure* circumstances, as 30th June, 2020, and in casting, on MIAL, the duty to remit the cumulative MAF, for the months April to June, 2020, into the AAI Fee Account, by 15th July, 2020. Dr. Singhvi has invited my attention, in this context, to Article 16.1.5(c) of the OMDA and, in my opinion, correctly. Article 16.1.5 (c) extends "the time for performance by the affected Party of any obligation or compliance by the affected Party with any time limit affected by *Force Majeure*, and for the exercise of any right affected thereby … by the period during which such *Force Majeure* continues

and by such additional period thereafter as is necessary to enable the affected Party *to achieve the level of activity prevailing before the event of Force Majeure*". There is no ambiguity, whatsoever, in this provision. The Clause, in plain and simple terms, provides that the party affected from performing its obligations owing to *force majeure*, is excused from such performance, till such time as it is able "to achieve the level of activity prevailing before the event of *Force Majeure*". The time for performance, by the party affected by *force majeure*, of its obligations under the OMDA, therefore, contractually stands extended till this point is reached, i.e. till the pre-*force majeure* level of activity of the party is restored. The *terminus ad quem* of the amnesty granted on account of *force majeure* having, thus, been contractually delimited by Article 16.1.5(c), the AAI could not have deemed the *force majeure* to end on 30th June, 2020, contrary to the explicit intent of Article 16.1.5(c).

34. AAI has complained that acceptance of this submission of MIAL would result in an indefinite and indeterminate extension of the obligation, of MIAL, to ensure the transfer of the amounts deposited in the Proceeds Account to the AAI Fee Account. The argument cannot be countenanced, for the simple reason that Article 16.1.5(c) says so. Parties to a contract cannot avoid the rigours of the terms thereof, being bound thereby, unless, of course, the concerned clause is invalidated on any other statutory ground contained in the Contract Act, 1872, or elsewhere. No such case has been made out, or even pleaded, by AAI.

35. It would always be open, no doubt, to AAI, to contend that MIAL has reached the level of activity that existed prior to the intervention of *force majeure*, i.e., essentially, prior to the intervention of the COVID-2019 pandemic. In the present case, however, AAI has not attempted to so contend, at least in express or unequivocal terms. Needless to say, the amnesty, available to MIAL, from adhering to its obligations under the OMDA, would continue only till the achievement, by MIAL, of the level of activity being undertaken by it prior to the COVID-2019 pandemic. Once that level of activity is restored, the protection available to MIAL, under Article 16.1.1, or Article 16.1.5, of the OMDA, would cease. That, however, in my view, cannot be automatic; it would have to be preceded by a Notice, by AAI to MIAL, putting it on notice that the "level of activity" existing prior to the *force majeure* situation stood restored and that, therefore, all obligations of MIAL, under the OMDA, stood revitalised. MIAL would be entitled to respond, and a decision would have to be taken by AAI only consequent to such response being received. These, however, are imponderables, on which I have merely ventured to pen my thoughts, without rendering any final finding.

36. As the situation stands, however, I find merit in the submission, of MIAL, that, in view of Article 16.1.5(c) of the OMDA, AAI could not have fixed the *terminus ad quem* of the *force majeure*, *vide* its letter dated 30th March, 2020, as 30th June, 2020, and directed remitting, into the AAI Fee Account, of the entire MAF, for the months of April to June, 2020, by 15th July, 2020. Such a stipulation would do violence to Article 16.1.5(c) and, in my view, cannot,

therefore, sustain. Once, having accepted the existence of *force majeure*, and the requirement to defer the obligations of MIAL, as a result thereof, such deferral would, by virtue of Article 16.1.5(c), have necessarily to continue till MIAL achieves the level of activity that existed prior to the *force majeure* situation, i.e. prior to the COVID-2019 pandemic. Article 16.1.5(c) would operate to extend the time for performance, by MIAL, of its obligation under the OMDA, as well as the right of AAI to enforce the said obligation, by the period during which the *force majeure* continued and by such additional period as is necessary to enable MIAL to achieve the level of activity prevailing prior to the *force majeure* situation having come into being.

