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

\+ **FAO(OS) (COMM) 58/2018 & CM Nos. 13434/2018, 17581/2018 & 31531/2018**

Reserved on : 2nd November 2018
Date of decision: 15th January, 2019

DELHI METRO RAIL CORPORATION LTD. ..... Appellant
Through: Mr. P.S. Narasimha, ASG, Mr. Parag P. Tripathi & Mr. Ajit Kumar Sinha, Sr. Advocates with Mr. Tarun Johri, Mr. Ankit Saini, Mr. Srinivasan Ramaswamy & Ms. Athira G. Nair, Advocates.

versus

DELHI AIRPORT METRO EXPRESS PRIVATE LIMITED... Respondent
Through: Mr.P. Chidambaram, Sr. Advocate with Mr.Rishi Agrawala, Ms. Megha Mehta Agrawal & Mr. Nishant Rao, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.:

Delhi Metro Rail Corporation Ltd. ('DMRC', for short) in this intra-Court appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ('A & C' Act, for short) read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 has impugned judgment and order dated 6th March, 2018, whereby the learned single Judge has dismissed objections under Section 34

of the A & C Act upholding the award dated 11th May, 2017 passed by the Arbitral Tribunal.

2. DMRC is a state-owned company with equal participation from the Government of India and the Government of National Capital Territory of Delhi.

3. The respondent, Delhi Airport Metro Express Private Limited ('DAMEPL', for short), is a company incorporated as a special purpose vehicle by the consortium of M/s Reliance Infrastructure Limited and M/s Construcciones Y Auxiliar de Ferrocarriles SA, Spain ('consortium', for short).

4. The consortium were successful bidders in the international competitive bidding process for construction, operation and maintenance of the Delhi Airport Metro Express Line ('AMEL', for short) based on Public-Private Partnership model for providing high speed metro connectivity with maximum speed of 120 Kms per hour between New Delhi Railway Station and Indira Gandhi International Airport, T-3 Terminal with further line till Section-21 at Dwarka with underground section of 15.7 Kms and elevated viaduct section of 7 Kms.

5. On 25th August, 2008 Concessionaire Agreement ('CA', for short) was signed and executed between DMRC and DAMEPL.

6. DMRC had undertaken clearances and borne costs relating to acquisition of land and in construction of all civil structures like tunnels, viaducts, station buildings except depot buildings.

7. Design, supply, installation, testing and commissioning of various railway systems like rolling stock, power supply, overhead equipment, signaling, track systems, platform, screen doors, ventilation, architectural finishing etc. were to be provided by DAMEPL, as a private partner in the project.

8. As per the CA, DAMEPL was allowed two years period for completion of obligations and scope of work after they were granted access to the civil segment by DMRC. DAMEPL was to operate and maintain AMEL for next 28 years i.e. till August, 2038.

9. The scheduled commissioning and operation date of AMEL as stipulated in the CA was 31st July, 2010 which was extended from time to time to 30th September, 2010. As per Article 16.5 of the CA, the Commercial Operation Date ('COD', for short) was to be within two months from the date of scheduled project completion date, i.e., by 31st November, 2010. On 11th January,2011 safety clearance/sanction for operation of the line was granted by the Commissioner of Metro Road Safety (CMRS) under the Delhi Metro Rail (Operation and Maintenance) Act, 2002, which is now known as Metro Railways (Operation and Maintenance) Act, 2002 [hereinafter would be referred to as 'the Metro Act']. Clearance was given with conditions and reduced speed limit of 105 kilometers per hour. On 23rd February, 2011, COD was achieved when Airport Line Consultancy as per Article 17.6 of the CA had issued provisional completion certificate.

10. DMRC had incurred expenditure of Rs.2,700 crores towards costs for executing their part of obligations.

11. Exact figure of the costs incurred on fixed assets by the DAMEPL is unclear. Paragraph 118 of the Award refers to the report of IRCON who were appointed by DMRC as consultants to evaluate the works executed by DAMEPL. As per the IRCON's report cost of assets including overheads and other charges created by DAMEPL was Rs.2273.67 crores. (This figure has been referred to indicate that DAMEPL had incurred substantial expenditure/costs. We express no opinion on correctness or otherwise of the report).

12. DAMEPL was entitled to collect fare from the passengers and from non-fare revenue sources like lease of retail space, property development in adjacent areas, advertisements, vending machines etc. As per the terms, the concessionaire was required to carry out an independent study to assess the revenue likely to be generated from traffic and non-fare revenue sources and prepare their own business model. The business plan was not a part of the CA. As per DMRC business plan prepared by DAMEPL had indicated losses for first five years and surplus earnings thereafter.

13. Based on the business model, DAMEPL had quoted annual concessionaire fee of Rs. 51 crores to be paid to DMRC with escalation of 5% (cumulative) per year till termination. Requirement of payment of annual concessionaire fee as stated by DAMEPL was incorporated in Article 8.2 of the CA and became a binding term.

14. DAMEPL had paid concessionaire fee of Rs.51 crores for the first year of operation i.e. for the period from 23rd February, 2011 to 22nd February, 2012. Thereafter, they did not pay concessionaire fee.

15. DAMEPL by letter dated 20th April, 2012, had requested DMRC to defer payment of concessionaire fee for five years due to financial constraints. In this letter while accepting that AMEL had been running without glitches since 23rd February, 2011, DAMEPL had stated that in spite of earnest efforts for meeting projections they were facing tremendous limitations beyond their control. Commercial viability of the project was largely based upon retail/property development component along with advertisements and other commercial activities, which were to account and cover 3/4th of the total revenue as against 1/4th for fare collections. However, retail activities had not picked up as retailers were taking significant time in fit outs; concept of retailing in metro stations had not percolated amongst big brands; there were delays in finalizing retail agreements, etc. Infrastructure projects have long a gestation period. The project being the first public private partnership in the metro domain, DAMEPL would require support from the public partner, namely DMRC, to make it viable. This letter did not mention of any breaches on the part of the DMRC and defects in the viaducts, etc. By letter dated 5th May, 2012, DMRC had turned down the request of DAMEPL for deferment of the concessionaire fee. This letter dated 20th April,2011 of DAMEPL has not been mentioned and stated in the award. The award however refers to the DAMEPL's letter dated 24th September, 2012, requesting for waiver of concessionaire fee and restructuring of the CA (see paragraph 111 of the Award).

16. DAMEPL by their letter dated 22nd March, 2012 had requested DMRC to arrange for joint inspection of viaducts and bearings before expiry

of 'Defect Liability Period' of the civil contractors. For convenience and clarity, we must state that viaducts were constructed and fell within the scope of civil work executed by DMRC.

17. DAMEPL by letter dated 23rd May, 2012 had alleged that there were serious design and quality issues with regard to installation of viaducts bearings and there were signs of girders having sunk at some locations causing deformation and cracks. DMRC had responded by their letter dated 2nd June, 2012, stating that detailed inspections as per Article 19 of the CA and all preventive maintenance were within the scope of concessionaire i.e. DAMEPL. DAMEPL was asked to give detailed inspection reports to DMRC for review and their comments. DMRC had inspected some locations identified by DAMEPL and had noticed that bearings were not damaged but the grouting material filled above/below the bearings was damaged or had loosened for which repair action had been taken on priority. DAMEPL was asked to impose speed restrictions as deemed necessary in interest of safety.

18. The Ministry of Urban Development had thereupon convened a meeting of stakeholders on 2nd July, 2012 and a Joint Inspection Committee ('JIT', for short) was set up. JIT had inspected the site on 4th and 5th July,2012 and submitted their report, which was signed by representatives of DMRC and DAMEPL.

19. DAMEPL by their letter dated 6th July, 2012 to DMRC had expressed their intent to stop the operations with effect from 8th July, 2012 on the ground that the line was unsafe to operate. Operations were stopped by DAMEPL with effect from 8th July, 2012.

20. On 7th July, 2012, in the second round of meeting held with the Ministry of Urban Development, it was envisaged that joint inspection would be completed by 15th July, 2012. DAMEPL had also agreed to repair viaduct bearings.

21. On 9th July, 2012, DAMEPL issued notice setting out a non-exhaustive list of defects, which according to them had created unsafe conditions to operate AMEL and thereby had prevented DAMEPL from performing its obligations as per the CA. DMRC was asked to take all actions and measures necessary to cure the defects within a period of 90 days, failing which the same would be treated as material breach and 'DMRC's Event of Default' under the CA. We shall subsequently reproduce portions of the letter.

22. It is accepted and admitted that number of meetings were thereafter held under the aegis of Ministry of Urban Development in which officers of Ministry of Railways had also participated. Systra Consulting India Pvt. Ltd., ('Systra', for short) the original design consultant for viaduct section were involved and had participated. Repair work was carried out by DMRC through agencies engaged by them. DMRC had also engaged other agencies to check quality of repair work. Progress of the repairs was monitored by the Secretary, Ministry of Urban Development.

23. On 8th October, 2012, DAMEPL issued a letter/notice terminating the CA claiming that though period of 90 days had expired from 9th July, 2012, i.e. the date of the cure notice, but neither the DMRC had cured the defects nor had they taken effective steps to cure the defects. Therefore, DMRC's 'Event of Default' had taken place, which entitled DAMEPL to terminate

the CA. DMRC was called upon to pay the termination amount under Article 29.5.1 of the CA.

24. DMRC by their letter dated 10th October, 2012 controverted and negated the contentions of DAMEPL, including the grounds relied by DAMEPL for terminating the CA.

25. DMRC further invoked Article 36.1 for conciliation process for amicable resolution of the disputes.

26. As per DMRC, the meeting called by Ministry of Urban Development on 12th October, 2012 was attended by representatives of DMRC, DAMEPL, Ministry of Railways, Systra and other sub-contractors engaged in repair work. In this meeting, DMRC had stated that 1986 bearings out of 2016 bearings had been rectified and other associate works such as load test, etc. would be completed by 31st October, 2012. DAMEPL had agreed to start the project after 31st October, 2012 with trial run of trains loaded with sand bags being undertaken. Thereafter, clearance from CMRS would be sought.

27. On 12th October, 2012, DAMEPL had agreed to participate in the conciliation proceedings in accordance with Article 36.1 of the CA. Weekly meetings were thereupon held on 20th and 22nd October, 2012 with the representatives of DMRC, DAMEPL, Systra, TUV-SOGL, an independent engineer, in which various issues pertaining to trial runs were discussed.

28. DMRC claims that on 22nd October, 2012 they had informed DAMEPL that all bearings had been repaired. DAMEPL had then

requested that they should be given seven days' notice when they can make a public announcement for commencement of the operations of the line.

29. On 26th October, 2012, it was decided that trial runs would be held on 28th October, 2012 with a stipulation on specific piers that would be observed during the train trial runs.

30. Notwithstanding the aforesaid meetings, on 23rd October, 2012 DMRC invoked the arbitration clause under Article 36.2. However, there was substantial delay in constitution of the Arbitration Tribunal consisting of Mr. H.L. Bajaj, Presiding Arbitrator, Mr. S.S. Khurana, Arbitrator and Mr. A.P. Mishra, Arbitrator, which was constituted on 8th August, 2013.

