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

RESERVED ON – 23.01.2025

% ***PRONOUNCED ON –07.03.2025***

\+ **O.M.P. (COMM) 186/2024**

AIRPORTS AUTHORITY OF INDIA .....Petitioner

Through: Mr. Tushar Mehta, Learned SGI with Mr. Raghavendra P Shankar, learned ASG with Mr. Karan Lahiri, Mr. Prateek Arora, Mr. Neelabh Bist, Ms. Rishieka Ray, Ms. Pallavi Misra, Advocates

versus

DELHI INTERNATIONAL AIRPORT LIMITED & ANR. .....Respondents

Through: Mr. Parag Tripathi, Mr. Raj Shekhar Rao, Sr. Advs. with Mr. Rishi Agarwala, Mr. Apoorv P. Tripathi, Mr. Dheeresh Kumar Dwivedi, Mr. Manu Krishnan, Mr. Daksh Arora, Mr. Nikhil, Advocates for DIAL.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J.:

A. PREFACE

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Act') challenging the impugned arbitral award dated 21.12.2023 as corrected under Section 33 of the Act vide order dated 16.01.2024.

2. Airports Authority of India (hereinafter referred to 'the Petitioner' and/or 'AAI'), is a statutory authority established under the Airports Authority of India Act, 1994, responsible for maintaining and managing civil aviation infrastructure in India.

3. Delhi International Airport Ltd. (hereinafter referred to as 'Respondent No. 1' and/or 'DIAL'), is a joint venture entity entrusted with the operation, management, and development of Indira Gandhi International Airport, Mumbai ('IGIA') under an Operation, Management and Development Agreement (hereinafter referred to as 'OMDA') dated 04.04.2006 executed between AAI and DIAL.

4. ICICI Bank limited (hereinafter referred to as 'ICICI' or 'Respondent No.2') is a private sector bank and the designated escrow agent under the Escrow Agreement executed as part of the financial arrangement governing the OMDA. ICICI has been arrayed as a pro forma party in these proceedings

B. FACTUAL MATRIX

5. Briefly stated the facts of the case as mentioned in the petition are that in March 2020, upon the outbreak of the COVID-19 pandemic and subsequent governmental restrictions aviation operations were severely disrupted. Consequently, DIAL sought relief under Article 16 of the OMDA, citing Force Majeure vide email dated March 19, 2020 and requested AAI to refrain from instructing the escrow bank regarding the Monthly Annual Fee ('MAF') for April 2020, contending that the existing business plan was no longer applicable. DIAL committed to submitting a provisional business plan for FY 2020-21 by March 31, 2020, taking into account the economic impact of the pandemic. The said request was acknowledged by AAI on March 23, 2020. Consequently, DIAL submitted an interim business plan for April 2020 on March 27, 2020, and sought a three-month waiver upto June, 2020 on MAF payments due to the nationwide lockdown.

6. Thereafter, on March 31, 2020, DIAL formally invoked Force Majeure, asserting that the outbreak of COVID-19 constituted an unforeseeable event under Article 16 of the OMDA, significantly impacting business operations and revenue. DIAL sought a waiver of MAF for April to June 2020 and indicated that its Business Plan for FY 2020-21 would only be finalized after obtaining Board approval by June or mid-July 2020. In response, AAI, through an email dated April 2, 2020, requested a board resolution confirming the invocation of Force Majeure. DIAL, on April 3, 2020, informed AAI that it was in the process of securing Board approval and requested permission for the

Escrow Bank to retain funds equivalent to MAF for April in the AAI Fee Account until approval was obtained.

7. Despite disputing DIAL's entitlement to invoke Force Majeure under Article 16.1.1, AAI, acting in good faith, accepted DIAL's request and granted a three-month deferral of MAF payments from April to June 2020 on a "without prejudice" basis. Under this arrangement, DIAL was required to pay the cumulative MAF for April, May, and June 2020, computed on actual revenues, by July 15, 2020, without incurring interest under Article 11.1.2.2. Additionally, AAI extended the submission deadline for the business plan for FY 2020-21 from March 31, 2020 to June 30, 2020. However, DIAL did not provide the required board resolution confirming the invocation of Force Majeure and continued to pay the MAF for April, May, and June 2020.

8. Through a letter dated April 16, 2020, DIAL sought adjustments for an alleged excess Annual Fee payment from the previous financial year. In a response dated April 28, 2020, AAI informed that any adjustments would be made as per the OMDA after verification by the Independent Auditor. AAI also reminded DIAL that the Board resolution approving the invocation of Force Majeure had not yet been submitted and that DIAL, per its own proposal, was continuing MAF payments until such approval was granted.

9. On May 1, 2020, DIAL reaffirmed its commitment to paying MAF and proposed that the MAF for May 2020 be adjusted against the alleged excess AF payments from the previous financial year. In response,

AAI, via a letter dated May 18, 2020, reiterated that adjustments would only be considered once DIAL's statutory auditor and board approved its accounts, which would then be submitted for independent verification. Subsequently, on May 27, 2020, DIAL requested AAI to permit MAF payments for FY 2020-21 to be based on cash receipts rather than the accrual basis, citing the adverse impact of COVID-19 on its revenue and cash flow.

10. Building upon this, in an email dated June 11, 2020, DIAL informed AAI of its intention to seek Board approval for the following: (i) deferment of the preparation and approval of the Annual Operating Plan (AOP) until business operations resumed to a reasonable level; (ii) continued submission of monthly revenue projections until AOP approval; (iii) a request for AAI to defer the payment of Revenue Share to support DIAL's cash flow; and (iv) an alternative arrangement allowing MAF payments on a cash-received basis rather than advance payments based on estimated revenues. DIAL sought this relief as a one-time measure for the remainder of FY 2020-21.

11. The aforesaid proposals were approved by the Board of DIAL on June 17, 2020 and consequently on June 24, 2020, DIAL formally requested deferment of MAF payments on a cash basis, submitting Board meeting minutes and a document titled "Detailed Note on Relaxation in Business Plan Submission and Payment of MAF." This note referenced various OMDA provisions and COVID-19's impact, arguing for special consideration under Article 20.3.1. AAI, in a response dated June 25, 2020, rejected DIAL's request and reiterated that MAF

payments must continue as per the approved plan from July 2020 onwards and called upon DIAL to submit the Business plan for financial year 2020- 2021 by 30.06.2020.

12. On June 30, 2020, DIAL submitted its projected financials for July 2020–March 2021 and requested an interest-free deferral of MAF payments for Q2 (July–September 2020). AAI, in a letter dated August 7, 2020, rejected this request and directed DIAL to comply with its OMDA obligations. Subsequently, DIAL formally sought to be excused from MAF payments via a letter dated August 27, 2020, submitting a Board resolution dated August 20, 2020, which permitted DIAL to request AAI to apply Force Majeure from April 1, 2020, and suspend MAF payments. Nonetheless, remittance of MAF continued as per the usual practice by DIAL.

13. Subsequently, DIAL invoked Article 15.1.1 of the OMDA vide notice on September 18, 2020, seeking resolution within 60 days, failing which the notice stated that DIAL would initiate arbitration under Clause 15.2. AAI rejected DIAL's Force Majeure claim on November 23, 2020, stating that DIAL had accepted AAI's position without protest for months and had failed to demonstrate an inability to perform its obligations.

14. Learned AT was constituted on 13.01.2021 and vide Procedural Order dated 23.08.2021, the learned AT fixed the following Issues/Points for Determination:

"(i)Whether the Claimant is entitled to the claims/reliefs raised in

the present proceedings? (OPC)

(ii) Whether either/both Parties are entitled to interest on their respective claims, and if so, for which period(s) and at what rate? (Onus on parties)

(iii) Whether either/both Parties are entitled to costs on their respective claims, and if so, for what sums?(Onus on parties)"

15. During the pendency of the arbitral proceedings, the Delhi High Court partially allowed a petition filed by Mumbai International Airport Authority (MIAL) under Section 9 of the Act and consequently, DIAL, through a letter dated 02.12.2020, contended that the directions contained in the aforementioned judgment constituted *decisions in rem* and that the AAI was bound to apply these directions to DIAL as well.

16. On 05.12.2020, DIAL also filed an application under Section 9 of the Act, OMP (I) (COMM.) No. 409 of 2020, seeking a declaration that, pending the hearing and final disposal of the arbitration proceedings, as well as the making and implementation of the arbitral award, its obligation to pay the AF under the OMDA should be excused. On the same day, AAI also filed an appeal, bearing FAO (OS) (COMM.) 168/2020, under Section 37 of the Act, challenging the order dated 27.11.2020 passed by the learned Single Judge in OMP (I) (COMM.) 174 of 2020 titled *'Mumbai International Airport Limited v. Airports Authority of India & Anr.'* This appeal was disposed of by an order dated 14.01.2021. The Division Bench of the Delhi High Court, while deciding the appeal, issued directions that partially modified the

directions issued by the learned Single Judge in its order dated 27.11.2020 in MIAL's case.

17. Meanwhile, on 05.01.2021, in OMP (I) (COMM.) No. 409 of 2020, the learned Single Judge of the Delhi High Court issued an order staying the transfer of funds from the Proceeds Account to the AAI Fee Account until further orders. The court also permitted DIAL to utilize the amounts in the Proceeds Account for the operation of the IGI Airport and related activities. Despite observing that there was "effectively no distinction whatsoever between the present case and MIAL's case," the learned Single Judge did not extend the same protection to AAI's share as had been granted in MIAL's case. Consequently, DIAL stopped making payments of the Annual Fee to AAI from January 2021 onwards. On 05.02.2021, AAI filed an appeal, FAO (OS) (COMM.) 22 of 2021, challenging the learned Single Judge's order dated 05.01.2021 in OMP (I) (COMM.) 409 of 2020 (DIAL's Section 9 Petition).

18. While the matter rested thus, the parties entered into a Settlement Agreement on 25.04.2022 governing the interim arrangement for the payment of the AF. Without prejudice to their respective rights and contentions, and subject to the final outcome of the arbitration, the parties agreed that an AF/MAF at the rate of 45.99% of the projected revenue of the DIAL for the financial year 2022-23 would be deposited from the Proceeds Account into the AAI Fee Account, in accordance with the OMDA and the Escrow Agreement. It was agreed that DIAL would withdraw its application under Section 9 of the Act filed before

the learned Single Judge of the Delhi High Court in OMP (I) (COMM.) 409 of 2020 and AAI would withdraw its appeal under Section 37 of the Act filed before the Division Bench of the Delhi High Court. It was also agreed that within five days of compliance with the above provisions, DIAL would be liable to pay the Annual Fee for April 2022, with subsequent monthly payments to be made in accordance with the OMDA and the Escrow Agreement. The Settlement Agreement superseded the ad-interim order dated 05.01.2021, passed by the Delhi High Court and pursuant to the same DIAL resumed MAF payments from April 2022 onwards, and this arrangement has continued since.

19. DIAL filed its Statement of Claim before the learned Arbitral Tribunal (AT) on 25.03.2021. In response, AAI filed its Counterclaims along with its Statement of Defence to DIAL's claims on 01.07.2021. Subsequently, on 31.07.2021, DIAL submitted its Statement of Defence to AAI's Counterclaims.

20. Final arguments were heard, and the learned AT reserved its Award on 21.03.2023. With the consent of both parties, the AT's mandate was extended for six months from 28.02.2023, setting its expiration date at 31.08.2023. Thereafter, the Court granted a further three-month extension of the mandate, commencing from 01.09.2023, followed by an additional three-month extension starting from 01.12.2023.

21. The Impugned Award was passed on 21.12.2023 by the learned AT, which was pronounced on 06.01.2024 and on 16.01.2024, the learned

AT, *suo motu*, passed an Order under Section 33 of the Act, correcting "stenographical errors" in the Award dated 21.12.2023.

22. Learned AT granted the claims of DIAL, while rejecting all the counter-claims of AAI. In the above background, AAI has sought to assail the Impugned Arbitral Award on the grounds that it is patently illegal and contrary to public policy, warranting its setting aside under Section 34 of the Act. The grounds for challenge as stated in the petition are as follows:

    a. Learned AT ignored vital evidence on record, including but not limited to relevant documentary and oral evidence particularly the extensive evidence demonstrating DIAL's ability to pay the AF, relying on DIAL's own documents and oral evidence. The learned AT disregarded the entirety of this evidence, which forms no part of the impugned award.

    b. Learned AT has not only rewritten the contract, but has also rendered certain contractual provisions ineffective. The impugned award nullifies Articles 16.1.1 and 16.1.2(e) of the OMDA by removing the requirement of demonstrating 'inability to perform obligations' to claim the benefit of Force Majeure. Furthermore, learned AT has not only failed to examine whether the notice was issued in compliance with the provisions of OMDA, but instead has altogether deleted the requirement of a notice under Article 16.1.5(a) of the OMDA. The award effectively deletes this provision by treating the occurrence of a pandemic and

government recognition of the same as co-equal to the issuance of a notice by DIAL under Article 16.1.5(a) of the OMDA.

c. The interpretation of the contract contained in the impugned Award is not even a possible view of the contractual terms, which are explicit, unambiguous and irreconcilable. Learned AT rejected the submission of AAI that since AF is calculated as a percentage of revenue, it remains proportionate to revenue and is always capable of being paid and held that that it would be too simplistic to require DIAL to pay 45.99% of its earnings without considering its obligation to ensure smooth airport operations. It has been stated that the said interpretation of AAI was based on the plain and literal reading of Articles 11 and 16 of the OMDA and the decision of the learned AT is in the teeth of contractual provisions. Further, the learned AT's finding that the occurrence of a Force Majeure event is indisputable contradicts the express terms of the contract and disregards AAI's contention that the Covid-19 pandemic alone does not justify relief for DIAL unless all requirements under Chapter XVI are met. It has been stated that while the pandemic qualifies as a physical event under Article 16.1.3(vii), it can only constitute Force Majeure if it satisfies the conditions set forth in Articles 16.1.1 and 16.1.2. DIAL failed to demonstrate its inability to perform a specific obligation, a key requirement under these provisions. By ignoring these contractual conditions and treating the pandemic itself as Force Majeure, the learned AT arrived at a conclusion that no fair or reasonable person could have reached.