37. The beneficial dispensation, contained in the email dated 30th March, 2020, of AAI to SBI, conforms to Article 16.1.5(c), but only in part. In permitting deferral of MIAL's obligations, under the OMDA, in view of the *force majeure* situation that had resulted as a consequence of the COVID-2019 pandemic, AAI had acted in accordance with Article 16.1.5(c), but in fixing the *terminus ad quem* for such deferral as 30th June, 2020, and in directing the payment of the MAF, for the months of April, May and June, 2020, into the AAI Fee Account on or before 15th July, 2020, AAI had infracted Article 16.1.5(c). The beneficial dispensation, rightly extended by AAI by the communication dated 30th March, 2020 was required, by operation of Article 16.1.5(c) of the OMDA, to continue till MIAL achieved "the level of activity prevailing before the event of Force Majeure" – to borrow, verbatim, the expression employed in Article 16.1.5(c).

38. The challenge, by MIAL, to the fixation of 30th June, 2020, as the date up to which the *force majeure* situation continued and up to which, therefore, MIAL could obtain the benefit thereof, consequently, succeeds. I am of the opinion that, in view of the express stipulation contained in Article 16.1.5(c) of the OMDA, it was not open to AAI to fix such a *terminus ad quem*, absent any specific accompanying observation or finding that, in fact, the adverse consequences of the COVID-2019 pandemic, and the various restrictions imposed in the weeks thereof, came to an end on 30th June, 2020.

39. For this reason, the reliance, by AAI, on the appropriate system of accounting, which was required to be followed under the OMDA, is also, in my view, somewhat misplaced. AAI has sought to point out that, for the past fifteen years, MIAL was following the accrual system of accounting, and paying MAF on the basis of the payments which have accrued to MIAL, i.e., for which bills had been raised by MIAL. According to AAI, allowing MIAL the liberty of paying MAF on the basis of monies actually earned would result in converting the arrangement, under the OMDA, from a revenue sharing model, to a profit sharing model. This would, effectively, rewrite the OMDA which, according to AAI, is completely impermissible.

40. This argument, in my opinion, misses the wood for the trees. Let us, for a moment refer, once again, to Article 16.1.1 of the OMDA. Article 16.1.1 excuses a party, affected by the *force majeure*¸ from performance of its respective obligations under the

OMDA, to the extent that the party is unable to render such performance by the *force majeure* event. Without going into the detailed specifics, it is clear that the obligations of MIAL, under the OMDA, are various and manifold, *including operation, running and maintenance of the CSI Airport* as well as depositing the money as received, from the said activities, into the Escrow Account, and directing dissemination, from such account, to the Proceeds Account, AAI Fee Account and Surplus Account, in the priority sequence contemplated by the Escrow Agreement. These obligations cannot be fulfilled by moneys which had merely accrued, but not received. Hard cash is required. MIAL's plea is that it did not possess the financial resources to discharge all these obligations, even while adhering to its other statutory obligations and servicing of its debts. It is no answer to this submission to state that the system of accounting, contemplated by the OMDA, and followed over a long period of time, was accrual-based, rather than cash-based. The error in the submission of AAI is clearly reflected in the first sentence of para 5 of its surrejoinder written submissions, in which it is averred that "the amount of Rs. 227 Cr. disclosed by MIAL to be its Revenue (within the meaning of the OMDA) for the period April-June 2020 is *on "actuals", i.e. this amount is the "actual billed revenue" of MIAL for this period"*. What AAI fails to discern, in advancing this submission, is that there is a distinction, in plain practical terms, between "actuals" and "actual billed revenue". MIAL could not be expected to discharge its obligations, under the OMDA, using "actual billed revenue". *Per sequitur*, the issue of whether MIAL had, within the meaning of Article 16.1.1 of the OMDA, been rendered unable to

perform its obligations thereunder, cannot be decided on the basis of its "actual billed revenue". What was required to be seen was the "actual" revenue available with MIAL, on the basis of which its obligations would be rendered. The submission of AAI, therefore, artificially obfuscates the distinction between "actual" revenue and "actual billed revenue", placing reliance on the latter whereas, for the purpose of Article 16.1.1 and 16.1.5(c) of the OMDA, what matters is the former.