31. On 19th November, 2012, DMRC and DAMEPL submitted a joint application to CMRS for re-opening of the line with the speed limit of 80 kilometres per hour. This application for inspection had resulted in CMRS asking for details which were supplied by DAMEPL and DMRC. CMRS had thereupon asked for extra load test on 10 most critical girders that were selected on the basis of location covering maximum cracks, etc. These tests were conducted by DMRC in December, 2012, in presence of the representatives of DAMEPL and were certified by Systra. CMRS had personally inspected the line on 14th and 15th January, 2013.

32. On 18th January, 2013, CMRS issued certification to AMEL permitting re-starting of the line with certain conditions, including reduced speed limit of 50 kilometers per hour, which could be enhanced by 10 kilometers per hour till 80 kilometres per hour. We shall subsequently refer

to this letter which as per DAMEPL was hedged with conditions and would not meet the terms and obligations imposed on DAMPEL under the CA.

33. DAMEPL thereafter started operations on the line with effect from 22nd January, 2013 reserving and without prejudice to its rights and obligations and allegedly on the instructions of the DMRC and not as a concessionaire. In the letter dated 21st January, 2013 DAMEPL had stated that they would be working as an agent of DMRC, which was not accepted by DMRC vide their reply dated 8th February, 2013. We shall subsequently examine the said aspect in some detail for one of the contentions raised by the DMRC is that DAMEPL by election and conduct had withdrawn the termination notice.

34. On 27th June, 2013, DAMEPL addressed a letter to DMRC calling upon them to take over the project and the assets by close of business hours of 30th June, 2013. DAMEPL stopped operations on close of working hours of 30th June, 2013 and AMEL operations were handed over to DMRC, who have continued to operate AMEL since 1st July, 2013.

35. As noticed above, on 8th August, 2013 the Arbitral Tribunal consisting of Mr. H.L. Bajaj, Mr. S.S. Khurana and Mr. A.P. Mishra were constituted. The first sitting was held on 6th September, 2013. The arbitration proceedings continued for nearly three years. On 11th May, 2017, a unanimous Arbitral Award was pronounced substantially in favour of DAMEPL.

The Award

36. The Arbitral Award dated 11th May, 2017 records that DAMEPL in the first hearing held on 21st September, 2013 had stated that in view of the termination notice dated 8th October, 2012, they were not proceeding and pressing their claim for restructuring of CA. DMRC by their letter dated 3rd October, 2013 had agreed to withdrawal of DAMEPL's claim on the issue of viability and restructuring of CA/project. This issue was also deliberated in the second sitting of the Arbitral Tribunal held on 19th October, 2013 in which DAMEPL had stated that at that stage they would not claim for restructuring and if such claim at all subsists or survives, it would be post any decision on the issue of validity of termination or consequential reliefs. Thereupon, the Arbitral Tribunal had recorded that the issue to be determined would relate to termination notice dated 8th October, 2012 issued by DAMEPL and all consequential and cognate claims arising from and relating to termination notice. The Arbitral Tribunal during the course of hearings had passed orders on different applications referring to another arbitration proceeding pending between the parties. Arbitration Tribunal held that in the present arbitration they were not interested to go into the question of fixing responsibility for the defects nor would they entertain such attempt. However, questions relating to cause of defects, their nature, severity and curability were relevant for determination of issues (see paragraph 17 of the Arbitral Award).

37. DMRC had led evidence which included affidavits of Mr. Ranjan Katarai, Executive Director/Technical, DMRC, Mr. Vinod Nair, Inspection Engineer of TUV-SOWILL and affidavit in rejoinder of Mr. Mathieu Muls

of Systra. DAMEPL had filed affidavits of Ms. Neena Goel, Chartered Accountant and Mr. Abhay Kumar Mishra, CEO of DAMEPL.

38. In paragraph 19 of the Award, the Arbitral Tribunal has referred to issues which have been divided into; DMRC's issues, counter claim issues, DAMEPL issues etc. We may note that issues were not specifically framed by a specific order by the Arbitration Tribunal and circulated to the parties. Thereupon, in paragraph 20, the Arbitral Tribunal observed that in substance the following main issues arose for consideration:-

> "(i) Were there any defects in the civil structure of the airport metro line?
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> (ii) If there were defects, did such defects have a material adverse effect on the performance of the obligation of DAMEPL under CA?
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> (iii) If there were defects in the civil structure, which had a material adverse effect on the performance of the obligations under the CA by DAMEPL, have such defects been cured by DMRC and / or have any effective steps been taken within a period of 90 days from the date of notice by DAMEPL to cure the defects by DMRC and thus were DMRC in breach of the CA as per 29.5.1 (i)?
>
> The determination of the aforesaid issues would then lead us to the determination of consequential questions particularly those related to specific performance of the contract or, alternatively, the award of damages or the outcome of the counter claim filed by DAMEPL."

39. Under the heading "JURISDICTION", the Arbitral Tribunal rejected the plea of DMRC that it had no jurisdiction to examine, who was responsible for defects; whether civil segment of AMEL was plagued by

"permanent defects". Referring to the contention of DMRC that DAMEPL had raised several issues regarding defects, which were not mentioned in the cure notice/letter dated 9th July, 2012 or at any time between June, 2012 to January, 2013, when operations had re-commenced, it was observed that the notice dated 9th July, 2012 was not an exhaustive list of defects as DAMEPL had stated that unless and until it was ascertained what the defects were, it was not possible to find out whether the defect were cured or not and whether effective steps were taken within the cure period to remedy the breaches (see paragraph 24 of the Award). In paragraph 27, reference was made to chronology of events in the form of correspondence written by DAMEPL that had referred to latent or inherent defects. Arbitration Tribunal had thereafter held:-

> "28. From the aforesaid, it transpires that the notice dated 9" July 2012 is not confined only to defects relating to bearings. It gives a "non-exhaustive" list of the various defects and makes reference to various "latent/inherent" defects as well. DMRC has not only admitted but has also contended and led evidence to show that defects, apart from those relating to bearing assembly, such as cracks at the soffit of the girders, were according to DMRC addressed and repaired. If DMRC was concerned only with the defects in bearing assembly and understood the complaint of DAMEPL as relating only to the bearing assembly, there was no point of DMRC addressing various other defects such as cracks at the soffit of the girders, gaps between the girders and girder and the shear key and twist in girders, etc. The contention of DAMEPL is that some of the said defects which were pointed out by DAMEPL and actually found to exist, which DMRC claims to have remedied, are not cured. A necessary pre-requisite of investigating the question of what the defects were/are and whether they have been remedied or not is to find out the nature, quantum and severity of the defects. This Is necessary to determine whether defects have been cured and / or effective steps

have been taken by DMRC to cure the defects. Thus, the submission of DMRC that addressing the questions as to what the defects are and what is the nature of the said defects is beyond the jurisdiction of the Arbitral Tribunal is not correct.

29. To conclude, the main issue to be decided in this arbitration is whether there were defects in the civil structure of the Airport Metro Line and whether the defects have been cured and/or effective steps to cure the same have been taken by DMRC in terms of Article 29.5.1 of the CA and the consequences of the finding on the said issue. The Arbitral Tribunal has undertaken only the said exercise. In the circumstances, It is held that the issues considered by the Tribunal are within the scope and jurisdiction of the Tribunal."

40. Under the heading "DETAILED ANALYSIS OF THE SPECIFIC DEFECTS/DEFICIENCIES IN THE VIADUCT STRUCTURE AND THEIR REPAIRS/RECTIFICATION" under different sub-headings after referring to submissions of the parties, the Arbitration Tribunal had made analysis and discussion. Thereupon the following summary was recorded by the Arbitral Tribunal:-

"The views of the Arbitral Tribunal on defects/design deficiencies/constrains in the civil structures of Delhi Metro Airport Line are summarized herein below:-

SI No.	**Defect/Deficiency in Design/Constraints**	**Views of the Arbitral Tribunal**
1.	Cracks at the bottom of the girders	Occurrence of such large numbers of cracks in the base slab of the pre-stressed concrete girders within just one year of train operation, tentative assessment of the cause of cracks, unreliable measurement of crack depth which in many cases extend to

		more than half of the depth of bottom slab of U girder and non serious inspection of the repairs by an agency appointed by DMRC impact adversely on the integrity of the structure. This leads to the conclusion that DMRC is in the breach of the CA as effective steps were not taken within the cure period of 90 days to cure this defect and this has caused Material Adverse Effect on the Concessionaire (DAMEPL).
2.	Twist in the Girders	Effective steps were not taken to cure twist in all the girders (twist up to 20 mm was left unattended) and girders of suspect integrity were allowed to remain in the network. This constitutes a DMRC Event of Default. DMRC is in breach and this breach has Material Adverse Effect on the Concessionaire (DAMEPL).
3.	Gaps between girders and between girders and shear key	No action to cure this defect was taken by the claimant (DMRC) during the cure period (09- 07-2012 to 08-10-2012). Gaps higher than 25 mm were not rectified. As such, this defect was neither cured nor effective steps were

"77. In the light of the aforesaid, it is clear that there were defects in the civil structure of the Airport Metro Line. It is also found that the above mentioned defects, which would have Material Adverse Effect on the performance of the obligations under the CA by DAMEPL, have not been cured within the cure period of 90 days from the date of the cure notice nor have effective steps been taken to cure such defects.

> 78. Thus, it is concluded that DMRC is in breach of the CA as it has failed to cure the breach or take effective steps for curing the breach within 90days of the notice dated 09.07.2012 from DAMEPL. Such breach has Material Adverse Effect on the Concessionaire (DAMEPL).As such, the Ingredients of Article 29.5.1(1) of CA are satisfied and, therefore, the Termination Notice given by DAMEPL on 08.10.2012 is valid."

The Arbitral Tribunal has held that there were cracks at the bottom and gaps between girders and between girders and shear key. Accordingly DMRC was in breach of CA as effective steps to cure the defects were not taken within 90 days that had caused 'material adverse effect' on the concessionaire i.e. DAMEPL, which entitled them to invoke Article 29.5.1 (i) of CA. Therefore, the termination notice given by DAMEPL on 8th October, 2012 was valid. DMRC has challenged the said findings on perversity and other grounds, which we would deal with subsequently.

41. After recording the aforesaid findings on validity of termination notice dated 8th October, 2012 and that ingredients of Article 29.5.1 (i) of CA were satisfied, the Arbitral Tribunal had dealt with the following legal issues:-

> "A. Is the Concession Agreement specifically enforceable and should specific performance of such an agreement be as a rule directed or are damages an adequate remedy for the breach of the OA?
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> B Whether DAMEPL has abandoned or "disowned" or "negated" or "nullified" the termination notice by continuously participating in the defect rectification process prior to and after the termination notice and by its conduct of operating the line subsequent to the termination notice?

C. Is the sudden and abrupt abandonment of a public interest project and the abrupt termination of the OA by DAMEPL valid?