d. Learned AT has violated the letter and spirit of Section 28(3) of the Act and effectively rewritten Article 11 which required DIAL to pay 45.99% of its 'Revenue' to AAI. The definition of 'Revenue' and the language of Article 11 is clear and unambiguous and provides that payment of AF was not contingent on whether DIAL generated profits or incurred losses. Learned AT has erroneously converted the revenue-sharing mechanism contemplated under the OMDA into a profit-sharing contract by holding that, during the Force Majeure period, revenue receipts would first be used for running the airport, and only the surplus, if any, would be shared between DIAL and AAI in the contractual ratio

e. Learned AT has rewritten Chapters XVI and XVIII of the OMDA by allowing an extension of the OMDA term for a period commensurate to 19.03.2020 till 28.02.2022. Even assuming, on a demurrer, that DIAL was entitled to the benefit of the Force Majeure clause, the relief of extension of the contract term finds no mention in the Force Majeure clause itself. There is no contractual basis whatsoever for extending the concession period, and the award provides no reasoning for granting such an extension.

f. The Impugned Award contravenes Section 31(3) of the Act as it fails to provide reasoning for its findings and leaves key issues unresolved. A crucial question—whether DIAL was genuinely unable to pay the AF—remains unaddressed. Furthermore, the learned AT failed to determine whether each instalment of the AF

is a separate and distinct obligation, which, if unpaid on time, would attract interest under Article 11.1.2.2. The learned AT also did not assess whether all conditions under Article 16.1.2 were met at the time each instalment became due. Additionally, the impugned arbitral award provides no rationale for excusing rather than suspending DIAL's obligation to pay the AF, despite explicitly raising the question in the award itself. Another core issue left unresolved is what constitutes pre-Covid levels of activity. It has been stated that while the learned AT rejected DIAL's argument that Air Traffic Movement ('ATM') and Passenger Traffic Movement ('PTM') should define pre-Covid levels of activity, it failed to provide a clear alternative standard. Factors such as government-imposed Covid-19 restrictions and DIAL's alleged negative cash flow are discussed but not linked to determining pre-Covid activity levels. Learned AT arbitrarily set 28.02.2022 as the end date for relief based on the Supreme Court's order extending limitation under general and special laws.

g. The impugned arbitral award has altered the very basis on which bids were invited inasmuch as it alters the 'key features of the transaction"' as recorded in the Judgment of the Supreme Court in ***'Reliance Airport Developers (P) Ltd. v Airports Authority of India & Ors.'***, (2006) 10 SCC 1 by allowing DIAL to be completely excused from making payment of AF for the period 19.03.2020 to 28.02.2022.

h. The impugned arbitral award altered the waterfall mechanism established in the Escrow Account Agreement dated 28.04.2006.

Under the Escrow Account Agreement, the Escrow Bank was required to prioritize deposits as follows: first, statutory dues; second, the monthly AAI Fee; and third, any remaining balance into the Surplus Account. This structure clearly established that DIAL's obligation to pay the MAF to AAI took precedence over its operational expenses, except for statutory dues. Learned AT, however, held that during the Force Majeure period, revenue receipts should first be used for airport operations, with only any surplus to be shared between DIAL and AAI, thereby overturning the agreed-upon financial structure.

i. Learned AT rendered that since force majeure steps in only upon the occurrence of an unforeseen event caused by a superior or irresistible force, an act of God, or an event entirely beyond human control (as opposed to a third-party event) and thus cannot be covered under Section 32 contradicts the public policy of India as the said interpretation conflicts with settled law, as established in ***'Associate Builders v. DDA'***, (2015) 3 SCC 49 and reaffirmed in ***'Ssangyong Engg. & Construction Co. Ltd. v. NHAI'***, (2019) 15 SCC 131. It has been stated that learned AT disregarded the binding judicial precedents—despite being made aware of them

j. Learned AT has granted DIAL relief in excess of what it sought in its letters 19.03.2020 and 31.03.2020. DIAL only sought certain waivers such as adjustments against past payments, payment on cash basis etc. under Article 20.3.1 of the OMDA but learned AT granted complete excusal from making payment of AF for the period 19.03.2020 to 28.02.2022 and also extended the term of the

OMDA. Learned AT failed to address AAI's objection that suspension or excusal of obligations applied only to those arising during the Force Majeure event which DIAL itself claimed ended on 17.03.2021, and that only the time for performing such obligations can be extended. Article 16.1.5(c) does not determine the right to excusal or suspension of obligations, which is governed by Articles 16.1.1 to 16.1.3, nor does it prescribe what relief can be granted under Chapter XVI. It has been stated that Article 16.1.5(c) applies only when obligations are suspended—not excused entirely as evident from the plain and ordinary meaning of the contract's terms, and any other view contradicts its clear and unambiguous language.

k. The allocation of costs to DIAL is patently illegal and lacks justification under Indian law. The award on interest is also unreasoned, patently illegal, and against the fundamental policy of Indian law.

l. The finding that AAI admitted the occurrence of Force Majeure in its letter dated 04.04.2020 is false, patently erroneous and contrary to the record. The letter, issued under Article 16.1.5(d) of the OMDA, explicitly disputed DIAL's claim that no AF was payable due to Force Majeure. It has been stated that while AAI, acting in good faith, granted DIAL an extension until 30.06.2020 to submit its annual business planned and deferred the time for payment of MAF till 15.07.2020 without interest, to align with the revised timeline given the difficulties cited due to the lockdown and. This was purely a procedural accommodation, not an acknowledgment

of Force Majeure. The letter expressly rejected DIAL's entitlement under Chapter XVI of the OMDA, and learned AT's conclusion that it amounted to an admission is legally untenable and a patently erroneous finding that no fair-minded arbitrator could have reached.

23. It has been stated in the petition that the impugned arbitral award warrants interference on two more counts. First, the learned AT's reliance on AAI granting relief to its own concessionaires to justify relief for DIAL is patently illegal and has no contractual basis under the OMDA. It has further been stated that the learned AT ignored key evidence that DIAL itself did not extend revenue share relief to its own concessionaires at Delhi Airport. Furthermore, AAI's argument that DIAL's claim was not contractual but premised on public law grounds beyond the jurisdiction was not even considered. Learned AT erroneously equated DIAL, an airport operator, with small retail concessionaires (such as cafés) at AAI-run airports, despite the fundamental difference in their roles. DIAL holds an exclusive right to operate Delhi airport, with its primary financial obligation being the payment of the AF, whereas AAI's concessionaires operate individual shops without comparable obligations. It has been stated that AAI never excused or suspended revenue share payments for its own concessionaires, making the learned AT's conclusion factually and legally flawed. Additionally, it has been stated the impugned arbitral award's reasoning is extra-contractual, relying on AAI's treatment of other agreements rather than the specific terms of the OMDA,

rendering it liable for setting aside under Section 34(2)(A) of the Act. It has also been stated that the learned AT also wrongly asserted that AAI ignored the term "excuse," despite AAI's written submissions addressing this distinction extensively. Furthermore, the finding that the contract would have become void "but for" the Force Majeure clause is entirely unsupported by evidence and overlooks the necessity of proving an actual inability to perform.

C. SUBMISSIONS ON BEHALF OF THE PETITIONER

24. Sh. Tushar Mehta, learned Solicitor General submitted that the impugned award is liable to be set aside as it is perverse, contrary to law, and fundamentally alters the contractual framework between the parties. It was submitted that an arbitral award is liable to be set aside, if the arbitrator construes the contract in a manner that no fair-minded or reasonable person would, and the arbitrator's view is not even a possible view, or if the award wanders outside the contract. It has been submitted that the contract, which is the culmination of the parties' agency, is to be given full effect, and no provision thereof can be frustrated or rendered otiose. It has been submitted that an arbitral award can also be set aside if the award is (i) unreasoned, in contravention of Section 31(3) of the Act; (ii) perverse and, hence, patently illegal; (iii) contrary to the fundamental policy of Indian law, *inter alia* for the reason that it disregards judgments/orders passed by superior courts. Reliance has been placed on ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***, (2019) 15 SCC 131 to emphasize that if an arbitrator gives no reason for an award, it contravenes Section

31(3) of the Act that would certainly amount to patent illegality on the face of the award. It was submitted that though perversity may no longer be a ground for challenge "under public policy of India" it would certainly amount to patent illegality appearing on the face of the award.

25. Learned SG has also relied on the judgment in ***DMRC Ltd. v. Delhi Airport Metro Express Pvt. Ltd***., 2024 INSC 292 to emphasize that in a similar case involving public funds, the Apex Court approved the exercise of power under Section 34 to set aside an Award holding it to be perverse and resulting in a miscarriage of justice, on the ground that the tribunal adopted an "unreasonable" and "uncalled for interpretation" of the contract which frustrated the relevant contractual provision(s). Learned SG submitted that in ***DMRC Ltd. v. Delhi Airport Metro Express Pvt. Ltd.,***(Supra) reliance was placed upon ***'Ssangyong Engg. & Construction Co. Ltd. v. NHAI'***, (Supra) wherein it was *inter alia* held that though construction of the terms of a contract is primarily for an arbitrator to decide. However, if the arbitrator construed a contract in a manner that no fair minded or reasonable person would or that the arbitrator's view is not even a possible view to take or if the arbitrator wanders outside the contract and deals with the matter not allotted to him, the arbitrator commits an error of jurisdiction. Learned SG submitted that this ground of challenge now falls within the new ground added under Section 34(2)(A) of the Act. It was submitted that a finding based on no evidence at all or an award which ignores vital evidence in arriving at

its decision would be "perverse" and liable to be set aside on the ground of "Patent Illegality".

26. Learned SG has relied upon ***Energy Watchdog v. CERC***, (2017) 14 SCC 80 in which reliance was placed upon ***Alopi Parshad & Sons Ltd. v. Union of India***, (1960) 2 SCR 793: AIR 1960 SC 588 wherein it was *inter alia* held that the performance of a contract is never discharged merely because it may become onerous to one of the parties. In ***Energy Watchdog (Supra)*** reliance was also placed upon ***Naihati Jute Mills Ltd. v. Khyaliram Jagannath***, (1968) 1 SCR 821, wherein it was *inter alia* held that a contract is not frustrated merely because the circumstances in which it was made are altered. It was further *inter alia* held that the courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

27. Similarly, in ***Energy Watchdog (Supra)*** reliance was also placed upon ***Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH*** (1961) 2 WLR 633 wherein the House of Lords *inter alia* held that even though the contract had become more onerous to perform, it was not fundamentally altered. It was further *inter alia* held that where performance is otherwise possible, a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

28. Learned SG has also placed reliance upon ***NTPC Limited v Jindal ITF Limited & Anr.***2025 SCC OnLine Del 511 wherein it was *inter alia*

held that despite the minimum judicial interference, the Court would not mechanically uphold the award of the learned Arbitral Tribunal without examining the same on the anvil of the settled judicial principles and principles of natural justice. In this case, it was *inter alia* held that the legislature may have circumscribed the jurisdiction of the Court but still it has bestowed a duty upon the Court to examine the same within a limited sphere

29. Learned SG has submitted that the Force Majeure clause in the OMDA, i.e., Chapter XVI is a self-contained code governing 'Force Majeure' which provides conditions that must be satisfied for an event to qualify as an event of 'Force Majeure' within the meaning of the OMDA for the benefit of suspension/excusal to be availed. Learned SG has taken this court through the scheme of Chapter XVI of the OMDA and submitted that Article 16 of the OMDA requires that the party claiming the benefit of the Force Majeure provision can seek suspension/excusal of the relevant contractual obligation "to the extent that" it is "unable to render such performance". It was submitted that in any case "Force Majeure" is not an admitted position, while the pandemic is covered as one of the physical events set out in Clause 16.1.3, however, as per the same clause, it is evident that the pandemic would qualify as Force Majeure only "to the extent that they, or their consequences satisfy the requirements set forth in Article 16.1.1 and Article 16.1.2", i.e., inability is a sine qua non for an event described in Article 16.1.3 to constitute "Force Majeure" under the OMDA and thereby avail the benefit of Chapter XVI.

30. Learned SG submitted that in the present case, DIAL has not been able to prove that it was "unable" to pay the AF from 13.03.2020 onwards. It has been submitted that DIAL had substantially discharged its obligation to pay AF to AAI during the subsistence of the alleged Force Majeure event, i.e., between 19.03.2020 to17.03.2021. DIAL was, admittedly, able to pay AF at least for the period March 2020 to December 2020, evident from the fact that it actually paid Rs.465.77 Crores during this period, discharging its liability to pay Annual Fee for this period in full. It was also submitted that on 17.03.2021 immediately prior to the expiry of 365 days from the date it allegedly sought relief, i.e., 19.03.2020, DIAL issued a letter declaring the end of Force Majeure.

31. Learned SG submitted that despite being able to pay the AF, DIAL, in its Statement of Claim, sought excusal from payment of the AF from March 13, 2020, till such time period it achieves the level of activity prevailing before occurrence of Force Majeure. Additionally, DIAL sought an extension of the term of the OMDA. Significantly, these reliefs were sought without a single pleading in the Statement of Claim asserting that DIAL was "unable" to pay the AF, as required under Chapter XVI of the OMDA.

32. Learned SG submitted that even DIAL itself candidly admitted that it had been "constantly making" payments of the AF. DIAL contended that it was not required to demonstrate such inability to claim the benefit of Chapter XVI—an argument that directly contradicts the requirement under Article 16.1.1 to demonstrate an inability to perform

the obligation in question. Learned SG emphasized that when a party has in fact been able to perform its obligations, it cannot claim an inability to do so or seek an excuse from performance.