41. The submission of MIAL, specifically predicated on Article 16.1.1, was that, owing to *force majeure*, it was unable to perform its obligations under the OMDA, and stay afloat. The communication dated 30th March, 2020, from AAI to SBI, indicates that AAI, *prima facie*, found substance in this contention. Though AAI has sought to submit that the beneficial dispensation, extended by the said communication, was only because MIAL had expressed its difficulty in finalising its proposed Business Plan, for 2020-2021, owing to a lack of staff. It is not possible to accept this submission, as the communication dated 30th March, 2020 does not say so. It would also be incongruous to suggest that, though a situation of *force majeure* existed, its impact on MIAL was only with respect to the preparation of its proposed Business Plan for the next year. Rather, a plain reading of the said communication indicates that AAI, even while recognising the existence of *force majeure*, owing to the COVID-2019 pandemic, unilaterally decided that the situation would exist only for the months of April, May and June, 2020. As I have already opined hereinabove, this decision cannot sustain, in view of Article 16.1.5(c).

42. In para 1 of its written submissions, filed in response to the initial written submissions of MIAL, AAI has identified the issue, arising in the present case, as "whether invocation of Force Majeure under the OMDA suspends the obligation of MIAL to pay a revenue share to AAI on the revenue actually generated by it during the period of issue, and whether such invocation permits a re-writing of the "Priority Cash-flow Application" under Article 3 of the Escrow Agreement". AAI has correctly identified the issue, and as paraphrased by it, the issue answers itself. One may divide the issue, as so identified by AAI, into two parts. The first "part" of the issue, as framed by AAI, is "whether invocation of Force Majeure under the OMDA suspends the obligation of MIAL to pay revenue share to AAI on the revenue actually generated by it during the period of issue". Article 16.1.1 of the OMDA squarely answers this "sub-issue". It is expressly stipulated, in the said Article, that "the JVC, or AAI, as the case may be, shall be entitled to suspend or excuse performance of its respective obligations under this Agreement", to the extent the party is unable to render such performance by the event of *force majeure*. That the payment "of revenue share to AAI, on the revenue actually generated by it during the period of issue" constitutes an obligation of MIAL, under the OMDA, stands acknowledged by AAI. *Subject, therefore, to MIAL establishing that the "event of force majeure" rendered it unable to perform this obligation*, Article 16.1.1 confers an absolute right, on MIAL, to suspend or excuse performance of the obligation. This would, of course, be subject to Article 16.1.5(c), which would allow such suspension or excusal to operate only during

the period of *force majeure* and such additional period thereafter as is necessary to enable MIAL to achieve the level of activity prevailing before the event of *force majeure*. MIAL has pointed out that the COVID-2019 pandemic, the various advisories, restrictions and lockdowns imposed by the Government authorities as a result thereof, and the mandatory financial obligations which MIAL had to shoulder, including the need to pay wages and salaries to its employees and servicing of the debts availed by it, in conjunction with the fact that it was receiving payments, from the concessionaires at the Airport and others, of a mere fraction of the amounts billed by it, did not leave it with the financial wherewithal to comply with its obligation to direct transfer, into the AAI Fee Account, the amounts which, according to the OMDA, were required to be so transferred. AAI has not seriously traversed this factual position, preferring, instead, to emphasise the fact that the OMDA only required MIAL to pay the stipulated percentage of the revenues earned by it. The learned Solicitor General has emphasised the fact that MIAL did not dispute the fact that, even during the currency of the COVID-2019 pandemic, and the resultant lockdowns and restrictions, it was earning revenue. His submission was that, once MIAL was earning revenue, it could not legitimately contend that it was unable to pay, to the Escrow Account – specifically, to the AAI Fee Account – the stipulated percentage of such revenue earned. The argument, though attractive at first blush (to employ a timeworn cliché), loses its attraction, on a deeper perusal. If compliance, with the requirement of paying, to AAI, the contractually stipulated percentage of the revenue actually earned by it, did not leave MIAL with the resources to meet its other mandatory