D. Was DAMEPL entitled to or justified in termination of the OA, since the cost of repairs of the alleged defects was only approximately Rs.14 crores as compared to the total costs of the project of approximately Rs. 5700 crores?

E. Did DAMEPL fail to carry out the required inspection resulting in the alleged defects not being discovered during the defect liability period of the civil contractors? Or, as contended by DAMEPL, was only limited access permitted to DAMEPL by DMRC without actually handing over the structures as required under the CA?

F. Was perceived financial unviability and not the defects in the structure, the real reason of the termination of the CA by DAMEPL?

G. Has DAMEPL failed to discharge its onus of disproving DMRC's case by not leading oral evidence to counter the rebuttal evidence of DMRC or was DAMEPL entitled to disprove the case of DMRC and prove its own case by cross examining the witnesses of DMRC?

H. Did the issuance of certificate by CMRS show that the defects were duly cured?"

42. Regarding prayer for specific enforceability and performance of CA, it was held that such prayer cannot be granted since DMRC had committed breach of contract having 'material adverse effect' on the ability of DAMEPL to perform the contract which disentitled DMRC to seek performance of CA. Further, specific performance was not permissible under Section 14 (1) (d) of the Specific Relief Act. Section 10 of the Specific Relief Act would not be applicable as this was not a case relating to

immoveable property. On issue 'B' it was observed that DAMEPL's participation in the discussions during the period 9th July, 2012 to 8th October, 2012 was immaterial as the CA was in operation and had not been terminated. After the termination notice dated 8th October, 2012, DAMEPL had asserted that it was participating without prejudice to their rights and contentions. Besides DMRC had invoked re-conciliation process under Article 36.1 of the CA. Immediately thereafter DMRC had invoked arbitration proceedings by their letter dated 23rd October, 2012. Participation of DAMEPL being without prejudice would not negate and nullify the termination notice as DAMEPL was always insisting that the CA was terminated. On issue 'C', the Arbitral Tribunal observed that no doubt the project was of public interest but DMRC had committed material breach of CA. Therefore, the argument of DMRC was untenable as DAMEPL could validly exercise their right to terminate the contract in terms of the contract which governed the rights of the parties.

43. On issue 'D', the Arbitral Tribunal had held :-

> " **D. Issue: Was DAMEPL entitled to or justified In termination of the CA, since the cost of repairs of the alleged defects was only approximately Rs.14 crores as compared to the total costs of the project of approximately Rs.5700 crores?**
>
> 91. It is contended by DMRC in para 1.1 of Addl. Submission dated 14.11.2016, that the cost of repair of the defects was only Rs. 14 crores while the cost of the project is in excess of Rs.5700 crores. The small quantum of the amount incurred to execute the repairs of the defects as compared to the

huge amount of the cost of the projects Itself shows that the defects were not substantial and that there was no breach of the CA on part of DMRC as contemplated by Article 29.5.1 of the CA.

92. In reply. DAMEPL contends that what is required to be seen is the nature of the defects themselves and not the costs of the repairs. It is the contention of DAMEPL that defects have not been cured and / or effective steps have not been taken during the cure period and, thus, the question of the quantum of the expense is immaterial. The fact that the repairs were not cured shows that the exercise undertaken by DMRC to repair the defects was inadequate.

93. Finding and Conclusion:

In view of our conclusions that there were defects which caused material breach of the CA and all the defects have not been cured nor have effective steps been taken during the cure period, It is not relevant that only a small amount in comparison to the overall cost of the project has been spent in the process of curing the defects."

44. On issue 'E', the Arbitration Tribunal held that DAMEPL was responsible only for maintaining such section of the site which had been handed over and not that section of which mere access was granted. DMRC had not formally handed over the site to DAMEPL and had only provided the access. Defects in the DMRC's work were apparent within 12 months of the handing over of the section and DAMEPL had advised the same to the consultant. DAMEPL was not aware of the completion certificate issued to the civil contractors effective from 30th September, 2010. "Built

drawings" were not provided to DAMEPL till much after the cure notice dated 9th July, 2012. There was no document to show that there was formal handing over of the site by DMRC and taking over by DAMEPL.

45. With regard to issues F, G and H, we would like to reproduce the findings of the Arbitration Tribunal in entirety:-

> "**F. Issue: Was perceived financial unviability and not the defects in the structure, the real reason of the termination of the OA by DAMEPL?**
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> 99. DMRC in its Statement of Claim (Para 47) contends that the action of DAMEPL was nothing else but an attempt on the part of DAMEPL to absolve itself from the obligation under the CA as a result of the financial distress in which DAMEPL had found itself after aggressively bidding for the project. DMRC submitted that the said cause cannot be legal and valid cause for absolving successful bidder from the obligations undertaken by it under the Concession Agreement.
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> 100. To similar effect are DMRC's contentions in para 41 of its Written Submissions dated 14.10.2016. In reply, DAMEPL has reiterated its stand in the Respondent's Rejoinder note-IV submitted on 20.08.2016 that if its termination was valid under Article 29.5.1 of the CA, the question of financial viability or otherwise of the Project is completely irrelevant.
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> 101. Findings and Conclusion:
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> While dealing with defects in the civil structures and constraints due to faulty construction, the Tribunal came to the conclusion that there continued to be uncured defects/constraints of a far reaching nature which adversely affect the ability of DAMEPL to perform its obligations under the CA. The Tribunal has not been called upon to go Into the question of the financial viability or otherwise of the project. In view of our findings that the termination is valid, the issue of financial viability Is not being dealt by us.

G. Issue: Has DAMEPL failed to discharge its onus of disproving DMRC'S case by not leading oral evidence to counter the rebuttal evidence of DMRC or was DAMEPL entitled to disprove the case of DMRC and prove its own case by cross examining the witnesses of DMRC?

102. DMRC contends that DMRC has led rebuttal evidence of Mr. Matheu Muls and Mr. Rajan Kataria on several aspects. DAMEPL ought to have led evidence in re-rebuttal to discredit the evidence of the said witnesses which DAMEPL has not done and, thus, DAMEPL has failed to prove its case.

103. DAMEPL, on the other hand, contends that Mr. Muls and Mr. Kataria have been elaborately cross examined while giving evidence in rebuttal and by the said cross examination, DAMEPL has successfully discredited the evidence of Mr. Muls and Mr. Kataria. DAMEPL contends that DAMEPL has been able to show from various codal provisions and the documents produced during the course of rebuttal cross examination that the evidence given by DMRC In rebuttal is not correct, In legal support of their contention that DAMEPL need not have led evidence In re-rebuttal but was entitled to discredit the rebuttal evidence of the witnesses by their cross examination and with reference to various documents and codal provisions, DAMEPL has cited various judgments.

104. Findings and Conclusion:

The Tribunal has considered the evidence both oral and documentary led by the parties. The Tribunal has also considered the provisions of various applicable codes. We are aware that the provisions of the Arbitration and Conciliation Act, 1996 (Section 19) clarify that the Arbitrators are not bound by the provision of the Indian Evidence Act, 1872. Thus, strict compliance with the provisions of the Evidence Act by the arbitrators is not warranted. However, even if the provisions of the Indian Evidence Act 1872 was to be considered, the judgments cited by DAMEPL support the proposition that it is indeed possible for a party to establish its

own case by means of the opponent's witness. In this respect, we quote herein below an extract (page 429) from the judgment of the Karnataka High Court, in the case of Shri. Ramchandra and Ors. Vs Shri Vittal and Other Reported in ILR 2009 KAR (Page 423 to 432) (Compilation of Judgments submitted by DAMEPL on 20.08.2016).

"The object of cross examination is twofold. Firstly, to weaken qualify or destroy the case of the opponent. To impeach the accuracy, credibility and general value of the evidence given in chief, to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of cross examining party. Secondly, to establish the party's own case by means of his opponents witnesses. It may be either by way of admissions or by way of eliciting facts which would prove the case of the cross examining party. It is like a double edged sword. Properly used it may destroy the opponents case and support the cross examining party. Otherwise, it may destroy the case of the cross examining the party. It is an art which requires great skill. It can be acquired only by training and experience".

b. In the circumstances, it is concluded that the contention of DMRC that merely on account of DAMEPL not leading evidence in re-rebuttal, DAMEPL has failed to prove its case is not correct.

H. Issue: Did the issuance of certificate by CMRS show that the defects were duly cured?

105. DMRC contends that CMRS has cleared the operations of the line inJanuary2013. The line has been running successfully since and no problems or defects have been discovered or encountered during the period of subsequent operations. This shows that the defects have been completely cured.

106. DAMEPL, on the other hand, has contended that far from the CMRS certificate showing that the defects have been cured, the large number of conditionality imposed by CMRS including the

reduction in the speed of the line and the mandatory requirements for periodical inspection shows that CMRS was not entirely satisfied with the condition of the line. Further, It is the submission of DAMEPL that events that have taken place after the date of the termination ofCA are not relevant.

107. Findings and Conclusion-

For the purposes of considering the aforesaid submissions the relevant extract of the CMRS sanction dated 18.01.2013 (RC - 14. Page 165 to 169) are reproduced below; -

"(xi) The repairs to all the bearings used in U girders have been carried out by DMRC in the entire stretch of the line. Such type of repairs have been done for the first time on the Metro Network and needs to be monitored.

(xii) Cracks in soffit of some of the 'U' girders have also been repaired by DMRC. These cracks are required to be monitored during operation also to make sure that the situation remains stable. The monitoring of cracks for any propagation should be carried out as per Railway Board's letter no.2012/Proj/AME/1/6 dated 04.01.2013 addressed to CPM/AP/DMRC.

(xiii) Apart from routine inspection, operation and maintenance by the Concessionaire, DMRC should also carry out periodical inspection to ensure that the condition to track structure, viaducts etc is commensurate with speed in operation.

Further increase of speed in this section beyond 50 (fifty) kmph up to the propose speed of 80 (eighty) kmph may be authorized by Dir/W/DMRC, who accompanied the inspection, in steps of 10 Kmph at the time on satisfactory tram operation in the section for a reasonable period of time and after his personal inspection, satisfaction, certification and after due consideration of items mentioned in para 2 (ix) to (xii) above. Before any increase in the speed, he should satisfy himself about the adequacy and any

necessary attention as required with reference to the safety of public carriage of passengers.
For increasing the speed beyond 80 kmph, the DMRC shall approach the Commission for sanction with adequate justification in regard to the improvements brought out."

108. From the said letter, it is evident that the CMRS sanction clearly recognizes that rigorous monitoring is required to be done during the operation of the line. CMRS imposed a speed restriction of 50 kmph to start with. The prime purpose of the Airport Metro Line is to serve as a high speed connectivity, which is not fulfilled due to the severe speed restriction imposed by CMRS. As such, the CMRS certificate does not support the contention of DMRC. The subsequent operation of the line in the hands of DMRC is not relevant for the purpose of determination of issues before the Tribunal. Thus, the said contention of DMRC is not accepted."