33. Learned SG further submitted via email dated 19.03.2020, DIAL informed AAI of an alleged decline in its revenues due to reduced traffic volumes caused by the COVID-19 pandemic. DIAL stated that it would submit a provisional Business Plan for FY 2020-21 before 31.03.2020, incorporating the effects of the pandemic, based on which it would determine its MAF payment for April 2020. Subsequently, on 27.03.2020, while submitting its interim business plan for April 2020, DIAL took the position that it would not be in a situation to discharge its obligation to pay the monthly AF to AAI for at least the next three months, up to June 2020. Following this, via an email dated 31.03.2020, DIAL made a request under Article 16 of the OMDA, stating that the outbreak of COVID-19 constituted a Force Majeure event under Article 16 of the OMDA, which had significantly impacted its business and severely affected its revenues. Accordingly, DIAL sought a waiver not a suspension or excusal of the MAF payments for the period up to June 2020. However, it has been submitted that none of these communications satisfied the requirements of Article 16.1.5(a), primarily because they did not explicitly claim an inability to fulfill the obligation to pay AF, as required under Chapter XVI of the OMDA. Moreover, none of these communications asserted any right or relief concerning an extension of the term of the OMDA, either under Chapter XVI or otherwise. It was further submitted that, despite raising

concerns about its financial position, DIAL did not avail itself of the one-time, without-prejudice deferral offered by AAI (which was initially requested by DIAL itself). Instead, DIAL continued making regular and complete payments of the Annual Fee throughout the peak of the pandemic, from March 2020 to December 2020.

34. Learned SG has submitted that in addition, the impugned arbitral award not only holds that DIAL is excused from making any payment of the Annual Fee to AAI during the period 19.03.2020 to 28.02.2022, but it also holds that DIAL is entitled to an extension of the very term of the OMDA despite the fact that, no clause in the OMDA, including the Force Majeure clause, contemplates such relief and, further that no such relief was sought at the relevant time by DIAL while purportedly invoking Article 16 of the OMDA. It has been submitted that DIAL has been granted a "double dip" of both excusal of its obligation to pay the AF and also an extension of the term of the OMDA and has been unjustly enriched at the cost of public monies.

35. Learned SG submitted that the learned AT has rewritten the contract between the parties and rendered otiose certain key provisions thereof. It has been submitted that DIAL's case was that Article 16 of the OMDA provided for suspension/excusal of DIAL's obligation to pay the AF to AAI under Article 11 in the event the revenues received by DIAL during the corresponding period were insufficient to operate and manage the Airport. It has been submitted that nothing in the language of either Article 16 or Article 11 contains such a stipulation. It has been submitted that without explicitly giving expression to the term it was

implying in the OMDA, the learned AT concludes that during the so-called force majeure period, revenue receipts would have to be used firstly for running the Airport, and in the event that there is a surplus thereafter, the surplus would have to be shared. It has been submitted that this stipulation finds no place in the OMDA, but has been written into the contract by the Award.

36. Learned SG submitted that an essential contractual precondition, i.e., that a party must be unable to perform a particular contractual obligation in order to claim the benefit of the force majeure provision, has been written out of existence by the learned AT. It has been submitted that since DIAL actually paid the AF during the worst of pandemic, DIAL cannot possibly be said to be "unable" to perform its obligation under Chapter XI of the OMDA. Therefore, the decision to order a refund of amounts paid over by DIAL to AAI is a patently illegal conclusion.

37. Learned SG submitted that learned AT has also inserted a provision on extension of the term of the OMDA. It has been submitted that no provision of the contract, either in Chapter XVI or XVIII or otherwise, contemplates the extension of the term of the OMDA on account of force majeure events. It has been submitted that in its letter dated March 31, 2020, DIAL did not seek such an extension, and during the arbitration proceedings, in the course of its oral submission, DIAL expressly admitted that there was no contractual basis for this relief, instead relied on the principles of business efficacy for seeking the relief of such extension. It has been submitted that the impugned

arbitral award does not examine or address these fundamental arguments, nor does it engage with the admission. It has been submitted that learned AT ignored this contention of AAI. It has further been submitted that the learned AT summarily granted the relief of extension in a single paragraph, without substantive reasoning or contractual justification, thereby effectively rewriting the contract by altering the term of the OMDA (Chapter XVIII), expanding the relief under the force majeure clause beyond what is permitted (Chapter XVI) and changing the basis on which bids were invited. It has been submitted that the learned AT erroneously inserted a provision for extension that does not exist in the contract.

38. Learned SG submitted that learned AT's justification, as set out in of the impugned arbitral award, is legally 'unsustainable' and 'unreasoned', as it asserts that in several contracts where the tenure spans a long term, alleviation/relief is accommodated by extending the tenure of the contract without citing any legal authority, contractual provision, or factual basis. Further, it was submitted that learned AT misinterpreted Article 16.1.5(c), which does not contemplate an extension of the term and erroneously relied on AAI's letter dated March 30, 2020. It has been submitted that there is no letter dated 30.03.2020 in the record of the present case and even otherwise, if AAI's letter dated 04.04.2020, which speaks of Article 16.1.5(c) is taken into consideration, it only provides that AAI would be willing to have recourse to the said Article to in respect of payment of MAF for the months of April, May and June 2020.

39. Learned SG submitted that learned AT has converted the OMDA into a Profit-Sharing Contract. It has been submitted that under the OMDA, DIAL shares 45.99% of its Revenue with AAI, and the said obligation to pay the Annual Fee is not contingent on DIAL being able to meet its operational costs or establishing that DIAL is encountering negative cash flow. Learned SG has submitted that the conversion of revenue-based model into profit-based model essentially rewrites the OMDA and also has an effect of rewriting the Priority Cash-flow Application provided in clause 3.2(B) of the Escrow Account Agreement, wherein payment of AAI Fee is given precedence over meeting of DIAL's operational and other expenditure.

40. Learned SG submitted that the impugned arbitral award is unreasoned and perverse on multiple key issues. Learned AT stated that the transpiration of a force majeure event is beyond cavil or disputation, thereby rendering otiose any notice as envisaged in Article 16.1.5 of the OMDA. It has been submitted that this observation by the learned AT effectively negates the contractual requirement of demonstrating an inability to perform obligations before invoking Force Majeure, thereby bypassing a fundamental prerequisite under the contract. It has been submitted that the learned AT fails to undertake any analysis of whether DIAL was actually unable to pay the AF which is a critical issue for determining the validity of its claim under Chapter XVI of the OMDA. Further, it has been submitted that the learned AT also held that it was unnecessary for it to return an opinion on the question whether OMDA envisions either revenue sharing or profit sharing,

despite AAI specifically arguing that acceptance of DIAL's claims would fundamentally alter the contractual framework. Learned SG submitted that this failure to engage with AAI's argument undermines the reasoning of the impugned arbitral award. Additionally, it has been submitted that the impugned arbitral award is plainly perverse and internally contradictory as on one hand the learned AT recorded that DIAL conceded that all conditions under Article 16.1.2 must be satisfied in order to claim relief under Chapter XVI, yet on the other hand, it has recorded the submission of DIAL that Chapter XVI does not require proof of inability to pay. Learned SG submitted that this contradiction further underscores the perverse nature of the impugned arbitral award, as it fails to provide a consistent and reasoned approach to the interpretation of the contractual provisions.

41. Learned SG submitted that the impugned award is contrary to the public policy as the learned AT held that Section 32 of the Indian Contract Act would only be attracted if the contingency of the outbreak of COVID or any other closely similar contagion had specifically been postulated and dealt with in the contract. However, it has been submitted that this statement disregards the binding effect of ***Energy Watchdog v. CERC***, (2017) 14 SCC 80, which clearly holds that Section 32 of the Indian Contract Act applies when a contract contains a force majeure clause, whereas Section 56 applies when there is no such provision.

42. Learned SG submitted that the fact that DIAL's revenues are said to have dropped during the relevant period is not sufficient to avail the

benefit of Chapter XVI. To avail the benefit of Chapter XVI, all conditions of Article 16.1.2 have to be satisfied. This is evident from the plain language of Article 16.1.2 as has also been held in the impugned arbitral award. This is also in accord with Article 16.1.3 which specifies that a physical event only constitutes "Force Majeure" if it also satisfies the requirements of Articles 16.1.1 and 16.1.2. Learned SG submitted that the alleged temporary negative cash flow of DIAL only satisfies the requirement of Article 16.1.2(a) but not the requirement of Article 16.1.2(e) and Article 16.1.1, i.e., the requirement to prove inability. It has been submitted notwithstanding above and assuming that DIAL suffered a temporary negative cash flow and that such temporary negative cashflow 'materially and adversely affects the performance of an obligation', even in that case this in itself is not sufficient to claim the benefit of Chapter XVI without DIAL also proving that it was "unable to render such performance by an event of Force Majeure". In view of the decision of Supreme Court in ***Energy Watchdog v. CERC***, (2017) 14 SCC 80, it has been submitted that a party is not discharged from its contractual obligations even if performance of the same has become more onerous.

43. Learned SG submitted that it is not sufficient for DIAL to say that if its revenues drop, the provisions of Chapter XVI automatically trigger. The test is inability or impossibility to perform the obligation, i.e., inability to pay AAI its share of the Revenue and, it has been submitted that this test is not satisfied. On the contrary, DIAL has in fact discharged its obligation by paying over AAI's share of Revenue while

continuing to operate and maintain the Delhi Airport. Thus, it has been submitted that the impugned arbitral award has substituted the contract between the parties with one of its own making *inter alia* by writing Clauses 16.1.1 and 16.1.2(e) out of existence, in an attempt to provide some basis for the grant of relief to DIAL.

44. Learned SG submitted that the grant of relief until 28.02.2022 is unreasoned. It has been submitted that DIAL's reliance on Article 16.1.5(c) of the OMDA is misplaced and contrary to the meaning of the said provision. It has been submitted that a bare peruse of Article 16.1.5(c) makes it clear that the provision allows for the "the time for performance" to 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." Therefore, Article 16.1.5(c) only provides for the period that a suspension could operate. Such a stipulation, it has been submitted, is not relevant to a whatsoever to "excusal", which is the relief that has been granted. If an obligation has been excused, there is no question of extending the time for performance of the same. Further, learned SG submitted that without prejudice to the above, and assuming without conceding that the said Article has any relevance in this context, it has been submitted that Article 16.1.5(c) only allows for a time extension to perform those obligations that were affected during force majeure. It does not wipe out contractual obligations that arose for the very first time after the period of force majeure ceased to exist. It has been submitted that even

according to DIAL itself, the force majeure event ceased to exist on 17.03.2021, thus, no obligation that arose after 17.03.2021 could have been suspended by having recourse to Article 16.1.5(c). Be that as it may, it has been submitted that the learned AT has erred in not determining what is the "additional period thereafter as is necessary to enable the affected Party to achieve the level of activity prevailing before the event of Force Majeure". It has been submitted that the sole basis on which DIAL has been granted relief till 28.02.2022 is the Supreme Court's Order extending limitation. However, it has been submitted that DIAL did not even attempt to justify this reasoning or even suggest that the Order of the Supreme Court extending the statutory period of limitation under several laws has any relevance to the purely contractual issue of relief being claimed under a Force Majeure clause.

45. Learned SG submitted that the Supreme Court's Order extending limitation has nothing to do with contractual force majeure generally or specifically under OMDA. It has submitted that the same has no relevance to the conditions stipulated in Chapter XVI which an affected party must satisfy in order to claim relief under the said Chapter. Therefore, it has been submitted that the impugned arbitral award is clearly based on guesswork and irrelevant considerations, which contradict the clear and unambiguous terms of the contract.

46. Learned SG submitted that the submission of DIAL that Article 16.1.5(c) also provides for extension of the term of the OMDA is incorrect and contrary to the plain language of the contract. It has been

submitted that Article 16.1.5(c) only allows for the time for performance of an obligation affected by force majeure to be extended for a specified period within the term. It does not allow a party to extend the term of the Contract itself. It has been submitted that Article 16.1.5(c) only entails the "Procedure for Force Majeure" and only defines the period of suspension of performance of an obligation affected by Force Majeure under Article 16.1.1 and has no application to the enjoyment of rights granted to DIAL under the OMDA. If it were the intention of the parties that the force majeure clause would operate to extend the Term of the OMDA, the contract would have said as much. It conspicuously does not do so. It has been submitted that Article 16.1.5(c) does not provide a basis for claiming a relief over and above those contemplated under Article 16.1.1, namely suspension or excuse of DIAL's obligations under the OMDA. In any case, it has submitted that DIAL's submission that Article 16.1.5(c) permits the extension of "any right affected" by Force Majeure and therefore the grant itself is to be extended cannot be accepted for the simple reason that no such reasoning exists in the Award. It has been submitted that the fact that DIAL is relying on reasoning that forms no part of the impugned arbitral award to support the conclusions arrived at therein is sufficient proof that the impugned arbitral award is incapable of being defended. Therefore, it has been submitted that the Tribunal has granted reliefs that find no mention in Chapter XVI or anywhere else in the contract, thereby impermissibly rewriting the very Term of the OMDA under Article 18.1(e).

47. Learned SG submitted that DIAL's reliance on the letter dated 04.04.2020 to contend that occurrence of force majeure was an admitted position between the parties is misplaced. It has been submitted that in the letter dated 04.04.2020 sent by AAI , AAI has never admitted to the occurrence of force majeure. However, on a without prejudice basis, AAI had offered a three month deferral to DIAL as requested by it. Further, it has been submitted that DIAL has failed to explain how this 'without prejudice' communication which is issued specifically under Article 16.1.5(d) constitute admission of force majeure.