financial obligations, Article 16.1.1 of the OMDA would stand attracted. It was not enough, therefore, for AAI to emphasise the fact that MIAL was required, under the OMDA, only to pay a percentage of the revenues earned by it, howsoever minimal they may be; it was also necessary for AAI to demonstrate that MIAL had the financial wherewithal to do so, even in the face of the *force majeure*. It cannot be said, on the basis of the materials on record, that AAI has succeeded in bridging this gap. Rather, the letter, dated 30th March, 2020, from AAI to the bank, indicates, *prima facie*, that AAI was alive to the financial constraints under which MIAL was operating. In any event, this would be a matter which would have to be thrashed out before the learned Arbitral Tribunal, and cannot be exhaustively, or conclusively, determined in proceedings under Section 9 of the 1996 Act. I am satisfied, however, that, in view, *inter alia*, of the letter dated 30th March, 2020, a *prima facie* case exists, in favour of MIAL, as regards the adverse financial effect of the COVID-2019 pandemic and the resultant restrictions and lockdowns, i.e., of the situation of *force majeure*.

43. The second "part" of the issue, as identified by AAI, is "whether such invocation permits a re-writing of the "Priority Cash-flow Application" under Article 3 of the Escrow Agreement." In my opinion, grant of the relief sought by MIAL does not involve any rewriting of the priority cash flow application, under Article 3 of the Escrow Agreement. As I have already opined hereinabove, the Escrow Agreement cannot be regarded as an independent contractual instrument, but has necessarily to be appreciated in the context of the

covenants in the OMDA. Thus viewed, the "Priority Cash-flow Application, under Article 3 of the Escrow Agreement" is also one of the obligations, cast on MIAL under the OMDA. Article 16.1.1 of the OMDA, therefore, operates to "suspend or excuse" the performance of this obligation, as well. To reiterate, no rewriting of any covenant of the Escrow Agreement is involved in this process.

44. At the end of the day, the issue boils down to whether MIAL is, or is not, entitled to the benefit of Article 16.1.1 of the OMDA. Subject to the decision of the Arbitral Tribunal, which would be constituted hereinafter, on the issue, I am, *prima facie*, convinced that it is.

45. AAI also sought to dispute the contention, of MIAL, that the "subject matter of the arbitration agreement" was not the CSI Airport, or its management, but the revenue sharing mechanism, devised under the OMDA. *Prima facie*, I am not able to agree. The opening covenants of the OMDA contain the following recital:

> "WHEREAS:
>
> (A) AAI is an authority established under the Airports Authority of India Act, 1994 (the "AAI Act"), which is responsible for the development, operation, management and maintenance of airports in India.
>
> (B) AAI, in the interest of the better management of the Airport (as defined herein) and/or overall public interest, is desirous of granting some of its functions, being the functions of operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport to the JVC and for this purpose to lease

> the premises constituting the Airport Site (as defined herein), in accordance with the terms and conditions set forth herein.
>
> (C) JVC is a company established, inter alia with the objectives of operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport (as defined herein).
>
> (D) JVC is desirous and agreeable to undertake the function of operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport (as defined herein) on and subject to the terms and conditions set forth herein."

It would be facile, in the face of such an unequivocal recital, to even suggest that the "subject matter of the agreement" was not managing of the CSI Airport, but earning of revenue by AAI in accordance with the revenue sharing agreement envisaged in the OMDA. Clearly, the *raison d'être* of the OMDA, and its essential intent and purpose, is "operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport to the JVC and for this purpose to lease the premises constituting the Airport Site", to borrow the somewhat commodious expression used by the OMDA itself. The revenue sharing agreement, in the OMDA would, therefore, *prima facie*, be part of the terms and conditions, subject to which this arrangement has been brought into operation. This is, in fact, expressly so stated in Article 2.1.1 of the OMDA, which reads as under:

> "AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernisation, finance and management of the Airport and to perform services and activities constituting Aeronautical Services, and Non-Aeronautical Services (but excluding

> Reserved Activities) at the Airport and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, upgradation, modernisation, finance and management of the Airport and at all times keep in good repair and operating condition the Airport and to perform services and activities constituting Aeronautical Services and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport, *in accordance with the terms and conditions of this Agreement (the **"Grant"**)."*
>
> (Emphasis supplied)

The "Grant", under the OMDA was, merely, a convenient abbreviation for the terms and conditions thereof. The obligations of MIAL, under the OMDA, therefore, constituted part of the "Grant". Article 16.1.1 of the OMDA, therefore, squarely applied thereto.