46. Thereafter the Arbitration Tribunal had specifically dealt with the claims, counter claims and had pronounced the final Award. Claim of DMRC relating to non-payment of the concessionaire fee was accepted holding that DAMEPL would be liable to pay concessionaire fee of Rs.51 crores for the first year of operation and thereafter with 5% increase for every year for the period upto 7th January, 2013, which was quantified and computed at Rs.46.94 crores Accordingly DAMEPL was held liable to pay concessionaire fee for the period between 23rd February, 2012 to 7th January, 2013. Thus, it was held that the contract was terminated only on 7th January, 2013. Other claims made by DMRC were rejected.

47. The Award on the counter claims by DAMEPL held that the Article 29.5.2 of the CA was applicable and accordingly DMRC was liable to make termination payment of Rs.1260.73 crores on account of Rupee term loan

and Rs.538.58 crores on account of external commercial borrowings as debt due. Further Rs.983.02 crores was payable by DMRC to DAMEPL being 130% of adjusted equity. Ergo, an amount of Rs.2782.33 crores was payable by DMRC to DAMEPL under Article 29.5.2 of the CA.

48. DMRC, it was held was also liable to pay interest on Rs.2782.33 crores payable as termination payment as per Article 29.8 of the CA at annualized rate of SBI Prime Lending Rate (PLR) plus 2%. The interest, it was held, would be payable and accrued from 7th August, 2013, i.e., 30 days after DAMEPL had raised the demand for termination payment vide their letter dated 8th July, 2013. It was also directed that in terms of Article 29.9, this amount shall be credited to the Escrow account, details of which had been furnished by DAMEPL. As per the DMRC, total amount of interest payable in terms of the Award towards termination payment cumulatively amounts to Rs.4506.02 crores.

49. The Award has also directed DMRC to pay Rs.147.52 crores with interest @ 11% per annum from the date of payment of stamp duty on the Award to DAMEPL towards expenses incurred for operating AMEL from 7th January, 2013 to 30th June, 2013 on account of net operating cost of Rs.39.76 crores and net debt servicing cost of Rs.107.76 crores.

50. DMRC has been also directed to reimburse Rs.62.07 crores on account of encashment of bank guarantee of Rs.55 crores and Rs.7.07 crores on account of differential commission and penal interest charged by the bank from DAMEPL. DMRC is also directed to reimburse the principal security deposit of Rs.56.8 lacs along with interest @ 11% per annum,

which would accrue from the date of payment of requisite stamp duty on the Award.

51. Some of the other counter claims made by DAMEPL have been rejected on the ground of duplication or principle of remoteness of damages. The claim for refund of the concessionaire fee was also rejected on the ground that it cannot be granted under the CA.

52. For the sake of clarity, we would like to reproduce paragraph 139 of the Award, which summarizes the claims raised and answers given by the Arbitral Tribunal:-

> "139. In view of the discussions and findings above, we proceed to answer the issues raised by the parties as follows:
>
> **DMRC'S ISSUES ON CLAIM:**

Sr No.	Issues	Answers
1.	Whether the letter dt 8/10/2012 issued by respondent is illegal, incorrect and against the provisions of the Concession Agreement and should be treated as null and void?	In the negative. The termination notice dtd. 08.10.2012 issued by the Respondent DAMEPL is valid.
2.	Whether the Claimants have performed their obligations under Concession Agreement towards curing of the defects as pointed out by the Respondent vide their letter dated July 9, 2012?	In the negative.
3.	Whether the real motive of Respondent to terminate the concession agreement is Financial viability of their Business Plan?	Not relevant in view of answer to issues 1 and 2 above.

4.	Whether the Claimants are entitled to the compensation of Rs.3173 crore from the Respondent along with interest @ 18% as per the Claim Petition?	In the negative.
5.	Whether the Claimant is entitled to an amount of Rs.4.92 crore per month as claimed in the Claim Petition along with interest @ 18% per annum?	In the negative.
6.	Whether the Claimant is entitled to an amount of Rs.1,000 crores along with interest as loss of reputation and goodwill caused due to illegal acts of the Respondent?	In the negative.
7.	Whether the Claimant is entitled to cost of the Arbitration proceedings?	We direct parties to bear their own cost of arbitration.
8.	Whether, as stated by Respondents, the Claimants had failed to cure the breach within the period specified under Concession Agreement as per the provisions of Article 29.5.1?(Para 11 of Reply)	In the affirmative.
9.	Whether, as stated by Respondent, the Claimants failed to make honest or sincere efforts or take effective steps for curing the defects as required by Concession Agreement? (Para 11 & 12 of Reply)	Claimants DMRC failed to take effective steps for curing the defects as required by the Concession Agreement.
10.	Whether the participation of Respondent in the repair process, submission of Application to CMRS and recommencement of Operation and Maintenance of the	In the negative.

	Project by Respondent, proves that the contentions of Respondent, as contained in letter dated October 8, 2012, stood negated and nullified. (Para 32 of the claim)	

DMRC'S ISSUES ON COUNTER CLAIM:

Sr No.	Issues	Answers
1.	Whether the Respondent is entitled to sum of Rs.3470 cr. as Termination Payment along with interest and further interest @ SBI PLR plus 2% per annum as claimed in the Counter Claim?	DAMEPL (Respondent) is entitled to the sum of Rs.2782.33 crores from DMRC. Interest and manner of payment should be as stipulated in Articles 29.8 and 29.9 of CA.
2.	Whether the Respondent is entitled to sum of Rs.166.32 crore including interest on the Principal amount of Rs.152.59 cr. of claims in Counter Claim?	In the affirmative. DAMEPL is entitled to receive the sum of Rs.147.52 crores from DMRC interest at the rate of 11 percent per annum will accrue from the date requisite stamp duty is paid by DAMEPL.
3.	Whether the Respondent is entitled to sum of Rs.105.74 cr with interest @ 18% per annum as claimed in Counter Claim?	In the negative.
4.	Whether the Respondent is entitled to an amount of Rs.66.93 crores with interest @ 18% per	In the affirmative. DAMEPL is entitled to receive sum of Rs.62.07

	annum as claimed in Counter Claim?	crores. Interest at the rate of 11 percent per annum will accrue from the date requisite stamp duty is paid by DAMEPL.
5.	Whether the Respondent is entitled to an amount of Rs.56.8 lakhs with interest @ 18% per annum as claimed in Counter Claim?	In the affirmative. DAMEPL is entitled to receive sum of Rs.56.8 lakh. Interest at the rate of 11 percent per annum will accrue from the date requisite stamp duty is paid by DAMEPL.
6.	Whether the Respondent is entitled to an amount of Rs.2382.82 crore with interest @ 18% per annum as claimed in Counter Claim?	In the negative.
7.	Whether the Respondent is entitled to an amount of Rs.452.17 crore with interest @ 18% per annum as claimed in Counter Claim?	In the negative.
8.	Whether the Respondent is entitled to an amount of Rs.1250 crore with interest @ 18% per annum as claimed in Counter Claims?	In the negative.
9.	Whether the Respondent is entitled to an amount of Rs.725.78 crore along with interest at the rate of SBI PLR+2% per annum on Rs.685 crore as claimed in Counter Claim?	In the negative.
10.	Whether the Respondent is	Parties to bear their

	entitled to cost as claimed in the Counter Claim?	own cost of Arbitration.

"

PROCEEDINGS BEFORE THE SINGLE JUDGE:

53. DMRC had thereupon preferred petition under Section 34 of the A&C Act, which was registered as OMP (COMM) No.307/2017. DAMEPL, on the other hand, had filed an application/petition under Section 9 of the A&C Act, OMP (COMM) (I) No. 200/2017 ,seeking direction that DMRC should deposit Rs.3502.62 crores being 75% of the awarded amount and the said amount should be released to the lenders. By order dated 30th May, 2017, learned single Judge had directed DMRC to pay Rs.60 crores directly to the lead banker, subject to furnishing of an unconditional bank guarantee of Rs.65 crores. The controversy; whether the Office Memorandum issued by NITI Aayog would be applicable was to be decided on the next date of hearing. This order was challenged by the DMRC before the Division Bench without success and the Special Leave Petition by DMRC was also dismissed.

54. Learned single Judge by the impugned judgment dated 6th March, 2018 has upheld the Award and rejected the objections filed by DMRC under Section 34 of the A&C Act. It directs DMRC to deposit the amount awarded alongwith interest directly with the Escrow account maintained by the project lenders. The bank guarantee issued by the concessionaire and furnished by DAMEPL to secure payment made by DMRC was discharged.

INTERIM ORDERS IN THIS APPEAL

55. On the present appeal being preferred, vide order dated 10th April, 2018 the Court disposed of interim application for stay, CM No. 13435/2018, taking letter dated 9th April, 2018 written by the DMRC on record. By the said letter, the DMRC had undertaken and the order dated 9th April 2018 has directed that DMRC would be liable to pay service dues of DAMEPL to its bankers. This order was subject to final outcome of the appeal and in the event of DMRC succeeding, appropriate orders for restitution, etc. would be passed. Thereafter, CM No. 17581/2018 was filed by promoter of DAMEPL, namely, M/s Reliance Infrastructure Limited, which application was subsequently disposed of vide order dated 26th September, 2018 as not pressed since arguments had commenced in the main appeal itself.

OBJECTIONS/ SUBMISSIONS

56. Objections raised by DMRC can be divided under the following heads:-

(i) Waiver of termination notice by election and conduct.

(ii) Validity of termination notice dated 8th October, 2012 and the findings of the Award that the DMRC had not taken effective steps for removal of defects and thereby caused 'material adverse effect' on DAMEPL and, therefore, Article 29.5.1 of the CA was attracted.

(iii) Computation or calculation under Article 29.5.1 by treating and adding Rs.611.95 crores to adjusted equity.

(iv) Award of interest under Article 29.8 of the CA at annualized rate of SBI PLR plus 2% notwithstanding Article 36.2.6.1 of CA which states that where an Arbitral Award is for payment of money, no interest shall be payable on whole or any part of money till award is made.

57. At the outset, we must record that DMRC has not challenged findings of the Arbitral Tribunal in the Award rejecting their prayer for direction for specific performance and direction to DAMEPL to operate the AMEL except and to the extent of challenging the finding recorded in the award that ingredients of Article 29.5.1 are satisfied. Similarly, DAMEPL has not challenged the Award insofar as it directs them to make payment of Rs.46.94 crores with interest @ 11% per annum from the date of payment of stamp duty by DMRC, being the unpaid concessionaire fee for the period 23rd February, 2012 to 7th January, 2013.

58. For clarity, we would clarify that the challenge made in the present appeal, therefore, is confined to direction to DMRC to make termination payment under Article 29.5.1 of Rs.2782.33 crores, including adjusted equity after including Rs.611.95 crores to arrive at the figure of Rs.756.17 crores payable @ 130% with interest in terms of Article 29.9 of the CA at the annualized rate of SBI PLR plus 2%; claim for paying net operating cost of the line plus debt servicing cost for the period 7th January, 2013 to 30th June, 2013; payment/refund of Rs.62.07crores with interest @ 11% per annum from the date of payment of requisite stamp duty on account of encashment of bank guarantee of Rs.55 crores and Rs.7.07 crores on account of differential commission and penal interest and lastly refund of

security deposit of Rs. 56.8 lacs with interest @ 11% per annum from the date of payment of requisite stamp duty by DAMEPL.