D. SUBMISSION ON BEHALF OF THE DIAL

48. *Per Contra*, Mr. Parag Tripathi and Mr. Raj Shekhar Rao, learned senior counsels submitted that the impugned award is unanimous, well-reasoned, and based on a correct interpretation of OMDA, as well as the pleadings, documents, and evidence presented during the arbitral proceedings. It has been submitted that the findings of learned AT are supported by a detailed evaluation of material evidence, legal precedents, and established contractual principles, thereby leaving no room for judicial interference under Section 34 of the Act.

49. Learned senior counsels submitted that it is trite that an arbitral tribunal's decision cannot be interfered with by the Court exercising its jurisdiction under Section 34 of the Act if its interpretation of a contract represents a plausible view of the matter. It was submitted that the arbitrator is the final Arbiter of facts, and courts while exercising

their power under Section 34 must defer to their findings unless they are perverse or contravene fundamental policy. Reliance has been placed on ***UHL Power Company Ltd. v. State of Himachal Pradesh*** (2022) 4 SCC 116, ***Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*** (2019) 7 SCC 236 and ***Hindustan Construction Co. Ltd. v. NHAI*** (2024) 2 SCC 613, to submit that the courts should not act as appellate forums over arbitration awards. Further, learned senior counsels also submitted that the grounds for challenge of an award under Section 34 are well settled and well defined and in the present case, none of the grounds of challenge are available.

50. Learned senior counsels submitted that the interpretation rendered by the learned AT regarding Chapter XVI of OMDA—the primary clause under scrutiny—is the only possible and legally sound interpretation. This is particularly true as critical facts, events, and material evidence are undisputed. It was submitted that the findings of fact have not even been challenged in the present petition. Learned senior counsels submitted that the testimony of DIAL's witness (CW-2) on crucial facts stood unrebutted throughout the proceedings, further strengthening DIAL's position. It was submitted that in fact it is the AAI that is seeking to read words into the clause and rewrite the said clause, which would render the word 'excuse' otiose. It was submitted that the learned AT's interpretation is based purely on the clause's wording and is both reasonable and prudent. Moreover, it was submitted that even if an alternative interpretation were possible, the

settled principle of arbitration law dictates that so long as the tribunal's view is plausible, it cannot be interfered with under Section 34 and the award cannot be set aside merely on the ground that there is another possible interpretation.

51. Learned senior counsels submitted that Article 16.1.2 of OMDA enumerates five specific conditions that must be satisfied for an event to be constituted as a Force Majeure Event. It was submitted that the learned AT meticulously examined the record and determined that in the present facts and circumstances all the five conditions were satisfied. It was submitted that the said finding of the learned AT is based on an exhaustive analysis of the unrequited evidence. Learned Senior Counsels pointed out that AAI's primary contention revolves around learned AT's supposed failure to consider conditions under Article 16.1.2(a) and (e), particularly regarding DIAL's purported 'inability' to pay AF. However, it was submitted that the learned AT, upon careful evaluation, held that Covid-19 had materially impaired DIAL's ability to perform and discharge its obligations under OMDA. Firstly, it was submitted that there cannot be any doubt that the Covid-19 pandemic was a force majeure event, and its ramifications on contractual performance had to be assessed accordingly. It was submitted that DIAL invoked Article 16 through a series of letters and emails addressed to AAI, outlining the severe impact of the pandemic, including an unprecedented revenue shortfall and its direct consequence was the inability to meet even mandatory obligations. It was submitted that in view of various notifications and circulars issued

by the Government of India, even though the aircraft and passenger movement had reduced drastically, DIAL was incurring significant operational and maintenance costs, rendering its financial position untenable. It was submitted that the entirety of these correspondences were presented before learned AT and duly proved by DIAL's witnesses including CW-2, that deposed to the effect that the pandemic had severely affected DIAL's financial performance, compelling the company to withdraw a working capital facility of Rs. 307.52 crores. Additionally, it was submitted that the financial statements of DIAL were also presented as evidence before the learned AT which conclusively demonstrated that airport revenues were insufficient to cover operational expenses and substantiated DIAL's inability to meet its financial obligations under OMDA. Learned senior counsels submitted that the AAI neither challenged nor questioned these financial statements during cross-examination. Furthermore, learned senior counsels submitted that the DIAL's revenue generation is directly tied to aeronautical and non-aeronautical services, which in turn rely on ATM and PTM. It was submitted that the government-mandated restrictions and suspensions of air travel resulted in a drastic reduction in both ATM and PTM and the data sourced from AAI's official website and its annual reports corroborated this decline, both of which were presented and thoroughly analyzed before learned AT. It was submitted that the learned AT, upon reviewing this evidence, rightly concluded that DIAL's ability to generate revenue was severely and acutely affected from the last week of March 2020 onward. The learned AT further observed that Covid-19's impact on airport

operations was such that operational expenses exceeded total revenue. Consequently, learned senior counsels submitted that that the finding qua 'inability' is a finding of fact based on the relevant and uncontested material before the learned AT making judicial interference unwarranted under Section 34 of the Act. It was submitted that the learned AT had painstakingly examined the entire contractual framework and the factual matrix. In fact, the view taken by the learned AT was not only plausible but the only correct view.

52. Learned senior counsels submitted that Article 16.1.1 explicitly entitles parties to either 'suspend' or 'excuse' performance of their obligations and the learned AT correctly held that these terms could be interpreted synonymously, as once force majeure conditions ceased to exist, the status quo ante would be restored. It was submitted that AAI's interpretation attempted to impose a restrictive reading that disregarded the word 'excuse' and the same was not supported by the contractual text. It was submitted that learned AT rightly rejected such an approach. Further, DIAL had no option to suspend airport operations during the pandemic, as it was legally bound to maintain the airport's functioning. Consequently, requiring payment of the AF despite DIAL incurring substantial losses would have been commercially unreasonable. It was submitted that force majeure principles dictate that no party should be unduly burdened with losses beyond its control. The learned AT, upon examining the evidence, found that Covid-19 had materially and adversely impacted DIAL's ability to operate the airport, creating a situation where expenses exceeded revenue. It was

submitted that the learned AT, rather than disregarding the phrase 'to the extent,' correctly applied it by considering financial evidence demonstrating DIAL's negative cash flow, which impaired its ability to perform its obligations under OMDA. It was submitted that recognizing the available reliefs—namely, 'suspend' or 'excuse'—learned AT rightly concluded that, since DIAL was mandated to continue operating the airport and was compelled by law to incur all associated costs, it was entitled to excusal from the AF payment. It was submitted that as Article 16.1.1 itself envisages the relief of excusal, and the learned AT has rendered a reasoned finding based on evidence and interpretation, no interference is warranted. Any other interpretation would undermine the objective of OMDA by placing DIAL in a position where it could not fulfill its primary obligation to operate the airport, leading to a failure of the contract's fundamental purpose.

53. Learned senior counsels submitted that the financial impact of the pandemic resulted in DIAL's expenses exceeding its revenue, making the payment of the Annual Fee infeasible. The assertion that DIAL could pay simply because some revenue was being generated is both misleading and legally untenable. It was submitted that learned AT correctly observed that it would be too simplistic to require DIAL to pay 45.99% of its earnings without considering its obligation to ensure the smooth functioning of the airport. Learned senior counsel submitted that accepting AAI's argument would effectively nullify the Force Majeure clause and undermine the fundamental structure of OMDA as

the said interpretation suggests that contractual obligations must remain unchanged even during a force majeure event. It was submitted that such a position is flawed, as it would render Article XVI of OMDA meaningless. Learned senior counsel submits that, given DIAL's legal obligation to keep the airport operational despite significant financial distress, excusal from the AF payment was the only reasonable outcome under Article 16.1.1 and the learned AT's interpretation upholds the principle of business efficacy, ensuring that contractual provisions remain commercially viable even in extraordinary circumstances such as a global pandemic.

54. Learned senior counsels submitted that AAI has objected that that learned AT ignored its evidence regarding 'inability'. However, it was submitted that AAI did not produce any factual witnesses, instead relied solely on an expert witness (RW-1), whose testimony was fundamentally flawed. It was submitted that RW-1 failed to adhere to forensic accounting principles and did not consider the utilization of DIAL's funds, and overlooked key financial indicators.

55. Learned senior counsels submitted that AAI contended that learned AT ignored Article 16.1.5(a). However, it was submitted that the Government of India had itself recognized Covid-19 as a Force Majeure Event through its office memorandum dated 19.02.2020, thereby rendering the requirement of notice under Article 16.1.5 redundant. Additionally, it was submitted that AAI's letter dated 04.04.2020 implicitly acknowledged the occurrence of a Force Majeure event. Learned AT concurred with this view and held that AAI's

argument—that DIAL had not validly invoked Force Majeure under Article 16.1.5(a)—was misconceived. It has been submitted that AAI's assertion that the letter dated 04.04.2020 did not amount to an admission of force majeure is both incorrect and an afterthought. The letter clearly recorded AAI's acknowledgment of the Force Majeure Event and confirmed that the Monthly Annual Fee payment was deferred on that basis. It was submitted that AAI, in the letter dated 04.04.2020 specifically noted DIAL's invocation of force majeure under OMDA and proceeded in accordance with the procedural framework outlined in the agreement. AAI had also indicated its willingness to extend the time for payment of the MAF for a specified period, thereby recognizing the impact of the pandemic. It was submitted that the Learned AT, after considering this letter, concluded that AAI had made a tacit admission of force majeure and had, in view of the prevailing circumstances, deferred certain obligations. The Learned AT further observed that AAI's subsequent denial of the force majeure event was disingenuous, particularly given the governmental directives, Supreme Court rulings, and AAI's own actions in granting relief to other concessionaires.

56. Learned senior counsels submitted that regarding the Pre-Force Majeure level of activity and the duration of the relief, Learned AT justifiably determined 28.02.2022 as the appropriate date until which relief could be granted, based on material on record. This *inter alia* included the financial statement of DIAL for FY 2021-22, which reflected a loss of INR 293.22 crores, the order dated 30.07.2021

suspending international commercial flights until 31.08.2021, and the widely known impact of the Second Covid Wave. It was submitted that learned AT was fully conscious that the precise date for the resumption of Pre-Force Majeure activity levels could not be definitively ascertained. Accordingly, it left this issue open for determination in a separate proceeding. However, until 28.02.2022, it was submitted that learned AT had sufficient evidence available particularly the financial statement of DIAL which demonstrated that pre-COVID activity levels had not been restored. This finding, based on evidence on record and a correct interpretation of Article 16.1.1 read with Article 16.1.5(c), is not open to challenge under Section 34 of the Act. Consequently, it was submitted that the argument advanced by AAI—that relief could not have been granted beyond 17.03.2021 or that the end date of 28.02.2022 was speculative and arbitrary. Thus, untenable and liable to be rejected.

57. Learned senior counsels further submitted that AAI contends that the obligation to pay the Annual Fee always remains capable of performance since it is calculated as a percentage of revenue. According to AAI, the relief of ‘excuse’ effectively rewrites the terms of the OMDA. However, it was submitted that this argument is misplaced. In fact, the same argument was raised before learned AT, which held that it was an oversimplification to assert that DIAL must pay 45.99% of its earnings without considering its obligation to ensure the smooth functioning of the airport. Learned AT's interpretation of Article 16.1.1 and the consequent relief of ‘excuse’ were based on a

sound understanding of Force Majeure and aligned with the business efficacy of the contract. It was submitted that it is a well-established principle that commercial contracts should be interpreted in a manner that upholds business efficacy and commercial prudence. Therefore, the learned senior counsels submit that learned AT, in holding that DIAL was 'excused' from paying the AF, merely interpreted the terms of the agreement in a way that preserved business efficacy. This does not constitute a rewriting of the contract. On the contrary, it was submitted that it is AAI that seeks to rewrite the contract by introducing the term 'deferral' into Article 16.1.1, a term that is not present in the said Article. Furthermore, when viewed in context, AAI's argument—that learned AT altered the OMDA from a revenue-sharing to a profit-sharing model—fails, as learned AT simply applied Chapter XVI and excused DIAL's obligation to pay the Annual Fee under Chapter XI.

58. Learned senior counsels submitted that AAI has also argued that the learned AT's finding that revenue receipts were to be utilized first for operating the airport, and any surplus thereafter was to be shared between DIAL and AAI in the agreed contractual ratio amounts to a rewriting of the waterfall mechanism under the Escrow Agreement. However, learned senior counsels submit that this argument is misplaced, as it overlooks the fact that the finding pertains to a Force Majeure event, the consequences of which are governed by Article 16 of the OMDA. Additionally, it was submitted that AAI's contention disregards learned AT's explicit finding that the opposition to payment

of the AF during the relevant period is not based on the DIAL having incurred losses—since it is correct that the OMDA does not guarantee profits to the DIAL—but rather due to the occurrence of Force Majeure circumstances arising from the Covid-19 pandemic. It was submitted that this does not, in any manner, amount to rewriting the Escrow Agreement.

59. Learned senior counsels in respect of relief of an extension of the OMDA term granted by learned AT, it was submitted that the said relief was granted after considering trade usage and the terms of the OMDA. It was submitted that learned AT adopted a practical and commercial approach aligned with the efficient business practices applicable to long-term concession agreements such as OMDA. Therefore, the relief granted by learned AT remains within the contractual framework and does not constitute a rewriting of the contract. Learned senior counsel submitted that Clause 16.1.5(c) of OMDA contemplates that in a force majeure event, the time for the exercise of any right available to DIAL would be extended. It was submitted that the grant of the concession under Article 2 of OMDA constitutes such a right, and the consequential extension of OMDA, as directed by learned AT, was correctly granted. Furthermore, it was submitted that applying Clause 16.1.5(c), DIAL specifically sought an extension of the concession period from 13.03.2020 until such time as ATM and PTM returned to pre-Covid levels. Learned AT, after examining the evidence, granted relief for the period from 19.03.2020 to 28.02.2022, noting that, based on the material on record, ATM and

PTM levels had not reached pre-Covid levels by 28.02.2022. Learned senior counsel submits that the interpretation of Clause 16.1.5(c) by learned AT was a plausible interpretation, and such a finding ought not to be interfered with under the limited scope of review available in a petition under Section 34 of the Act.