Conclusion

46. As a result, this petition is allowed to the following extent:

(i) 38.7% of the actual payments, received by MIAL, from the activities connected with the OMDA and the functioning of the CSI Airport, shall be deposited in the Proceeds Account in the Escrow Account maintained by SBI. Subject to the directions that follow, this direction shall operate prospectively from the date of the pronouncement of this judgement.

(ii) AAI is restrained from transferring the said amounts, lying in, or to be deposited in, the Proceeds Account to the AAI Fee Account.

(iii) MIAL would be entitled to utilise the amounts lying in the Proceeds Account, for meeting its expenses in connection with its obligations under the OMDA, pertaining to the running and maintaining of the CSI Airport and other obligations linked thereto. I do not deem it necessary, therefore, to transfer the amounts lying in the Proceeds Account to the Surplus Account. The utilisation, by MIAL, of the amounts lying in the Proceeds Account, towards maintaining the CSI Airport and fulfilling other obligations under the OMDA – save and except such obligations, the fulfilment of which are impeded by the COVID-2019 pandemic and the restrictions imposed consequent thereupon – would be strictly accounted, and monthly account statements, in that regard, shall be provided to AAI as well as the SBI.

(iv) MIAL and AAI are both directed to appoint one arbitrator each, of their choice, within a period of ten days from the communication, by the Registry of this Court, of a copy of this order, by e-mail to learned Counsel who appeared on their behalf, or from the date of uploading of this order on the website of this Court, whichever is earlier, and to communicate the choice of arbitrator to each other. The two arbitrators, so appointed, shall appoint the Presiding Arbitrator, on or before 31st December, 2020. The learned Arbitral Tribunal would enter on the reference within two weeks of its being so constituted.

(v) The fees of the learned arbitrators would be in accordance with the Fourth Schedule of the Arbitration and Conciliation Act, 1996, subject to any other fees being fixed by the learned arbitrators after discussion with the parties.

(vi) MIAL is permitted, if it so chooses, to prefer, before the Arbitral Tribunal thus constituted, an application, under Section 17 of the Arbitration and Conciliation Act, 1996, for the continuance of the operation of this order, within two weeks of the Arbitral Tribunal entering on the reference. Default, on the part of MIAL, in doing so, would result in this order ceasing to operate on the expiry of the said period.

(vii) AAI is also permitted to move an application, under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitral Tribunal, for alteration or variation of the present order, or for a direction, to MIAL, to deposit any differential amount, remaining to be paid in accordance with the OMDA, in the Proceeds Account or the AAI Fee Account, or for any connected or cognate reliefs. Any such application, if moved, would be decided on its own merits.

(viii) In case such an application is moved by MIAL or AAI, the learned Arbitral Tribunal is requested to consider and dispose of the application as expeditiously as possible, needless to say after affording due opportunity to the opposite party to

contest the prayers. The present order would, therefore, continue to remain in operation, pending and subject to the decision of the learned Arbitral Tribunal in this regard.

(ix) The interim protection, under (i) to (iii) *supra*, would continue till, and remain subject to, the decision, of the learned Arbitral Tribunal, on the application to be preferred, before it, by MIAL under Section 17 of the Arbitration and Conciliation Act, 1996, if it so chooses to prefer any such application. Else, as already noted hereinabove, this order would cease to operate two weeks after the Arbitral Tribunal enters on the reference.

(x) All observations and findings, contained in the present judgement, are only entered for the purposes of disposing of the present application, of MIAL, under Section 9 of the Arbitration and Conciliation Act, 1996. They do not represent any binding expression of opinion, by this Court, on the merits of the claim of MIAL, or of the opposition, by AAI, thereto. Any application by MIAL, under Section 17 of the 1996 Act, for the continuance of the present order, if preferred, would also be decided by the learned Arbitral Tribunal uninfluenced by any observation or finding, contained in this judgement.

47. There shall be no orders as to costs.

C.HARI SHANKAR, J

NOVEMBER 27, 2020
HJ