Whether participation in the reconciliation process, signing of the application form dated 19th November, 2012 submitted to CMRS for recommencement of AMEL and operation thereafter for a period of 5 ½ months from 21st January, 2013 till 30th June, 2013 had amounted to waiver of the right to terminate

59. The aforesaid question and issue have been discussed by the Arbitral Tribunal under legal issue 'B'. Their findings are that DAMEPL's participation during the cure period from 9th July, 2012 to 8th October, 2012 was inconsequential and would not amount to waiver. Subsequent participation of DAMEPL in the discussions, submission of papers to CMRS and operation of AMEL from 23rd January 2013 till 30th June 2013, after issue of termination notice on 8th October, 2012, was without prejudice. DMRC had invoked the conciliation process under Article 36.1 of the CA. Further, DAMEPL had made substantial investment in the infrastructure of AMEL and, therefore, they were interested in the process being undertaken. Throughout DAMEPL had not relinquished, abandoned, waived or negated the termination notice. Reliance was placed upon the correspondence as per which the DAMEPL had throughout asserted the termination.

60. On behalf of DMRC, it was submitted that to sustain an action based upon contractual right of termination, the termination must be unequivocal in both letter and conduct. In the present case, the conduct was inconsistent with termination and, therefore, doctrine of waiver should have been applied. When a contract is terminated, parties do not by conduct affirm

continuation of the contract as had happened in the present case when DAMEPL had jointly made an application with DMRC to CMRS on 19th November, 2012 for re-starting operations, which had in fact commenced with DAMEPL operating the AMEL from 22nd January, 2013 to 30th June, 2013. The DAMEPL had equally participated in the joint meetings which had continued even after the termination notice with the intent and purpose to cure/rectify the defects and make the project safe for transportation. In these meetings, DAMEPL had not actually reiterated the intent to terminate.

61. The Award highlighted that DAMEPL had participated in the conciliation proceedings without prejudice to the termination notice. It was highlighted that their interest was to protect their huge investment, which was valued at Rs.2273.67 crores by IRCON. DAMEPL has also stated, that they were specifically instructed by Ministry of Urban Development vide Minutes of Meetings dated 31st October, 2012 to apply to CMRS by 5th November, 2012. Accordingly, DAMEPL had signed the draft applications pertaining to systems installed by DAMEPL, which was thereafter filled up. The form was signed by DMRC with reference to the civil structure before the same was forwarded to CMRS. Even after CMRS had granted sanction, on 18th January, 2018, DMRC had instructed DAMEPL to run the line in accordance with Article 29.7 of the CA. DAMEPL by their letter dated 21st January, 2013, which was marked without prejudice as the CA stood terminated, had agreed to commence operation subject to the pending adjudication before the Arbitral Tribunal. Reference is made to the contents of the letter dated 31st January, 2013 written by DAMEPL to DMRC.

62. Having considered the contention raised on both sides, we are not inclined to interfere with the findings recorded in paragraph 87 of the Award, which reads as under:-

> "87.1 .....during the cure period DAMEPL was required to give all assistance in the process and since it had made substantial investment in the infrastructure of the metro line, it was obviously interested in the process being undertaken. No sooner was the termination notice given on 08.10.2012 (CD-28, Pg. 284), DAMEPL repeatedly asserted that whatever it was doing was "without prejudice" to its rights and contentions and, additionally, the parties immediately invoked the conciliation process under Article 36.1 of CA followed immediately by invoking the arbitration by DMRC by its letter dated 23.10.2012 (Miscellaneous Application dated 30.10.2013, Pg. 14-15). The subsequent actions of DAMEPL were without prejudice to its rights and contentions as well as without prejudice to the pendency of the arbitral proceedings. Thus, far from "negating" or "nullifying" the termination notice, DAMEPL was insisting upon the same."

The aforesaid findings are predicated and founded on the conduct of DAMEPL, including the letters written by them, which had made it clear that their participation in the conciliation proceedings, etc. were without prejudice to their rights. There is force in the contention of DAMEPL that the finding in the Award should not be re-appraised afresh.

63. DAMEPL had also drawn our attention to the DMRC application dated 6th December, 2014 filed before the Arbitral Tribunal for interim direction relying upon Articles 36.2.4 and 36.3.3 of the CA for directing DAMEPL to operate and maintain AMEL and the assets till the arbitration proceedings attained finality. The application was opposed. The aforesaid Articles 36.2.4 and 36.3.3 read as under:-

"36.2.4 No Suspension of Work

The reference to arbitration shall proceed notwithstanding that Works shall not then be or be alleged to be complete, provided always that the obligations of the DMRC, the Engineer and the Concessionaire shall not be altered by reasons of arbitration being conducted during the progress of Works. Neither party shall be entitled to suspend the work to which the dispute relates on account of arbitration and payments to the Concessionaire shall continue to be made in terms of the Contract.

XXXXX

36.3.3 This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder."

64. DAMEPL had also relied upon Article 40.2 of the CA on the question of waiver, which had stipulated that waiver in the observance and performance of any provision or obligations and/or under the agreement shall not be effective unless it is in writing and executed by duly authorized representative of the parties.

65. DMRC had drawn distinction between waiver by election and waiver by estoppel or promissory estoppel. The said distinction exists in law as held in ***HIH Casualty and General Insurance Limited Vs. Axa Corporation Solutions***, 2001 WL 161 2576. Concept of waiver by election involves a choice by the waiving party between two inconsistent courses of action, which becomes applicable when there is a repudiatory breach of a promissory warranty by one party and the other has a choice to accept the breach as discharging the contract or waive it and affirm the contract. If the party waives by election, the contract continues to be in force. Essence of waiver by estoppel or promissory estoppel is to show willingness of the

representor to forego his rights, which should be reasonably seen by the other side. Reference in this regard can be also made to ***Motor Oil (Hellas) Corinth Refineries S.A. v. Shipping Corp. of India***, (1990) 108 N.R. 280 (HL), interpreting expression 'waiver', in its different contours. Waiver, it was observed, in a sense is abandonment of a right which arises by virtue of a party making an election, which may arise when a state of affairs comes into existence in which one party becomes entitled, either in terms of the contract or by general law to exercise a right and he has to decide whether or not to do so. Characteristically, this state of affairs arises where the other party has repudiated the contract or has committed a breach if the contract, which entitles the innocent party to bring it to an end, but the latter has made a tender of performance which conform to the terms of the contract. If a party with the knowledge of the fact, which has given rise to repudiation, acts in a manner consistent only with treating the contract as still alive, he is taken in law to have exercised his election to affirm the contract. The election must be unequivocal.

66. The conduct of DAMEPL in commencing operations from 22nd January, 2013, notwithstanding the earlier termination vide notice dated 8th October, 2012, would indicate their intent and desire to find an amicable solution and resolve financial unviability as stated in communications dated 20th April, 2012 and 24th September, 2012 expressing DAMEPL's desire to re-negotiating the terms, but it would be difficult to hold that the decision of the Arbitral Tribunal on the issue of waiver is flawed and can be corrected in limited jurisdiction and scrutiny under Section 34 of A & C Act. Similarly, the contention that use of words 'without prejudice' in the communication

and letters is inconsequential and does not require interference or rejection of the findings in the Award. Reliance placed on ***Segal Securities Ltd. Vs. Thoseby***, 1963 Queen's Bench 887 on the question of tenancy law applicable in England does not justify interference in exercise of power under Section 34 read with Section 37 of the A & C Act.

67. Looked from all angles and situations, we are not inclined to interfere with the finding recorded in the Award rejecting the contention of DMRC that DAMEPL had withdrawn or waived the termination notice.

Termination on 'DMRC Event of Default'

68. As noticed above, DAMEPL had issued cure notice dated 9th July, 2012 followed by termination notice dated 8th October, 2012.

69. Counsel for both sides had drawn our attention to Article 29 of the CA under the heading "Termination for the Concessionaire event of Default". Relevant clauses of Article 29.1.1, which deals with DMRC's right to terminate, read as under:-

> "29.1.1 **Concessionaire Event of Default**
>
> The following events shall constitute an event of default by the Concessionaire (a "Concessionaire Event of Default") unless such Concessionaire Event of Default has occurred as a result of DMRC Event of Default or a Force Majeure Event;
>
> XXXXX
>
> (xi) The Concessionaire is in Material Breach of this Agreement or any of the Project Agreements resulting in Concessionaire's incapacity to perform under this Concession Agreement to the satisfaction of DMRC;

XXXXX

(xiii) The Concessionaire abandons the operations of the Airport Metro Express Line for more than 15 (fifteen) consecutive days without the prior consent of DMRC, provided that the Concessionaire shall be deemed not to have abandoned such operation if such abandonment was (i) as a result of Force Majeure Event and is only for the period such Force Majeure is continuing, or (ii) is on account of a breach of its obligations by DMRC.

(xiv) The Concessionaire repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement;

XXXXX

(xvi) The Concessionaire has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days."

70. Article 29.1.2 empowers the DMRC to terminate the agreement by issue of termination notice to the concessionaire if the concessionaire has failed to cure such breach or default within the period provided in the CA. However, before issuing termination notice, DMRC was obliged to issue notice in writing to inform the concessionaire of its intent to issue termination notice and grant 15 days time to the concessionaire to make representation against such intended termination notice. Upon expiry of 15 days, whether or not any representation was received, DMRC had sole discretion to issue termination notice. Article 29.1.3 is subject to Article 29.2 and stipulates that the DMRC could issue cure notice for any of the defaults or breaches under the agreement asking the concessionaire to cure the breach or default specified therein. Issue of cure notice would not relieve the concessionaire from liability of damages caused by breach or

default or extend the period of the CA. DMRC, however, had right to extend the period during which the concessionaire was required to take reasonable action to cure the defects. We shall subsequently refer to Article 29.4 as this clause is of some significance, when we deal with the question of computation/calculation of termination made in the Award with reference to termination payment payable on 'DMRC Event of Default'

71. Article 29.5 deals with 'Termination of DMRC Event of Default' and clauses (1) and sub-clause (i) thereof read as under:-

> "**29.5 Termination for DMRC Event of Default.**
>
> 29.5.1 The Concessionaire may after giving 90 (ninety) days notice in writing to DMRC terminate this Agreement upon the occurrence and continuation of any of the following events (each a "DMRC Event of Default"), unless any such DMRC Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event.
>
> (i) DMRC is in breach of this Agreement and such breach has a Material Adverse Effect on the Concessionaire and DMRC has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire;
> (ii) xxx
> (iii) xxx
> (iv) xxx
> (v) xxx"

Clause (1) states that the concessionaire may after giving 90 days notice in writing to DMRC terminate the CA upon occurrence and continuation of the events enumerated in sub-clauses (i) to (iv), which events have been described as 'DMRC Event of Default'. There is also a stipulation that 'DMRC Event of Default' should not have occurred as a

result of 'Concessionaire's Event of Default' referred to above or due to *force majeure* event. Sub-clause (i) of Article 29.5.1 states that DMRC would be in breach of the agreement if the breach has 'material adverse effect' on the concessionaire and DMRC has failed to cure such breach or taken effective steps for curing such breach within 90 days of the receipt of the notice in this behalf from the concessionaire. The expression 'material adverse effect' has been defined in the CA to mean "material adverse effect of any act or any event on the ability of either party to perform any of its obligations under and in accordance with the provisions of this agreement". Obligations of DMRC have been set out in Article 9 of the CA. Article 10 deals with the obligations of the concessionaire, i.e., DAMEPL.