60. Learned senior counsel also submitted that DIAL's payment of the AF for the period from March 2020 to December 2020 does not negate the fact that DIAL, due to the Force Majeure event, was unable to fulfill its obligations under OMDA. It was submitted that the AF for the said period was wrongfully appropriated by AAI, despite being fully aware of DIAL's financial situation and despite receiving a notice of the occurrence of Force Majeure. It was submitted that AAI not only insisted on but also continued issuing instructions to the Escrow Bank to transfer amounts equivalent to the monthly AF into its Fee Account. As a result, DIAL made a specific claim for a refund, which learned AT granted.

61. Learned senior counsels submitted that OMDA contemplates business as usual on all days when revenue earned is to be shared, except in the event of a force majeure, wherein the usual revenue-sharing obligation stands excused. It was submitted that the findings of learned AT, as expressly recorded by learned AT itself, were rendered in the context of the force majeure event (Covid-19 pandemic), wherein DIAL was compelled, by government mandate, to continue operating, maintaining, and managing the airport despite a drastic reduction in ATM & PTM. It was submitted that DIAL's ability to generate revenue

is inherently linked to aeronautical and non-aeronautical services, and that, in the event of a substantial reduction in air traffic and passenger traffic movement, DIAL's capacity to collect requisite revenues was materially and detrimentally impacted. The financial impact of Covid-19 was duly established through the testimony of DIAL's witness, who proved the financial statements of DIAL, the significant drop in revenue, and DIAL's financial inability to pay the AF.

62. Learned senior counsels submitted that AAI has not challenged the fundamental findings of learned AT, which have therefore attained finality. It was submitted that learned AT, categorically noted that the occurrence of a force majeure event due to Covid-19 was not in dispute. Further, the learned AT found that the conditions under Article 16.1.2(b), (c), and (d) were satisfied, thereby conclusively establishing force majeure. It was also submitted that learned AT, recognized that a reduction in ATM and PTM had a detrimental impact on DIAL's revenue, while, it also determined that DIAL's income for FY 2020-21 and 2021-22 was lower than its expenses. Moreover, the learned AT acknowledged that DIAL had no option but to continue operating the airport and that ceasing operations would have nullified the contract. Additionally, it was submitted that Paragraph 129 of the award established that DIAL's financial statements for FY 2019-22 demonstrated its financial inability, a finding that AAI did not challenge in cross-examination. Since AAI has failed to contest these fundamental determinations, it was submitted that the Section 34 petition is liable to be dismissed.

E. FINDING AND ANALYSIS

63. It is a settled proposition that the Arbitration and Conciliation Act, 1963, as amended up to date, prescribe minimum judicial interference. The Court can interfere under Section 34 of the Act on the limited grounds provided therein. The award can only be interfered with if the Court reaches to the conclusion that the perversity of the award goes to the root of the matter and there is no possibility of alternative interpretation which may sustain the arbitral award. It is no longer *res integra* that the Court while exercising the jurisdiction under Section 34 cannot clothe itself with the appellate jurisdiction. The Court is bound to respect the finality of the arbitral award. The Act mandates party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. The approach of interfering into the award without there being any ground as prescribed under Section 34 would actually frustrate the commercial wisdom behind opting for alternate dispute resolution. It is also pertinent to mention here that the Court cannot interfere into the award merely on the ground that an alternative view is possible on the facts and interpretations of contract. It is also a settled proposition that the Court should respect the view taken by an Arbitral Tribunal even if the reasoning provided in the award is implied. The award can only be interfered if it portrays perversity, unpardonable under Section 34 of the Act. Reliance can be placed upon ***Dyna Technologies Vs. Crompton Greaves Limited*** (2019) 20 SCC 1.

64. In ***Dyna Technologies Vs. Crompton Greaves Limited***(Supra), it was *inter alia* held that while considering the requirement of a reasoned

order, three characteristics of a reasoned order can be fathomed i.e.; that the order is (i) proper, (ii) intelligible and (iii) adequate. It was further *inter alia* held that if the reasonings in the order are improper, they reveal a flaw in the decision making process. The award is also open to challenge on the ground of impropriety or perversity in the reasoning. Similarly, if the award is based on no reasoning at all that would be termed as unintelligible. However, if there is a challenge on adequacy of reasons it was *inter alia* held in ***Dyna Technologies Vs. Crompton Greaves Limited***(Supra), that the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. It was further *inter alia* held that the degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. The Apex Court *inter alia* held that even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the tribunal so that the awards with in adequate reasons are not set aside in casual and cavalier manner. Thus, it was held that the Courts have to be very careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.

65. Bare perusal of the above makes it clear that if the award provides no reasoning at all then it falls in the category of unintelligible. Even otherwise it would be hit by Section 31(3) of the Act which provides

that the arbitral award must state the reasons upon which the award is based except for the reasons given in the provision itself. It is also pertinent to mention here that the Arbitration and Conciliation Act, 1996 does not provide any qualification for being appointed as an arbitrator. In this regard, Section 11(1) only provides that a person of any nationality may be an arbitrator unless, agreed by the parties. Thus, it is not necessary that an arbitrator would be a person from a legal background. Possibly for this reason, the legislature in its wisdom under Section 31(3) of the Act has provided that generally the arbitrator shall state reasons upon which it is based. However, a liberty was given to the parties that they may agree that in the award no reasons are to be given. The award may also not provide any reasons, if the parties have reached on a settlement as provided under Section 30 of the Act. Thus, it seems that for this reason the Apex Court has *inter alia* held that while entertaining the challenges of an award on the ground of inadequacy of reason the Courts may also consider the documents submitted by the parties and contentions raised before the tribunal. Thus, the Courts while exercising its jurisdiction under Section 34 of the Act may not look only at the award but also look at the pleadings, documents and submissions made by the parties.

66. The court, in exercising its jurisdiction under Section 34 of the Act to set aside an award, must determine whether the award is so irrational that no reasonable person could have reached the same conclusion. An arbitral award shall into the aforesaid category if the findings are based on no evidence; or an Arbitral Tribunal has taken into account

something irrelevant to the decision or ignores vital evidence in arriving at its decision. Reliance can be placed upon ***Associate Builders v. DDA***, (2015) 3 SCC 49.

67. In ***Excise And Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*** 1992 Supp (2) SCC 312 it was *inter alia* held that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law. Similarly, in ***Kuldeep Singh v. Commr. Of Police*** (1999) 2 SCC 10 it was *inter alia* held that if a decision is arrived at on no evidence or evidence which is thoroughly unreliable that no reasonable person would act upon it, the order would be perverse. However, if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.

68. Petitioner, in the present case has relied heavily upon the finding of ***Energy Watchdog*** (Supra) case to submit that a contract cannot be discharged merely because the same has become onerous. However, this Court considers that the facts in the ***Energy Watchdog*** (Supra) are respectfully distinguishable to the facts and circumstances of the case. In the present case, it is not the case of either of the parties that performance of the contract had become onerous. It was never an option for the DIAL to close down the operation of the airport. It is a

settled proposition that the force majeure clause will not generally be invoked, if the contract provides for an alternative mode of performance. Reliance can be placed upon Treitel on Frustration and Force Majeure, 3rd Edition. The Court is of the considered view that 'a force majeure clause' in a contract is generally an exception or an eclipse provision, meaning thereby if a force majeure is enforced the performance as mandated in the other terms of the contract will remain eclipsed till the force majeure event persists. Whether the force majeure has taken place or not or it exists or not or the time till when it exists is a question of fact to be determined by the Arbitral Tribunal.

69. In ***Rashtriya Ispat Nigam Limited vs Dewan Chandram Saran*** (2012) 5SCC 306 it was *inter-alia* held that if the terms of a contract are capable of two interpretations and the view taken by the arbitrator is a possible if not a plausible one then it is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. Reliance can also be placed upon ***SAIL v. Gupta Brother Steel Tubes Ltd.*** (2009) 10 SCC 63. In ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd.***(2010) 11 SCC 296 it was *inter alia* held that if the umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one, one may at the highest say that one would have preferred another construction, but that cannot make the award in any way perverse. It was further inter alia held that in such a situation, the Court cannot substitute its own view in place of the view taken by the arbitrator as it would amount to sitting in appeal.

70. In ***Kwality Mfg. Corpn. v. Central Warehousing Corpn.***(2009) 5 SCC 142 it was *inter alia* held that if the umpire is legitimately entitled to take the view, which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement, the same has to be accepted as final and binding.

71. The Court while deciding the petition under Section 34 of the Act and particularly in the dispute arising out of the commercial contract must bear in mind that the parties while entering into the contract, voluntarily agreed to refer their matter for adjudication by an adjudicator chosen and appointed by them. The parties at that stage themselves have excluded their option of going to the Court of Law. The basic genesis of the arbitration, particularly in the commercial dispute is that the arbitrator while deciding such dispute may not clothe himself with a very technical mindset and should decide the dispute between the parties taking in view the commercial sense and the business efficacy.

72. In ***Mumbai Metropolitan Region Development Authority v. Unity Infraprojects Ltd.*** (2008) SCC OnLine Bom 190, it was *inter-alia* held that a business like interpretation of contractual provisions must be adopted in construing contracts entered into by persons of business to govern business dealings. It was further *inter alia* held that the Court must ensure that interpretation of law in commercial cases must not be disjointed from the intent and object which those having business dealings seek to sub-serve. It was noted that unless interpretation of contracts effectuates a business meaning for persons of business, the

law will not fulfill its purpose and object of being a facilitator for business and providing a structure of ordered certainty to those who carry on business here. It is necessary to note that the judicial dispensation system cannot remain static and has to be dynamic and required to innovate constantly itself to keep abreast with rapid changes in business terms.

73. In the present case, the AAI which is a statutory authority established under the Airport Authority of India Act, 1994 and DIAL entered into contract for commercial purposes. It cannot be disputed that the intentions of both parties were to earn revenue out of the joint venture. The joint venture herein was of the development and maintenance of the one of the most important and landmark airports of this country, i.e., Delhi. This Court is of the firm view that the state cannot be denied the commercial gains of profits merely because it has been termed as a welfare state and certain fundamental responsibilities have been placed upon it under the various statutes and the Directive Principles of State Policies. The state would also need the money and the resources for running various welfare projects, and therefore in the commercial disputes, the adjudicator has to maintain the balance between the two. However, the adjudicator must take into account the peculiar facts and circumstances of every case and must assess the same in a very broad horizon. The issue in the present case is that whether during the period of the pandemic, the general provisions of the contract, which mandates DIAL to pay an AF at a certain percentage will continue even during the pandemic. It cannot be disputed that during the period of

Covid the life had come to a standstill. The case of DIAL is that though they continue to run the operation but their revenues had fallen down so much that they were unable to meet even the expenses. On the contrary the case of the AAI is that; firstly it cannot be said that the DIAL were "unable to pay" the fee as secondly, the conditions as provided in Article 16 of the OMDA regarding the force majeure never existed in entirety. Learned AT agreed with the contentions of DIAL and passed an award against the AAI.

74. The question is whether the finding of the arbitrator in such a situation can be considered to be perverse. It is a settled proposition that the interpretation of the contract must be in sync with the test of business efficacy and should be responsive to the facilitation of business. Any interpretation which may generate any sense of uncertainty for the parties, who choose arbitration as a mode of adjudication, should be avoided.

75. In ***UHL Power Company Ltd. (Supra)*** was inter alia held that the law is not divorced from business realities nor can the vision of the Judge who interprets the law be disjointed from the modem necessities to make business sense to business dealings. In ***UHL Power Company Ltd. (Supra)*** the Apex Court while relying upon the Hudson's elaboration in his seminal work on Engineering Contracts *inter alia* held that the task of the Court is to ascertain the objective intention of the contract as evidenced by the words used and not by the subjective intentions of the parties. It was emphasized that the rule of evidence is

that the whole of the contract should be examined before construing an individual part.

76. It is pertinent to mention here that there cannot be any dispute to the proposition as laid down in ***NTPC Limited v Jindal ITF Limited & Anr.***(Supra).This Court is fully conscious of the fact that if the award suffers from patent illegality, the Court can certainly interfere to avoid the miscarriage of justice. However, whether the award suffers from 'patent illegality' is a matter of fact which varies from case to case and has to be determined after taking into account the peculiar facts and circumstances of the case. While deciding a petition under Section 34 of the Act, Courts cannot adopt the approach of one-size-fit-for-all. Courts can interfere into the award only if it shocks the conscience of the Court and is prone to adversely affect the administration of justice.

77. In ***Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd***.(Supra), the Apex Court after relying upon the catena of the judgments *inter alia* held that an Arbitral Tribunal must decide in accordance with the terms of the contract, and if an Arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside. It was *inter alia* held that construction of the terms of a contract is primarily for an Arbitrator to decide and the award can be set aside if the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It was further *inter alia* observed that when a court is applying the 'public policy' test to an arbitration award, it does not act as a court of appeal and consequently

errors of fact cannot be corrected. It is pertinent to mention here that it was *inter alia* held that a possible view by the Arbitrator on facts necessarily has to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is also *inter alia* held that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

78. Similarly, in ***Hindustan Construction Co. Ltd. Vs. NHAI***(Supra), it was *inter alia* held that by training, inclination and experience, Judges tend to adopt a corrective lens; usually commended for appellate review. However, it is this lens which is unavailable when exercising jurisdiction under Section 34 of the Act. The Apex Court *inter alia* held that the Courts cannot, through process of primary contract interpretation, create pathways to the kind of review which is forbidden under Section 34. In ***State of U.P. v. Allied Constructions***, (2003) 7 SCC 396 the Apex Court went to the extent of *inter alia* holding that in case of a speaking award even if it is wrong either in law or in fact, it cannot be interfered. The only requirement is that the arbitrator must have assigned sufficient and cogent reasons in support thereof. It is pertinent to mention here that while interpreting the contract the duty of the adjudicator is to give efficacy to the contract rather than to invalidate.

79. The genesis of entire dispute between the parties is the interpretation of Article 16 of the Operation Management and Development Agreement (OMDA) executed between the parties. Before proceeding further, it is

advantageous to look at some of the salient features of the OMDA. The preface of the OMDA reads as under:-

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 m3nogement 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.

80. The perusal of the preface makes it clear that the purpose of the OMDA is the better management of the Airport in public interest. The OMDA permitted the joint venture company (JVC) to undertake the function of operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the Airport. Article 2.1.1 of Chapter II is also important, which granted exclusive right and authority to the JVC and the same reads as under:-

"2.1.1. 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, modernization, 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, modernization, finance and management of the Airport and at all times keep in good repair and operating of 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")."

81. Chapter XI of the OMDA deals with the "fees". Article 11.2.1 provides that the DIAL shall pay 44.99% of the projected revenue for the said year. Chapter XVI provides about the force majeure. Chapter XVI is primarily the bone of contention between the parties. For ready reference, chapter XVI "force majeure" is reproduced as under:-

"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 Party or the failure of such Party to perform its obligations hereunder; and

(e) (or any consequence of which), have an effect described in Article 16.1.1.

16.1.3 "Force Majeure" includes the following events and / or circumstances to the extent that they, or their consequences satisfy the requirements set forth in Article 16.1.1 and Article 16.1.2:

(i) war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy in each case involving or directly affecting India;

(ii) revolution, riot, insurrection or other civil commotion, act of terrorism or sabotage in each case within India;

(iii) nuclear explosion, radioactive or chemical contamination or ionizing radiation directly affecting the Airport, unless the source or cause of the explosion, contamination, radiation or hazardous thing is brought to or near the Airport by the JVC or any affiliate of the JVC or any contractor or sub-contractor of the JVC or any such affiliate or any of their respective employees, servants or agents;

(iv) strikes, working to rule, go-slows and/or lockouts which are in each case widespread, nationwide or political;

(v) any effect of the natural elements, including lighting, fire,

earthquake, unprecedented rains, tidal wave, flood, storm, cyclone, typhoon or tornado, within India;

(vi) explosion (other than a nuclear explosion or an explosion resulting from an act of war) within India;

(vii) epidemic or plague within India;

(viii) aircraft accident or breakdown;

(ix) Any period of step-in by AAI, under Article 14.l(d) exceeding a period of three months; or

(x) any event or circumstances of a nature analogous to any events set forth in paragraphs (i) to (viii) of this Article 16.1.3 above within India.

16.1.4 Notwithstanding anything contained herein, a strike by General Employees at the Airport shall be an event of Force Majeure."

82. The contention of the AAI is that firstly the event of force majeure is not admitted at all as the event of "force majeure" as provided in Article 16.1.2, can happen only if all the conditions from (a) to (e) takes place jointly. The second predominant contention of AAI is that under Article 16.1.1, the party can only claim 'to suspend' or 'to excuse' the obligation only 'to the extent' that the party "is unable to render such performance". Thus, the contention is that there can only be "suspension" or "excusal" to the extent that the party is unable to render such performance. Another contention is that the procedure for invoking the force majeure as provided under Article 16.1.5 has not been followed by DIAL. As far as the happening of the epidemic i.e. COVID-19 is concerned, that cannot be disputed. The question is

whether merely happening of the COVID-19 or anyone epidemic within India is sufficient to invoke force majeure. In this regard, learned AT has accepted the reliance of DIAL on various Central Government notifications, State Government notifications to hold that outbreak of Covid-19 pandemic is a force majeure event. The finding of learned AT in this regard as contained in para Nos. 49, 58, 73, 74, 87-94, 99 and 101-109 are relevant and the same are reproduced hereinbelow:-

"49. As already noted, the aspect whether or not the outbreak of COVID-19 pandemic is a force majeure event does not call for consideration. In this regard, the Claimant has justifiably placed reliance on various Central Government notifications, State Government notifications, and the Orders passed by the Hon'ble Supreme Court. These notifications and circulars have been placed on record in Convenience Volume B-2 filed by the Parties.

58. Article 16.1.2 of the OMDA postulates five (5) conditions, all of which are required to be fulfilled by an aggrieved Party in order to claim the benefit of Chapter XVI / Force majeure. A perusal of the various Circulars enumerated hereinabove, and various other circulars, reports, placed on record by the Claimant, and discussed hereinbefore, renders it beyond cavil that the outbreak of Covid-19 which was an event not within the reasonable control of the Claimant; the Claimant could not have prevented or reasonably overcome with the exercise of Good Industry Practice or reasonable skill and care; the event of Covid-19 has not occurred from the negligence or misconduct of the Claimant or the failure of the Claimant to perform its obligations. Therefore, conditions encapsulated in Article 16.1.2 (b), (c), and (d) are satisfied in the present case.

73. Further, on a conjoint reading of Articles 16.1.1 and 16.1.2 (a) and (e) the conundrum surrounding the use of the words

'suspend' and 'excuse' remains to be unravelled; as also whether the Claimant was indeed 'unable to render such performance by an event of force majeure', and whether the force majeure event or circumstances 'materially and adversely affects the performance of an obligation'. For example, the existence of force majeure circumstances did not render performance of obligations or materially and adversely affect the medical sector to mention only one example. Again, it is disingenuous for Respondent No.1 to lay a challenge on this aspect as has been reflected by the Tribunal elsewhere in these presents.

74. This Tribunal is of the opinion that if the factum of the Claimant earning profits is immaterial and irrelevant for the doctrine of force majeure to be attracted in the present case, then the argument of Respondent No.1 that the Claimant was able to meet its expenses from its revenue collections is totally self-contradictory and irrelevant. Alternately stated, if the Tribunal is invited to undertake this enquiry by the Respondent No.1, then it is otiose whether profits/ revenue came to be earned and the extent thereof. The Tribunal is of the opinion that the consequence of the occurrence of a force majeure event is that a partial or complete cessation, as the circumstances dictate, of the contractual obligations; all parties stand insulated or alleviated from performance of their respective deleterious or disadvantageous contractual obligations during that period, thereby saving the compact from termination on the ground of frustration/ impossibility of performance under Section 56 of the Contract Act. In the case in hand the Parties did not have the option to terminate the OMDA save in the event, as postulated in Article 16.1.7, that force majeure conditions continued for more than 365 days.

87. As noted above, the Claimant produced two Fact witnesses and one Expert witness in support of its case. On the other hand, Respondent No.1 produced only an Expert Witness in support of its stand that the Claimant was not rendered 'incapable' of performing its obligations under Chapter XI of the OMDA.

88. CW-1 was produced by the Claimant to prove the various correspondence exchanged between the Parties. CW-1 placed reliance on the various government circulars and stated that in view of the restrictions imposed by the Government, the Claimant's operations had taken a severe hit. The Witness stated that as per the circulars, office orders, notifications issued by the GOI, the Force Majeure event was recognized to prevail since February 2020; and due to the spread of Covid 19, various restrictions were imposed in India as well as internationally, as a result of which the business of the Airport Operators including the Claimant suffered heavily. The normal business dwindled only to essential travel, thus, significantly cutting-off the economic functioning of the IGI Airport. As a result, the Claimant has suffered incapability to discharge obligations under OMDA. He stated that the Claimant, vide email dated 19.03.2020, brought to the attention of the Respondent No. I that the entire aviation industry, more particularly airports, are badly affected by Covid-19, therefore, the AF/MAF as per the business plan for last Financial Year 2019-2020 will no more be applicable for Financial Year 2020-2021 and the Claimant requested the Respondent No. 1 not to send any communication to Respondent No. 2 for payment of MAF for April, 2020 till further advice. He stated that the Claimant, vide letter dated 27.03.2020, once again informed Respondent No. 1 that the pandemic situation as well as the current situation of nationwide lock-down and cessation of scheduled flights for passenger movement, is already having a significant impact on Claimant's revenue and that it would not be in a position to discharge its obligation to pay AF /MAF during the next three months up to June, 2020 at least (April 2020-June 2020). The witness then stated that the Claimant vide its email dated 31.03.2020 had informed Respondent No. 1 that consequent to the outbreak of the pandemic across the world, a Force Majeure event has occurred in the contemplation of OMDA. The Witness has also stated that Respondent No. 1 in its Annual Report for 2019-2020 has categorically admitted the impact of Covid- 19 pandemic and also the reports issued by

various agencies which details the impact of the Covid-19 pandemic. He stated that due to the occurrence of the second wave of this pandemic and the subsequent issuance of government orders from April, 2021 air traffic was further drastically impacted, leading to a sharp decline in the Claimant's revenue.

89. Respondent No.1 has contended that the testimony of CW-1 does no more than reiterate portions of the SoC and prove documents, the existence of most of which had already been admitted, and that CW-1 has intentionally withheld testimony on the letter dated 17.03.2021, written by him personally, declaring the end of event of Force Majeure.

90. CW-2, Mr. G. Radha Krishna Babu, was produced by the Claimant to prove its financial statements, the drop in revenue, and its financial inability to pay the Annual Fee. The Witness stated that the pandemic and the effect thereof severely impacted the financial performance of the Claimant as the funds available are not even enough to meet the airport operation, maintenance and financial obligations of the Claimant, but for the interim relief received pursuant to the Order dated 05.01.2021 in O.M.P. (I) (COMM.) 409/2020. The Claimant has withdrawn Working Capital Facility of Rs. 307.52 Crores (as on December, 2020) and outstanding as of March, 2021 was Rs. 264.75 Crores, which was repaid during FY 2021-22; that if the Claimant is not excused from making payment of MAF/AF, then the business of the Claimant will be completely impaired and Claimant will not have enough resources to meet its obligations of operating, maintaining, developing and financing the airport. The adverse impact of the pandemic and the government orders continued even in Quarter 4 of FY 20-21. In Quarter 4 of FY 20-21 and Quarter 4 of FY 19-20 as compared to Quarter 4 of FY 18- 19, there was a de-growth of 34% and 21 % respectively as given in the Table below. He has stated that the Claimant is under obligation to maintain IGI Airport as per the provisions of OMDA and keep the Airport in running and operational condition, even though

there was significant reduction in air traffic, passenger movement and revenues, due to the outbreak of the pandemic and the government orders. He (CW-2) has stated that the Claimant has to incur expenses to maintain the IGI Airport and always to keep the vital equipment properly maintained and in running condition, despite the revenues earned by the Claimant being insufficient to meet the said expenses. However, correspondingly expenditure could not be reduced because majority of it is fixed in nature.

91. Respondent No.1 has contended that CW-2's evidence is also largely a reiteration of the SoC and Reply to Counterclaim, and that CW-2 does not provide any independent analysis of the figures, tables and charts mentioned in his Affidavit and merely states that the revenue and traffic numbers have gone down as compared to previous years. Respondent No.1 contends that the Claimant did, in fact, pay Annual Fee from March 2020 till December 2020 and managed to operate the Delhi Airport through the said period. When asked whether the Claimant had funds to operate and maintain the Airport and also pay Monthly Annual Fee until December 2020, CW-2 replied that the Claimant did not have the required funds as the limited funds available were used for operating the Airport and the Claimant started paying the revenue sharing after raising the money in the form of working capital from the banks (Q.4). Respondent No.1 further argues that DIAL seeks benefit of Article 16 not because of any inability to pay but to secure windfall gains, and the Claimant has never considered liquidating any of its assets or sought to raise funds through investors (Q.10-12).

92. CW-3, Mr. Montek Mayal an Expert Witness on behalf of the Claimant, claimed to specialize in accountancy investigation and expert witness related work in commercial disputes. He filed his Expert Report dated 11.07.2022 on the following scope of work: (i) Basis the information and documents provided, independently examine, assess, and compute the expected revenue of DIAL, up to FY 2024 which was expected to be achieved prior to outbreak of Covid-19 pandemic i.e., "Pre-Force Majeure Level activity"; (ii) Submit

an Expert Report on the above-mentioned independent analysis and computation and appear as an Expert Witness. In his Expert Opinion, CW-3 has calculated the expected revenue of the Claimant for the period from FY 2020-2021 to FY 2023-2024, the details of which he provided in the following table:

Table 31: Expected revenue for the period 1 April 2020 to 31 March 2024

Particulars	FY 2019-20 (Actual)	FY 2020-21	FY 2021-22	FY 2022-23	FY 2023-24
Aeronautical revenue (I)					
a. Landing & Parking Charges	519.28	558.02	599.65	637.98	685.57
b. Baggage X-Ray	78.68	84.55	90.85	96.66	103.87
c. User Development Fees / Passenger Service Fee	243.23	409.96	430.12	494.66	544.57
d. Fuel Farm	107.97	-	-	-	-
Non-Aeronautical revenue (II)					
a. Duty Free	469.38	535.73	611.46	697.90	796.56
b. Retail	167.61	192.82	206.02	255.17	293.54
c. Advertisement	157.31	176.85	198.83	223.53	251.30
d. Food & Beverages	161.41	185.89	198.84	246.55	283.94
e. Cargo Handling	269.73	313.23	339.32	367.58	398.20
f. Ground handling	114.17	145.85	166.72	190.57	217.83
g. Car Parking	34.35	38.28	79.24	95.07	105.94
h. Land & Space rentals	386.57	430.11	478.55	532.45	592.42
i. Other non-aeronautical revenue	224.12	234.67	253.03	287.29	314.94
Income from CPD (III)	446.54	93.71	(94.49)	343.66	511.36
Total Revenue from Operations (I + II + III)	3,380.35	3,399.66	3,558.15	4,469.07	5,100.05
Other Income (IV)	327.42	169.98	177.91	223.45	255.00
Total Revenue (I + II + III + IV)	3,707.77	3,569.64	3,736.05	4,692.52	5,355.06

Source: Expected revenues as calculated in Section 7 above

93. Respondent No.1 has emphasised that CW-3's testimony has failed to engage with the question of inability and that he has admitted that he did not examine the financials of DIAL since it was outside the scope of his instructions. (Q.10-15).