72. The cure notice dated 9th July, 2012 states that DAMEPL had noticed certain defects in DMRC's works, which were affecting performance obligations of DAMEPL under the CA. A non-exhaustive list of defects that had created unsafe conditions for performance of DAMEPL's obligations under the CA were thereafter enumerated and read as:-

> "i) Failure by the DMRC/Claimant to assume correct Super-imposed Dead-load in its design;
>
> ii) The Co-efficient of Dynamic augmentation (CDA) assumed by the Claimant for longitudinal analysis in the Design Basis Report'
>
> iii) The strengthening by the Claimant of all piers having eccentric pier caps by jacketing of reinforced concrete;
>
> iv) Non-adherence of the Design by the Claimant, such:
>
> a) Non-adherence to design principles;
> b) Non-compliance to dimensional requirements;
> c) Non-compliance of material specifications; and

d) Method Statements have not been prepared, independently checked, approved and followed;
e) Defects in the U-Girder;
f) Defects in Pier Caps

v) The Claimant failed to ensure adequate gap between the girders and the shear key, which has led to permanent flaw in the civil structure;

vi) Twist in girder has led to permanent damage to girder;

vii) The cracks in the girder are relatable to inherent defect in the design of the girder."

73. Notice states that DAMEPL had carried out inspections without original and other relevant designs and drawings, which had not been provided by DMRC. Defects in DMRC's work were not capable of being noticed and identified at the time of taking over due to defaults of latent and inherent nature. Preliminary investigation report had been prepared by an internal team. Reference was made to the earlier letter dated 17th May, 2012, report submitted by M/s Shirish Patel and Associates Consultants Private Limited engaged by DAMEPL and observations of others on the question of safety of passengers that were paramount. Hence, it was not possible for DAMEPL to continue with the operation of trains in view of defects to safeguard life and property of public at large. Defects in DMRC's work had resulted in 'adverse material effect' as the situation had made the operation highly unsafe with potential to cause loss of life and property thereby severely impairing technical capabilities of DAMEPL. DMRC was accordingly requested to take such actions or measures as were necessary to completely cure the defects within 90 days, failing which there would be a material breach and 'DMRC Event of Default'.

74. Thereafter, DAMEPL had issued termination notice dated 8th October, 2012, which reads as under:-

> "Ref: DAME/DMRC/2012/5107
> Dated: 8th October. 2012
>
> **By Hand/Email**
>
> To,
> Managing Director
> Delhi Metro Rail Corporation,
> Metro Bhawan,
> Fire Brigade Lane,
> Barakhamba Road New Delhi.
>
> Project :Airport Metro Express Line Contract AMEL-P1
>
> Subject : Termination Notice under the Concession Agreement for High Speed Airport Metro Express Line between New Delhi - Indira Gandhi International Airport - Dwarka Sector 21 ("Project") consequent of upon DMRC's Event of Default
>
> Ref : a) Concession Agreement dated August 25, 2008 ("Concession Agreement")
>
> b) Our letter no. DAME/DMRC/2012/4728 dated July 9, 2012 ("Notice to cure DMRC Events Of Default")
>
> c) DMRC's letter no. DMRC/20/1I/AP/P1 dated August 3, 2012 ("DMRC's Reply")
>
> d) Our letter no. DAME/DMRC/2012/5101 dated October 5. 2012
>
> **Dear Sir**,

1.0 The Concessionaire writes in respect of the captioned subject and the letters under reference hereinabove

2.0 Notwithstanding anything that is alleged in DMRC's Reply, the Concessionaire hereby repeats and reiterates that it has duly complied with all its obligations under the Concession Agreement and maintenance manuals including in respect of the conduct of regular inspections and undertaking of repairs of the works which were its responsibility.

3.0 The Concessionaire submits that it was due to its efforts and periodic inspections only that the Defects could be detected. The Defects being latent/inherent in DMRC Works were not capable of identification at any point of time, including at the lime of providing access of the Site to the Concessionaire for carrying out the Concessionaire's Works.

4.0 DMRC, despite receiving notifications and all necessary and reasonable support from the Concessionaire, has failed to cure the breach of its obligations under the Concession Agreement Including for the cure of the Defects, which have resulted into the DMRC Events of Default.

5.0 A period of 90 (ninety) days has expired since the issue of Notice to cure DMRC Events of Default, and none of the DMRC Events of Default have been cured.

6.0 In view of the above, the Concessionaire hereby terminates the Concession Agreement under Article 29.5.1 of the Concession Agreement.

7.0 The exercise of its rights by the Concessionaire concerning termination of the Concession Agreement under Article 29.5 1 of the Concession Agreement is without prejudice to its rights and remedies available to it under the Concession Agreement, law or in equity.

8.0 As the Concession Agreement is terminated due to the DMRC Event of Default, the Concessionaire is hereby immediately released from all its obligations under the Concession Agreement or any document forming part thereto.

9.0 In view of the termination of the Concession Agreement and pursuant to the provisions of Clause 29.5.2 of the Concession Agreement, the Concessionaire hereby calls upon DMRC to pay, by way of Termination Payment, an amount equal to:

(a) Debt Due, which is Rs. 2.940 Crores (Rupees Two Thousand Nine Hundred and Forty Crores Only); and

(b) 130% of the Adjusted Equity, which is Rs. 130,000 (Rupees One Lakh and Thirty Thousands Only)

within 7 (seven) days hereof.

10.0 In view of DMRC's failure to discharge its functions and obligations in accordance with the terms of the Concession Agreement and the DMRC Events of Default, the Concessionaire has suffered the revenue and other operational losses, damages and expanses, and accordingly, the Concessionaire hereby reserves its right to call upon DMRC to indemnify the Concessionaire for

all such revenue and other operational losses, damages and expenses of whatsoever nature as per the relevant provisions of the Concession Agreement including Article 34.1(b) thereof, upon its quantification.

11.0 The Concessionaire hereby also calls upon DMRC to appoint its nominee and instruct him to be present at a mutually convenient time to take-over the possession of the Project Assets and the inventory thereof. If DMRC fails to appoint its nominee or agree upon a mutually convenient lime within 7 days hereof, then the Project will be vacated at the sole risk and liability of DMRC. and the Concessionaire will not be responsible for any form of risk or liability whatsoever in relation to the Project Assets or any inventory forming part thereof.

12.0 In the event DMRC fails, neglects or delays to do the acts and things stated above, the Concessionaire reserves right to initiate appropriate legal actions at DMRC's risk as to costs and consequences.

13.0 Nothing contained in this Termination Notice shall be seen as a waiver of any of the Concessionaire's rights or the obligations of DMRC, under the Concession Agreement, of any nature. The Concessionaire hereby reserves all its rights and remedies against DMRC.

14.0 Unless otherwise defined herein, the capitalized terms shall mean to have the same meaning as ascribed to such term under the Concession Agreement or under the Notice to cure DMRC Events of Default."

Notice was not specific on failures *albeit* had simply eluded to latent/inherent defects in DMRC's work that had not been cured despite notification and DAMEPL's support. CA was terminated with immediate effect.

75. As per DMRC in terms of Article 29.5.1 DAMEPL should have given 90 days' notice in writing to DMRC setting out its intention to terminate the CA, post and in addition to the cure notice of 90 days to constitute 'DMRC Event of Default'. For valid termination under Article 29.5.1 the default by DMRC in the form of failure to cure or take effective steps to cure was "upon occurrence and continuation" till the date of termination. The period postulated in Article 29.5.1 was 90 days plus 90 days and then and then alone on DMRC's failure to cure or take effective steps, there would be 'DMRC's Event of Default'. Specific emphasis was laid on the words "The Concessionaire may after giving 90(ninety) days notice……upon occurrence and continuation of any of the following events……(i) DMRC has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days". DMRC also relies upon letter dated 21st January, 2013, written by DAMEPL in which they had stated that termination would be effective after 90 days of cure notice plus 90 days of the termination notice. Notice of termination dated 8th October, 2012 was invalid as it had terminated the CA with immediate effect.

76. Our attention was specifically drawn to paragraph 78 in heading "Summary of Arbitral Tribunal's view" quoted in paragraph 40 above, which states that DMRC had failed to cure any breach as it had failed to take effective steps within 90 days of the notice dated 8th July, 2012 to

rectify and cure cracks at the bottom of the girders, twist in the girders, gaps between the girders and between the girders and the shear key. It was observed that such breach had 'material adverse effect' on DAMEPL. As such ingredients of Article 29.5.1 of CA were satisfied. Therefore, the Award records in paragraphs 77 and 78 that termination notice given by DAMEPL on 8th October, 2012 was valid. The aforesaid finding, it was highlighted, contradicted subsequent findings on termination date recorded by the Arbitral Tribunal in paragraphs 128, 130 and 131 of the Award. Contention of DMRC is that two different dates of termination of CA consequent to DMRC's 'Event of Default' have been mentioned in the Award.

77. We have already quoted paragraph 78 of the Award, which states that the DMRC had failed to take effective steps to cure the breach within 90 days of the notice dated 9th July, 2012 and as such ingredients of Article 29.5.1(i) of the CA were satisfied. Termination notice issued on 8th October, 2012, effective immediately was valid. Paragraph 115 records that the Arbitral Tribunal had already concluded in paragraph 78 that termination notice dated 8th October, 2012 was valid. Accordingly, the counter claims of DAMEPL were being considered. *Ex facie* the CA could not have been terminated with immediate effect from the date of termination notice. DAMEPL would not even contend to the contrary.

78. Paragraphs 128, 130 and 131 of the Award read as under: -

> "128. The other component of Termination Payment is "Debt due". "Debt due" comprises of two elements i.e. Rupee term loan and External commercial borrowing (in foreign currency). For the loan received and repaid, we have relied upon the information

submitted by DAMEPL through their advocates vide letter no. DJK/HM/1208 dtd. 01.12.2014. In the absence of definition of "Transfer Date" in the CA, we have taken the date of termination i.e. 07.01.2013 as the reference date for the calculation of the "Debt due".

XXXXX

"130. Prayer (b) of the Counter Claim

DAMEPL has contended that after termination of the CA from 07.01.2013, they were asked to run the line which they continued up to 30.06.2013.....

Therefore , DAMEPL is entitled to Rs. 147.52 Crores against this counter claim…."