94. Having considered the deposition of the Claimant's witnesses it appears to the Tribunal that the veracity of their respective testimonies deserve due consideration. It is also of significance that Respondent No.1 has chosen not to produce any fact witness.

99. As analysed previously, the Claimant's ability to earn revenue is linked to performance of its obligations vis-à-vis Aeronautical Services [Schedule 544]; and Non-Aeronautical Services [Schedule 645]. The charges of Aeronautical and Non-Aeronautical services are determined as per Chapter XII of the OMDA46; these services are directly dependent on the Air Traffic Movement and the Passenger Traffic Movement. It is therefore, only logical that in the event of a decrease in the Air Traffic Movement and the Passenger Traffic Movement, the Claimant's ability to collect requisite revenues would get impacted detrimentally.

101. We next proceed to examine the impact of Covid-19 on the Airport operations. As per the Financial Statement of Claimant for the year ended 31st March 2021[47], the total income/receipts/collections/revenue from the sundry operations of the Airport aggregated Rs.1669.31 Crores, whilst the total expenses aggregated Rs.2567.10 Crores. Similarly, the Standalone Financial Statement of the Claimant for the year ended 31st March 202248 shows that the total income /collections /receipts/ revenue from the Airport were less than the expenses incurred for its operation. It will be advantageous to reproduce the relevant extracts of the Annual Report of Respondent No.1 itself, for the year 2020-21[49]:
"…The Covid-19 pandemic has substantially altered the global economic landscape. A farreaching impact of the global crisis on the aviation section was due to the imposition of travel restrictions and a decimation in passenger demand. The shock posed by Covid-19 disrupted the long spell of robust growth enjoyed by the aviation section in the last few years. According to ICAO, in 2021 there was an overall reduction of 50% in air passengers (both international and domestic) couples with a

40% reduction in seats offered by airlines as compared to 2019. Moreover, the losses of global airlines in gross passenger operating revenues have mounted to approximately USD 323 to 330 billion.[50]

…

Aircraft & Passenger Movement[51]

The overall impact of COVID-19 on Traffic Movement in FY 2020-21 as compared to FY 2019-20 and for the period April to November of FY 2021-22 as compared to the same period of FY 2019-20 (Pre Covid-Period) is given below:

Traffic Category	Airports	% Reduction in FY 2020-21 as Compared to FY 2019-20	% Reduction for the period April to November of FY 2021-22 compared to FY 2019-20
Aircraft Movements	All Airports	-53.74%	-36.05%
	AAI Airports	-52.31%	-38.59%
Passenger Movements	All Airports	-66.17%	-51.46%
	AAI Airports	-63.10%	-53.85%

102. As per the details of Aircraft movement submitted by the Claimant, (which in turn have been taken from the website of Respondent No.1), for the period of 2019 to 2020, the impact

can be seen as under:

Aircraft Movement International

Month	2020	2019	Change %
JANUARY	10,469	10,226	2.38%
FEBRUARY	9,430	8,974	5.08%
MARCH	5,984	9,127	-34.44%
APRIL	688	8,202	-91.61%
MAY	1,253	8,417	-85.11%
JUNE	2312	8373	-72.39%
JULY	3,163	9,124	-65.33%
AUGUST	3,299	9,587	-65.59%
SEPTEMBER	3,574	9,566	-62.64%
OCTOBER	3,737	10,156	-63.20%
NOVEMBER	3,808	10,048	-62.10%
DECEMBER	4,209	10,513	-59.96%

Aircraft Movement Domestic

Month	2020	2019	Change %
JANUARY	29,925	28,210	6.08%
FEBRUARY	29,565	25,361	16.58%
MARCH	22,172	27,081	-18.13%
APRIL	377	25,888	-98.54%
MAY	2,426	27,638	-91.22%
JUNE	9335	27985	-66.64%
JULY	9,674	28,586	-66.16%

AUGUST	11,362	29,030	-60.86%
SEPTEMBER	14,156	28,677	-50.64%
OCTOBER	17,354	30,660	-43.40%
NOVEMBER	18,549	29,959	-38.09%
DECEMBER	21,702	30,059	-27.80%

Total Aircraft Movements (International and Domestic)

Month	2020	2019	Change %
JANUARY	40,394	38,436	5.09%
FEBRUARY	38,995	34,335	13.57%
MARCH	28,156	36,208	-22.24%
APRIL	1,065	34,090	-96.88%
MAY	3,679	36,055	-89.80%
JUNE	11,647	36,358	-67.97%
JULY	12,837	37,710	-65.96%
AUGUST	14,661	38,617	-62.03%
SEPTEMBER	17,730	38,243	-53.64%
OCTOBER	21,091	40,816	-48.33%
NOVEMBER	22,357	40,007	-44.12%
DECEMBER	25,911	40,572	-36.14%

103. Details of Aircraft movement submitted by the Claimant (taken from the website of Respondent No.1) for the January of 2020 and 2021, the impact can be seen as under:

Aircraft Movement International

Month	2021	2020	Change %
JANUARY	4,536	10,469	-56.7%

Aircraft Movement Domestic

Month	2021	2020	Change %
JANUARY	22,584	29,925	-24.5%

Total Aircraft Movements (International and Domestic)

Month	2021	2020	Change %
JANUARY	27,120	40,394	-32.9%

104. As per the details of Passengers movement submitted by the Claimant (taken from the website of Respondent No.1) for the period of 2019 to 2020, the impact can be seen as under

Passengers Movement International

Month	2020	2019	Change %
JANUARY	1,749,594	1,743,774	0.33%
FEBRUARY	1,522,616	1,549,335	-1.72%
MARCH	769,347	1,591,219	-51.65%
APRIL	19514	1,387,500	-98.59%
MAY	40,212	1,422,564	-97.17%
JUNE	132756	1469224	-90.96%
JULY	193,007	1,468,071	-86.85%
AUGUST	228,313	1,501,098	-84.79%
SEPTEMBER	230,963	1,475,367	-84.35%
OCTOBER	263,493	1,588,742	-83.41%
NOVEMBER	316,102	1,691,087	-81.31%
DECEMBER	398,982	1,785,871	-77.66%

Passengers Movement Domestic

Month	2020	2019	Change %
JANUARY	4,350,167	4,206,828	3.41%
FEBRUARY	4,470,541	3,826,998	16.82%
MARCH	2,755,968	3,889,794	-29.15%
APRIL	1110	3,581,007	-99.97%
MAY	154,973	3,857,847	-95.98%
JUNE	882773	4032767	-78.11%
JULY	866,898	4,337,904	-80.02%
AUGUST	1,134,822	4,277,039	-73.47%
SEPTEMBER	1,445,598	4,225,477	-65.79%
OCTOBER	1,876,535	4,421,886	-57.56%
NOVEMBER	2,190,546	4,636,673	-52.76%
DECEMBER	2,507,954	4,522,659	-44.55%

Total Aircraft Movements (International and Domestic)

Month	2020	2019	Change %
JANUARY	6,099,761	5,950,602	2.51%
FEBRUARY	5,993,157	5,376,333	11.47%
MARCH	3,525,315	5,481,013	-35.68%
APRIL	20,624	4,968,507	-99.58%
MAY	195,185	5,280,411	-96.30%
JUNE	1,015,529	5,501,991	-81.54%
JULY	1,059,905	5,805,975	-81.74%
AUGUST	1,363,135	5,778,137	-76.41%
SEPTEMBER	1,676,561	5,700,844	-70.59%
OCTOBER	2,140,028	6,010,628	-64.40%
NOVEMBER	2,506,648	6,327,760	-60.39%
DECEMBER	2,906,936	6,308,530	-53.92%

105. Details of Aircraft movement submitted by the Claimant (taken from the website of Respondent No.1) for January of 2020 and 2021, the impact can be seen as under:

Passengers Movement International

Month	2021	2020	Change %
JANUARY	4,44,282	1,749,594	-74.6%

Passengers Movement Domestic

Month	2021	2020	Change %
JANUARY	26,25,361	4,350,167	-39.6%

Total Aircraft Movements (International and Domestic)

Month	2021	2020	Change %
JANUARY	30,69,643	6,099,761	-49.7%

106. A perusal of the above tables would show that the international aircraft movement reduced from 9127 in March 2019 to 688 in April 2020; and domestic aircraft movement reduced from 27,081 in March 2019 to 377 in April 2020. Similarly international passengers numbers reduced from 15,91,291 in March 2019 to a dismal 19,514 in April 2020; and domestic passengers reduced from 38,89,794 in March 2019 to a dismal 1110 in April 2020.

107. These statistics show beyond disputation that the capability of the Claimant to earn revenues was adversely and acutely affected commencing from the last week of March 2020. Although the figures placed on record refer to the monthly aircraft and passenger movement, however, the restrictions were imposed by the Government between 15th and 22nd March 2020. Therefore, the impact of these restrictions was eventually evident from April 2020 onwards. The impact, as is seen from the aforesaid statistics, which are taken out from the website of Respondent No.1, was acute/severe and therefore, we are convinced that the outbreak of Covid-19 had materially and adversely impacted the capability of the Claimant to operate the Airport such that the expenses were greater than and exceeded

the receipts.

108. It is relevant to mention that the Claimant was mandated to ensure that Airport services continued to function as theretofore for handling permitted flight operations/ transportation for essential goods/ fire, law and order and emergency services, and hence, even though the aircraft and passenger movement had drastically reduced, the Claimant was compelled by law to defray all costs in the maintenance and operation of the Airport. We have already recorded above that Respondent No.1 had deferred the payment of Annual Fee till June 2020, as per its understanding of the provisions contained in Chapter XVI, viz. that the Claimant is only entitled to get a suspension/deferment and not a complete excusal from paying the Annual Fee. Therefore, we have no hesitation in holding that clause (a) of Article 16.1.2 i.e., "materially and adversely affects the performance of an obligation" had in fact transpired. The OMDA defines "Material Adverse Effect" in the following manner:

> *""Material Adverse Effect" shall mean a material adverse effect on the business, condition (financial or otherwise), liabilities, assets, operations (or the results of operations) or prospects of the JVC or the Airport solely to the extent materially frustrating or impairing either Party's ability to perform, discharge, receive and/or assume the respective obligations, undertakings, rights and benefits ascribed to such Party pursuant to the express terms under this Agreement."*

109. The outbreak of Covid-19 in our view undoubtedly had an adverse effect on the Claimant's business, its financial condition, operations (results of operations), which caused a negative cash flow to the Claimant and materially impaired its ability to perform and discharge its obligations under the OMDA. The definition covers those events which affect the Claimant's business operations and ultimately its ability to

perform further obligations cast upon it under the OMDA."

83. The perusal of the relevant paras of the impugned arbitral award makes it clear that the learned AT has taken into account all the conditions as contained in Article 16.1.2. Learned AT has also gone into the question of the pleas of both the parties regarding interpretation of the words "suspend" and "excuse". Learned AT rejected the contention of AAI that the learned AT cannot go into the question of earning of profit by DIAL. It was *inter alia* held that the result of force majeure event is that there would be partial or complete caseation of the contractual obligations of the parties and the parties would be protected from performing their respective contractual obligations during the period of force majeure. Learned AT also noted that the parties did not have the option to terminate the OMDA, same in the event as postulated in Article 16.1.7.

84. The Court considers that no fault can be found with the finding of the learned AT in this regard. It is also to be noted that the learned AT has also rejected the conditions of AAI that Articles 16.1.1 and 16.1.5(c) should be harmoniously construed on the ground that both works in the different spheres. It is pertinent to mention that learned AT duly noted that OMDA was entered into with the motive of earning profit with the exception of contracted relief pertaining to force majeure circumstances. Learned AT has rightly noted that endeavour of the Adjudicator should be to neutralize profit/losses between the parties. It is also pertinent to mention here that the learned AT has duly

appreciated the evidence of the AAI. It was noted that CW-1 specifically stated that *vide* e-mail dated 19.03.2020, it was brought to the attention of the AAI that the entire aviation industry, more particularly, the Airports are badly affected by Covid-19. Therefore the AF/MAF as per the business plans for the last financial year 2019-20 will no more be applicable for financial year 2020-21 and requested not to send any communication for payment of MAF for April, 2020 till further advise. This was followed by another e-mail dated 27.03.2020. It was noted that the DIAL *vide* its e-mail dated 31.03.2020, had informed AAI that consequent to the outbreak of the pandemic across the world, a force majeure event has occurred. It was also noted that the respondents had withdrawn working capital facility of Rs.307.52 crores as on December, 2020 and outstanding as of March, 2021 was Rs.264.75 crores, which was repaid during financial year 2021-22. The witness had stated that if the DIAL was not excused from making payment of AF/MAF then the business of the DIAL will be completely impaired and DIAL will not have enough resources to meet its obligations of operating, maintaining, developing and financing the Airport.

85. Learned AT has duly discussed the evidence of CW-2 in detail as well. It is pertinent to mention here that CW-2 stated that expenditure could not be reduced because majority of it was fixed in nature. In respect of the contention of the AAI that DIAL had funds to operate and maintain the Airport and also to pay MAF until December, 2020, CW-2 stated that the DIAL did not require the funds as the limited funds available

were used for operating the Airport and DIAL started paying the revenue sharing after raising the money in the form of working capital from the banks.