''131. Prayer (c) of the Counter Claim

DAMEPL has contended that it has been servicing the debt after handing over of the line on 01.07.2013 to DMRC. In CC-5, it has claimed that an amount of Rs.104.41 crores have been paid by DAMEPL during the period 01.07.2013 till 30th November, 2013. DAMEPL has further claimed interest from the date of filing claim till the date of actual payment at the rate of 18% p.a. DAMEPL has led the evidence of Ms. Neena Goel who has examined the records and verified the figures. This evidence has not been challenged by DMRC nor any counter evidence led.

Tribunal has examined the above claim and is of the view that the interest allowed in the claims at Annexure CC-1 and CC-3 substantially covers the interest paid by DAMEPL for debt servicing.

As such, this prayer is a duplication and, hence, not granted."

The aforesaid paragraphs have taken the date of termination of CA as 7th January, 2013. Arbitral Tribunal had also held that DAMEPL was liable to pay concessionaire fee till 7th January, 2013.

79. Date of termination is crucial as clause (i) to Article 29.5.1 mandates that the DMRC should have cured the defects or taken effective steps to cure the defects within the period specified upon occurrence and continuation of the breach. DMRC's failure to cure or take effective steps to cure the breach upon occurrence and continuation till termination date constitutes 'DMRC Event of Default'. Confusion and lapse vide aforesaid contradiction on the termination date as 8th October, 2012 and also as 7th January, 2013 is obvious and glaring in the face of the Award. Paragraphs 128, 130 and 131 do hold that the effective date of termination was 7th January 2013. This could materially change outcome of the findings recorded by the Arbitral Tribunal.

80. Faced with the aforesaid position, DAMEPL have submitted that DMRC had not pleaded or argued that the cure period was 90 days plus 90 days and this argument is an afterthought and was raised before the learned single Judge for the first time. DMRC was required to cure the defects or take effective steps to cure the defects within 90 days from the date of DAMPEL's letter dated 9th July, 2012 and were not entitled to another period of 90 days after termination notice dated 8th October, 2012. This was not what is postulated under Article 29.5.1 (i) of the CA.

81. In the written submissions, it is also stated that the Arbitral Award has considered the entire period including the period upto 7th January, 2013 to examine and conclude whether the defects had been cured or effective

steps had been taken to cure the defects. (See paragraph 44 at page 65 of the written submissions.)

82. In other words, DAMEPL in the written submissions in alternative has taken the effective date for the purpose of clause (i) to Article 29.5.1 as 7th January, 2013. However, this is not what the Arbitral Tribunal has held in the first part of the award, including paragraphs 78 and 115 quoted above. DAMEPL has not explained and justified the reason for the two dates.

83. DMRC has submitted that the contention is not an afterthought and was raised before Arbitral Tribunal. Reference was made to the written submissions filed by the DMRC before the Arbitral Tribunal dated 24th November, 2016, wherein it was submitted:-

> "35. The issuing of termination notice on 8th October, 2012 itself was against the provision of above mentioned provision of Concession agreement because even if it is assumed that DMRC Event of Default had occurred under CA or was in continuation in the opinion of Respondent, still they were not entitled to terminate the Concession Agreement on 8th October, 2012. They were only entitled to issue 90 days notice for termination."

84. Similar written submissions on the said aspect made before the single Judge, read :-

> "xxvii. That issuing of termination notice on 8th October, 2012 itself was against the provision of above mentioned provision of CA because even if it is assumed that DMRC Event of default had occurred under CA or was in continuation in the opinion of Respondent, still they were not entitled to terminate the CA on 8th October, 2012."

85. We cannot decide this controversy except by referring to the Award, which does not interpret Article 29.5.1(i) of the CA with specific reference

to a period of 90 or 180 days. Nevertheless, the Award does record confusing and contradictory stances on termination and has predicated its reasoning in different parts of the Award on two different dates, without elucidating which date (8th October,2012 or 7th January, 2013) has been taken as the basis for deciding failure to cure or take effective steps to cure the defects. We are therefore left baffled and confused as to the date of termination and the cut off date taken by the Arbitral Tribunal for deciding 'DMRC Event of Default'.

86. We have already quoted the relevant portion of the Award vide heading 'H' dealing with the contention of the DMRC on CMRS approval dated 18th January, 2013 to re-commence AMEL operations, which DMRC submits is perverse, illogical and also contrary to law/statute. We would examine this contention below. At this stage we observe that the Arbitral Tribunal has not held that the certification/sanction dated 18th January, 2013 was not relevant as the date for determining 'DMRC Event of Default' was 8th October, 2012 and not 7th January, 2013. This would indicate as has been stated by DAMEPL in 'alternative' that Arbitral Tribunal had taken 7th January,2013 as the relevant date for Article 29.5.1 of the CA.

87. The Award in paragraph 107 quotes CMRS sanction dated 18th January, 2013, which records that repairs of all bearings used in U girders and cracks in some soffit of some of U girders have been carried out and the situation was stable. However, the repairs were required to be monitored, to ensure that the position remained stable. DMRC was directed to carry out routine inspection, operation and maintenance. Permission to operate AMEL at 50 kilometres per hour was granted with right to increase the

speed till 80 kilometres per hour in steps of 10 kilometres per hour at a time on personal inspection, satisfaction, certification of conditions specified by the Director (W) DMRC. For increase in speed beyond 80 kilometres per hour, DMRC was to approach the CMRS for sanction with adequate justification.

88. The Arbitral Tribunal after recording the said position rejected the contention of DMRC observing that AMEL was to serve as a high-speed connectivity and severe speed restrictions were imposed by CMRS. It did not examine the issue, and question and answer how and in what way the speed restrictions imposed would amount to 'material adverse effect' on DAMEPL as defined in the CA. Findings in paragraphs 77 and 78 refer to defects in girders etc. and failure to cure the defects. Speed restrictions were not treated as ‘material adverse effect’. Findings in paragraph 108 on the other hand state that notwithstanding the clearance and statutory certification given by CMRS, the prime purpose of the project was high speed connectivity which was not possible to comply with the speed restrictions. This was not the ground or reason given in either the cure notice or the termination notice. How and why speed restriction would have prevented DAMEPL from performing their obligation in the CA to constitute ‘material adverse effect’ is neither stated nor elucidated and explained by reasoning. The question whether speed restriction as imposed would justify the termination of the CA should have been debated and answered after due deliberation on facts put forth by both sides. Factual assertions and counters were argued before us, but we refrain from making any comments as the Award is silent and has not examined the facts and given reasons.

89. Relevant provisions of the Metro Act read:-

"7. **Appointment of commissioner of Metro Rail safety** -The Central Government may appoint one or more Commissioners of Metro Railway Safety.

8. **Duties of Commissioner**- The Commissioner shall -

(a) inspect the metro railway with a view to, determine whether it is fit to be opened for the public carriage of passengers and report thereon to the Central Government as required by or under this Act;

(b) make such periodical or other inspections of metro railway, its rolling stock used thereon and its other installations as the Central Government may direct;

(c) make an inquiry under the provisions of this Act into the cause of any accident on the metro railway; and

(d) discharge such other duties as are conferred on him by or under this Act."

9. **Powers** of **Commissioner** -Subject to the control of the Central Government, the commissioner, Whenever it is necessary so to do for any of the purposes of this Act, may-

(a) enter upon and inspect the metro railway or any rolling stock used thereon, and its other installations;
(b) by order in writing addressed to the metro railway administration, require the attendance before him of metro railway official and to require answers or returns such inquiries as he thinks fit to make from such metro railway official or from the me & railway administration; and

(c) require the production of any book, document or material object belonging to or in the possession or control of any metro railway administration which appears to him to be necessary to inspect.

XXXXX

14. **Sanction of Central Government to the opening of metro Railway-The** metro railway in the metropolitan city of Delhi shall not be opened for the public carriage of passengers except with the previous sanction of the Central Government.

15. **Formalities to be complied with before giving sanction to the opening of Metro Railway**-(1) The Central Government hall(sic), before giving its sanction to the opening of the metro railway under section 14, obtain a report from the Commissioner that-

a. he has made a careful inspection of the metro railway and the rolling stock that may be used thereon;
b. the moving and fixed dimensions as laid down by the Central Government have not been infringed;
c. the track structure, strength of bridges, standards of signaling system, traction system, general structural character of civil works and the size of, and maximum gross load upon, the axles of any rolling stock, comply with the requirements laid down by the Central Government; and
d. in his opinion, metro railway can be opened for the public carriage of passengers without any danger to the public using it.

(2) If the Commissioner is of the opinion that the metro railway cannot be opened without any danger to the public using it, he shall, in his report, state the grounds therefor, as also the requirements which, in his opinion,

are to be complied with before sanction is given by the Central Government.

(3) The Central Government after considering the report of the Commissioner, may sanction the opening of the metro railway under section 14 as such or subject to such conditions as may be considered necessary by it for the safety of the public.

XXXXX

21. **Delegation of Powers -** The Central Government may, by notification, direct that any of its powers or Delegation of functions under this Chapter, except power to make rule under section 22, shall, in relation such matters and subject to such conditions, if any, as may be specified in the notification, be exercised or discharged also by the Commissioner."

90. CMRS is appointed under Section 7 of the Metro Act and its duties as enumerated in Section 8 include duty to inspect metro railway with a view to determine whether it is fit to open for public carriage, conduct periodical or other inspection of metro lines when directed by the Central Government and discharge such other duties as are conferred. To enable CMRS to perform its duties, it is vested with powers under Section 9. CMRS has to prepare annual report of its activities and such annual reports are laid before the Parliament as per Sections 12 and 13 of the Metro Act. Metro line/railway in terms of Section 14 cannot be opened for public carriage of passengers except with the pervious sanction of the Central Government. Section 15 mandates that the Central Government before giving its sanction shall obtain report from CMRS on aspects referred to in clauses (a) to (d).

Section 21 states that the Central Government by a notification may delegate any of its powers except power to make Rules.

91. The Opening of Delhi Metro Railway for Public Carriage of Passenger Rules, 2002 as enacted, on power and authority of CMRS including those delegated to him by the Central Government, state:-

> **"Rule 4: "Supply of documents to the Commissioner. — (1)** The Chief Executive Officer shall, while making reference to the Commissioner for inspection and report on the safety of the metro railway under sub-rule (2) or rule 3, furnish all relevant documents to the Commissioner from the following list of documents, namely;--
>
> (a) Tabulated details;
> (b) Index plan and sections;
> (c) drawings of works;
> (d) Certificate;
> (e) List of infringements of moving and fixed dimensions;
> (f) Working orders to be enforced at the operations control centre and at each station.
> (g) Administrative note giving salient features of the project.
>
> (2) The documents referred to in sub-rule (1) shall indicate the distances from the same fixed point in kilometers and decimals up to two digits and the fixed point shall be clearly defined in a note on the plant and section sheets of the work documents.
> (3) The datum adopted shall be mean sea level as fixed by the Survey of India and heights shall be mentioned with reference to the datum in metres and decimals up to two digits.