86. Learned AT has also noted the testimony of CW-3 Montek Mile, an expert witness. After due discussion, the learned AT has rightly accepted the veracity of the testimony of the DIAL's witnesses. Learned AT has rightly noted that in the event of decrease in the ATM & PTM, the DIAL's ability to pay requisite revenue got adversely impacted.

87. It is pertinent to mention here that learned AT noted that as per the financial statement of DIAL for the year ending 31.03.2021, the total income/receipt/collection/revenue from the sundry operations of the Airport aggregated at Rs.1669.31, crores while the total expenses aggregated at Rs.2567.10 crores. It was also noted that the standalone financial statement of DIAL for the year ending 31.03.2022, the total income/receipt/collection/revenue from the Airport were less than the expenses incurred for its organization. The data as reproduced in the impugned arbitral award, demonstrates the negative flow and shows that there was reduction in international traffic movement and domestic traffic movement as well as a reduction in the number of international and domestic passengers. The Court considers that the evidence as produced by the respondents demonstrates that there was an adverse impact on its revenue w.e.f. March, 2020.

88. It has rightly been noted by the learned AT that DIAL was mandated to

ensure that the Airport services continued to function for handling permitted flight operations /transportation for essential goods/fire, law and order and emergency services. Therefore, DIAL was compelled by law to incur all the costs in the maintenance and operation of Airport.

89. In view of the evidence as discussed above, the contention of AAI that despite the negative cash flow or reduction in ATM & PTM, the DIAL would be liable to pay the fee as per Article 11 of the OMDA has rightly been rejected. The scheme of the OMDA clearly reveals that after making the stipulation for payment of fee in Article 11, both the parties agreed to incorporate Chapter XVI "force majeure". There is no stipulation in the contract that whatsoever may be the circumstances that DIAL would be liable to pay the AF as provided under Article11. It is correct that there is no stipulation to the contrary also but this Article 11 of OMDA has rightly been interpreted in a manner which encourages the business efficacy.

90. The contentions of AAI regarding the interpretation of Article 16, if accepted, will be too hyper technical, while making the interpretation of a commercial contract, the adjudicator has to interpret the same as a facilitator and not as an obstructer.

91. The Court considers that the contention of AAI regarding "inability" to pay the fee has rightly been rejected. The payments were made by DIAL of the AF initially in terms of the contractual obligations and further, by virtue of orders of the court on the settlement. The question here is not that whether it was made voluntarily or involuntarily, the

question is that whether merely factum of payment of AF will negate the plea of DIAL that in view of the reduction in the ATM & PTM, they were unable to pay the fee in accordance with the Article 11. DIAL was certainly at the receiving end, they had to run the operations of the Airport as well as, as a commercial venture had to fulfill their obligations. The Court does not find any fault with the finding of the learned AT that merely because the payment was made, it cannot be held that they were unable to make payment of the fee.

92. It is a matter of record that DIAL by way of repeated communications invoked Article 16 and intimated the shortfall of revenue and having not enough revenue to fulfill even its mandatory obligations. The material on the record shows that the revenue from the Airport was less than the expenses incurred for its operations. The various notifications issued by the Government from time to time, restricting and suspending air travel to curb the pandemic has also be taken into account. In this regard, even the AAI annual report displayed the material adverse effect of Covid-19 and the same was duly considered by the learned AT.

93. It is no longer *res integra* that the Arbitrator is final Arbiter of the disputed facts between the parties. The question of "inability" is pre-dominantly a question of fact, which has been determined by the learned AT on the basis of the evidence produced by the parties and, therefore, it would be difficult for this Court to interfere into such findings within the domain of section 34 of the Arbitration & Conciliation Act, 1996. The interpretation of terms of the contract by

the Arbitrator can only be interfered if the findings are perverse.

94. The Court considers that there is no perversity in the order of the learned Arbitral Tribunal. There is no finding which can be said to have been rejected without any evidence, nor is there any material on record to suggest that any extraneous material has been taken into account or any relevant material has not been considered. The Court considers that the purpose of the force majeure clause in any contract, is to prevent the parties from suffering undue losses. The purpose is that the business under the contract should continue and may not be put to an end. The purpose is that before the party becomes totally drained out on account of force majeure event, there should be some respite for recovering or mitigating the losses. In a situation where the closure of the Airport was not an option and the expenditure was more than the revenue earned, the learned AT has rightly held that DIAL had to be excused from the payment of AF.

95. AAI has vehemently argued that DIAL itself had admitted in their communication dated 17.03.2021 that force majeure event per se had ceased. It has been submitted that, therefore, in any case, no relief could have been granted beyond 17.03.2021. In this regard, Article 16.1.5(c) acknowledges the concept of "to achieve the level of activity prevailing before the event of force majeure".

96. In the present circumstances, it has rightly been noted by the learned AT that the precise date on which activities would return to the level of activity prevailing before the force majeure event, could not be

determined. Learned AT, therefore, took the cutoff date as 28.02.2022, as determined by the Supreme Court in *Suo Motu Writ Petition (Civil) No.3 of 2020, 'IN RE: Cognizance for Extension of Limitation'*. Learned AT in this regard also took into account the financial statement of DIAL. The finding of the learned AT in this regard was based on material on record. It is correct that there is some guess work being employed by the learned AT in this regard. The Court considers that in absence of any better alternative, the learned AT has rightly taken a cutoff date of 28.02.2022.

97. The petitioner has also raised a contention that the learned AT has re-written the terms of the OMDA and rejected the argument of AAI that obligation to pay AF always remains capable of performance as it is payable as a percentage of revenue. The plea of AAI is that relief of "excuse" amounts to re-writing the terms of the OMDA. The plea of DIAL was that the interpretation of the terms of the contract falls within the domain of the learned AT. It has been brought on the record that the expenditure during this period was more than the revenue. Learned AT has interpreted the contract taking into account the concept of furthering the business efficacy of the contract.

98. The finding of learned AT is based on the interpretation of Chapter XVI. It is pertinent to mention here that the learned AT in para 129 had noted that even in the year when the claimant had incurred losses prior to financial year 2019-20, the annual fee was duly paid. Learned AT rejected the contention of AAI regarding payment of AF in the relevant period not on the ground of DIAL having incurred losses but owing to

the occurrence of force majeure circumstances arising out of COVID-19 pandemic.

99. In regard to the extension of the terms of the contract, AAI has raised the argument that the same was not even asked for and by granting the extension, the learned AT has re-written the terms of the contract. Learned AT had passed this direction after taking a holistic view of the trade usage and the terms of the OMDA.

100. Learned Arbitral Tribunal has considered this issue in para -115 which is reproduced herein below:

> *115. In several contracts where the tenure spans a long term, alleviation/ relief is accommodated by extending the tenure of the contract. Our attention was repeatedly drawn to the provisions of Article 16.1.5(c) which contemplates this situation. This prayer/claim has been pleaded in paragraphs 238 to 240 of the SOC. It has been denied by Respondent No.1 in paragraph 85 of the SOD, describing it as a "perverse and obtuse interpretation of the OMDA." Ironically, Respondent No.1, has itself adopted this interpretation in its letter dated 30th March 2020 in these words:*
>
> > *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*."

101. In regard to the force majeure, it is also advantageous to refer to Office Memorandum dated 19.02.2020, which is reproduced hereinbelow:-

OFFICE MEMORANDUM

Subject: Force Majeure Clause (FMC)

Attention is invited to para 9.7.7 of the "Manual for Procurement of Goods, 2017" issued by this Department, which is reproduced as under

A Force Majeure (FM) means extraordinary events or circumstance beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strike, riots, crimes (but not including negligence or wrong-doing, predictable/ seasonal rain and any other events specifically excluded in the clause). An FM clause in the contract frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract. An FM clause does not excuse a party's non-performance entirely, but only suspends it for the duration of the FM. The firm has to give notice of FM as soon as it occurs and it cannot be claimed ex-post facto. There may be a FM situation affecting the purchase organisation only. In such a situation, the purchase organisation is to communicate with the supplier along similar lines as above for further necessary action. If the performance in whole or in part or any obligation under this contract is prevented or delayed by any reason of FM for a period exceeding 90 (Ninety) days, either party may at its option terminate the contract without any financial repercussion on either side.

2. A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above."

Sd/-
(Kolluru Narayana Reddy)

Deputy Secretary to the Govt. of India
Tel. No. 24621305
Email: kn.reddy@gov.in

102. At this juncture, it is also prudent to refer to the letter dated 04.04.2020 of AAI. The relevant intact of the said letter is reproduced as under:-

> *"4. AAI has noted DIAL's invocation of an event of Force Majeure under Chapter XVI of the OMDA and is issuing the present communication in terms of the procedure contemplated in Clause 16.1.5(d) of the OMDA.*
>
> *8. AAI is cognizant of the extraordinary nature of the events that have transpired in the past weeks. Keeping these in view, AAI is willing to grant consideration to deferral, as requested, for a period of three (3) months of DIAL's obligation under Article 11.1.2.2 to make Monthly Annual Fee payments against its Annual Fee obligation. In short, AAI accepts DIAL's proposal for deferral of its obligation to pay MAF, on the stated ground that it "would not be in a situation to discharge its obligation to pay Monthly Annual Fee to AA/ during the next three months upto June, 2020". AAI is doing so in these extraordinary circumstances on a without prejudice basis and notwithstanding DIAL's failure to produce any supporting docL1mentation on its available cashflows, debt obligations or evidence of DIAL's temporary inability to pay MAF. However, as stated below, AAI's acceptance is conditional upon the Board of DIAL passing a Resolution on this matter, and such Resolution being duly communicated to AAI.*
>
> *11. In view of the above, till such time DIAL submits the Board resolution, AAI shall issue instructions to the Escrow Bank to transfer funds equivalent to 45.99% of the Gross revenue projected by DIAL in the spreadsheet included as an attachment to DIAL's email dated 03.04.2020 for the three months (i.e. April, May and June 2020) from the Proceeds Account to the AAI Fee account and thereafter to AAI's bank*

account by the 7th of the month. This would, as you are aware, be considerably less than monthly payment of Rs.148.33 Cr. MAF as per the last Business Plan, which would (as per past practice) have determined the MAF payable until the new Business Plan for FY 2020-21 is approved by DIAL's Board of Directors.

12. In the event that DIAL is able to submit the Board Resolution within the three months (i.e. April, May and June 2020, and prior to 06.06.2020), then AAI would instruct the Escrow bank to not transfer funds from the Proceeds Account to the AAI Fee Account, for the remaining time within the said three month period and, instead, transfer such amounts directly to the Surplus account up to 06.06 2020. After 06.06.2020, the normal procedure would be followed in respect of transfer of funds from the Proceeds Account to AAI Fee Account as per Business Plan to be submitted by DIAL.

15. We trust that the measures proposed above wuuld ensure that adequate liquidity is available with DIAL to discharge its dues, principally towards its employees and contract labour and ensure that no hardship is caused to these groups."

103. The perusal of the OMDA makes it clear that the respondent was given the task of operation, maintenance, development, design, construction, upgradation, modernization, finance of the Airport. Such a task must have involved huge investment. It is a matter of the fact that this world had never expected the pandemic like COVID to happen. It may be recalled in March, 2020 when it started, nobody knew its ramifications. It was impossible to imagine its effects and the period during which it will continue. Initially, everybody was under impression that it may last for few days then few weeks then few weeks and then few months.

But it is a matter of the record that after causing havoc in the first wave, it returned back in 2021 with the second wave and caused unimaginable damages in the terms of loss of human life and economy. God forbids such an event happen again, the Court considers that the learned Tribunal has rightly taken into account the commercial sense and extended the terms of the contract."

104. This communication occurred when COVID-19 had just begun, and at that time, the full scope of its impact was unknown. Even the best scientists and economists were uncertain about the pandemic's long-term effects. The world was in the early stages of trying to manage the situation, and it was unimaginable that its effects would last as long as they did. At the time, AAI reasonably assumed that the impact would be short-lived, likely continuing only until June 2020, and thus accommodated the DIAL. However, it is now widely recognized that the pandemic lasted far longer than anticipated.

105. It is a matter of common acknowledgement that during Covid, it had materially and adversely effected the function of the business. The learned AT taking into account the terms of the contract and the trade and usages along with the commercial sense has taken a holistic view in extending the tenure of the contract. The findings of the learned AT are based on these facts, and the Court does not find any perversity in them. It is also important to note that just because another view might have been possible, the Court cannot substitute its own opinion.

106. The facts and contentions of the parties as well as the finding in the award as challenged in both O.M.P. (COMM) 186/2024 and O.M.P. (COMM) 185/2024 are similar. The terms and conditions of the OMDA dated 04.04.2006 are also identical. The entire case revolves around the interpretation of Article XVI of the OMDA. The question was that whether the force majeure event had taken place in terms of Article XVI and further, whether the petitioner can be excused from paying the AF as provided under Article 11 for the period till 19.03.2020 to 28.02.2022. Another major bone of contention was the extension of the term of the OMDA for the period of two years. The plea of the petitioner was the force majeure event had not taken place and there was no question of excusal of the payment of fee in terms of the OMDA and furthermore, there was no provision for the extension of the contract. *Per contra*, the contention of the respondents was that the learned AT has granted the relief in terms of the terms of contract. It is a settled preposition that interpretation of the terms of the contract falls within the domain of the Arbitrator. The entire dispute in both the cases revolved around the interpretation of the terms of the contract. The discussion made hereinabove makes it clear that the learned AT had passed a speaking order after taking into account the material and the evidence available on the record. The perusal of the award makes it clear that it cannot be said that the view taken by the Arbitrator is not a possible and plausible view. It is also a settled preposition that even if the alternative view is available, the Court cannot substitute its own. This Court did not find any material to say that there was perversity in the award passed by the learned AT.

107. In view of the above, the Court considers that there is no illegality or perversity in the impugned award passed by learned AT. Hence, the present petition along with pending applications, if any, stands dismissed.

DINESH KUMAR SHARMA, J

MARCH 7, 2025
N/SMG