(4) The documents referred to in sub-rule (1) shall be signed by atleast an officer equivalent to senior administrative grade rank except the certificate which shall be signed by the Chief Executive Officer himself.

(5) The Chief Executive Officer shall furnish such documents to the Commissioner, as far as possible, at least one month in advance of the stipulated date of inspection."

Rule 5: "Contents of documents .—(1) Tabulated details which shall consist of important characteristics of the metro railway or a portion thereof to be opened for public carriage of passengers, and in particular shall include —

a) Curve abstract as specified in Form I ;
b) Gradient abstract as specified in Form ll ;
c) Bridge abstract as specified in Form III ;
d) Viaduct abstract as specified in Form IV ;
e) Important bridges abstract as specified in Form V ;
f) Ballast and permanent way abstract as specified in Form VI;
g) Stations and station sites as specified in Form VII;
h) Brief particulars of rolling stock as specified in Form VIII ;
I) Brief particulars of traction installations as specified in Form IX ;
J) power supply installation abstract as specified in Form X ;
K) Restricted Over Head Equipment clearances abstract as specified in Form XI ;

(l) Electrical crossings over metro railway tracks as specified in Form XII ;

(m) Traction maintenance depot abstract as specified in Form XIII;
(n) Ventilation, smoke management and fire safety measures in tunnels and stations as specified in Form XI V; and
(o) Signalling and train control installations as per sample in Form XV.

(2) Index plan and section sheets, completion drawings, etc., shall include ,--

(a) Index plan and section sheets as mentioned in the Schedule;

(b) Completion drawings of bridges / viaducts showing details of structure, loading standards adopted, etc.

(c) Completion drawing of tunnels, if any;

(d) Diagrammatic plan of station yards showing layout of tracks and particulars of turn outs, gradients, of any signals and interlocking installed; and
(e) Implementation diagrams of overhead equipment masts/ overhead current collection system as applicable.

(3) The comments on the following matters, namely:--

(a) Moving and fixed dimensions;
(b) Strength of bridges / viaducts;
(c) Brake and communication;
(d) System of working;
(e) Electric traction equipment; and

(f) Type of rolling stock, proposed along with list of restrictions, shall be contained in the certificate in Form XVI.

(4) List of infringements of moving and fixed dimensions shall be prepared as specified in Form XVII and shall contain full explanations for the infringements and restrictions or precautions to be adopted because of them and the reference to the authority of the Central Government under which the infringement is permitted for allowed.

(5)Working orders to be enforced at each station on the metro railway to be opened shall be prepared in accordance with the provisions of the Delhi Metro Railway General Rules, 2002 and shall specify any special conditions that are required to be met with and such orders shall include working rules."

XXXXX

Rule 22:"Sanction to open metro railway. –

(1) The Central Government may, after considering the report submitted under Rule 21 by the Commissioner, sanction the opening of the Delhi metro railway or a portion thereof as the case may be, under Section 14 of the Ordinance as such or subject to such conditions as may be considered by it for the safety of the public.

(2) The Chief Executive Officer shall publish the date of opening of Delhi metro railway or a portion thereof for public carriage of passengers in the local newspapers both in English and Hindi languages.

Rule 23: "Opening of a metro railway by the Commissioner. -

(1) The Commissioner may also sanction opening of Delhi metro railway for public carriage of passengers, subject to such conditions as he may impose in the interest of the passengers. While giving sanction to the opening of metro railway, he will, however, forward his inspection report to the Central Government:

(2) On receipt of the inspection report of the Commissioner, the Central Government may confirm, modify or cancel the sanction given under sub-rule (1) subject to such conditions, alterations or relaxation as may be considered necessary."

92. CMRS performs statutory functions and duties under Sections 9 and 10 of the Metro Act. Under Rule 23 CMRS may also sanction opening of Delhi metro railway for public carriage of passengers. CMRS as the technical expert is vested with authority and power to decide on the safety of the metro tracks/lines, opening and operations of metro tracks/lines and empowered to suspend traffic, close metro line/station and re-open metro line/station previously open to public carriage, etc.

93. Safety of metro line is a matter of public importance and therefore statutory sanction/permission under the Metro Act is required. Certification or permission is granted by way of administrative act under the statute and in exercise of statutory power. The certification cannot be challenged or questioned in the arbitration proceedings. Arbitrators cannot go into validity of the said sanction. Certificate is factually and legally binding as far as Arbitral Tribunal is concerned. DAMEPL, in fact, does not contend and has

not argued to the contrary. The legal position in this regard is well-settled (see ***U.P. State Electricity Board versus Banaras Electricity Light and Power Company Limited, (***2001) 7 SCC 637, ***Haryana Telecom Limited versus Sterlite Industries (India) Limited, (***1999) 5 SCC 688 and ***Booz Allen versus SBI Home Finance***, (2011) 5 SCC 532).

94. Thus, the Arbitral Tribunal was required to treat and give legal effect to the sanction and permission accorded for public carriage of passengers vide CMRS certificate of fitness dated 18th January, 2013. Sanction/permission was given after examining the civil structure be it cracks, twists and gaps in the girders, which were not found to be compromising fitness and safety for public use. Conspicuously, the Arbitral Tribunal did not consider the legal effect and consequence of the permission/sanction accorded by the CMRS in the first portion of the Award recorded in the summary of arbitral views in paragraphs 77, 78 and paragraph 115 of the Award. Grant and effect of sanction/permission accorded by CMRS dated 18th January, 2013 was ignored and bypassed.

95. The aforesaid error in the impugned Award has occurred because the legal issue "H" has been determined and decided separately, whereas it should have been decided and considered in the first portion of the Award with reference to the validity of termination. Even the legal issue 'H'-Did the issue of certificate by CMRS show that the defects were duly cured-; the answer to which was obvious yes, was not answered.

96. Argument of DAMEPL that compliance of the obligations in the CA and grant of sanction by CMRS for re-commencement of operations are two separate issues is *ex facie* incorrect and unacceptable. Submission has to be

rejected for the simple reason that issue of sanction by CMRS directly relates to whether or not the defects in the viaducts had been repaired or effective steps for repair had been undertaken by DMRC. Permission certifies to safety and fitness of repairs that were undertaken for commencement of commercial passenger operations of the AMEL. The Arbitral Tribunal has also obviously erred in not accepting and taking into consideration the factum that the line was operationalized and put to use continuously after DAMEPL had recommenced operations from 22nd January, 2013 till 30th June, 2013. Thereafter, DMRC had continued to operate the line till the Award was pronounced on 11th May, 2017. The fact that speeds were increased from time to time and numbers of trips and passengers had increased were spurned and discarded. During this period of over four years there were no problems, issues and even one accident. This is too obvious and apparent to have been ignored and treated as inconsequential.

97. In view of the aforesaid discussion, the following position emerges:-

(i) DAMEPL was incurring losses.

(ii) DAMEPL had written to DMRC for deferment of payment of concessionaire fee and re-structuring of the CA.

(iii) DMRC had rejected the prayers.

(iv) DAMEPL had operated AMEL from 23rd March, 2011 till 8th July, 2012. During this period, there were no accidents and damage to life and property.

(v) DAMEPL stopped operations in view of cracks and defects in the girders, bearings, etc. with effect from 8th July, 2012.

(vi) DAMEPL had issued cure notice dated 9th July, 2012 calling upon DMRC to rectify the 'defects' within a period of 90 days.

(vii) On 8th October, 2012, DAMEPL had terminated the CA with immediate effect.

(viii) On 2nd July, 2012, Ministry of Urban Development had convened meeting of the stakeholders, including DMRC and DAMEPL on the question of defects in the civil structure, bearings, etc. Several meetings were held.

(ix) Repairs and rectification work were undertaken with involvement of consultants. Trial runs were also done and a joint application for re-opening the line was made to CMRS. DAMEPL had participated in the said meetings without prejudice to their rights.

(x) On 18th January, 2013, CMRS had granted permission/certification for re-starting AMEL.

(xi) DAMEPL thereupon has started operations on the line from 22nd January, 2013. Operation continued till 30th June, 2013.

(xii) DMRC has been thereafter operating and maintaining AMEL since 1st July, 2013. No accident and damage to life and property has been reported and alleged in the period from 22nd January, 2013 till the Award dated 11th May, 2017.

(xiii) The sanction/permission granted by CMRS was in terms of the Metro Act and the Rules. It is a statutory sanction not amenable to challenge in arbitration.

(xiv) Notwithstanding the aforesaid sanction/approval, the Arbitral Tribunal has held that DMRC had not taken steps to cure the

structural defects and, therefore, 'DMRC Event of Default' under Article 29.1.1 of the CA had occurred. Defects in girders, etc. had caused 'material adverse effect' on DAMEPL's performance of obligations in the CA.

(xv) While deciding the said issue, the Arbitral Tribunal did not take into consideration the permission granted by CMRS. The certification given by CMRS was ignored and bypassed. Similarly, unhindered actual commercial operations of AMEL of over four years have not been adverted to and examined.

(xvi) Arbitral Tribunal has given two conflicting effective dates of termination. In the first portion of the Award, they have upheld the termination notice dated 8th October, 2012, which had immediately terminated the CA. In the second portion of the Award, they have taken the date of termination of CA as 7th January, 2013. Thus, the Arbitral Award on the date of termination is ambivalent if not contradictory.

(xvii) CMRS certificate was separately dealt with in Ground 'H'. Arbitral Award holds that sanction/certification by CMRS dated 18th January, 2013 was inconsequential as there was restriction with upper speed limit of 50 KMPH to start with, whereas AMEL was to serve as high speed connectivity line. Further, rigorous monitoring was required. Arbitral Tribunal did not answer legal issue 'H'- Did the issuance of certificate by CMRS show that the defects were duly cured?

(xviii) Similarly, in Ground 'H' it has been held that subsequent operation of the line by DAMEPL and DMRC from 23rd

February, 2012 till the date of Award in November,2017 was inconsequential.

(xix) Award does not hold that the speed restriction imposed with certification dated 18th January,2012 had 'adverse material effect' on DAMEPL's obligations in the CA.

98. In the light of the aforesaid discussion, we would hold that the impugned Award suffers from perversity, irrationality and patent illegality in the face of the Award in the form of confusion and ambivalence as to the termination notice and the date of termination. Most importantly, the Arbitral Tribunal had ignored and did not consider vital evidence of certification for commercial operations accorded by CMRS while deciding the question of civil structure faults and in holding that no effective steps to cure the defects were taken. Reasoning virtually over-rules, negates and rejects statutory certification accorded by CMRS. Arbitral Tribunal without 'reason' has held that the permission accorded and subsequent satisfactory commercial operations were not relevant and inconsequential. Pertinently certification/permission was granted by CMRS after due verification of the civil structure including the defects in girders. Certification by CMRS was binding and its validity was not capable of 'submission to arbitration'. Cumulative effect of the aforesaid discussions is that the Award shocks conscience of the Court. Consequently, the Award on the said finding would falter and fail on the tests and parameters elucidated in ***Associate Builders versus Delhi Development Authority,*** (2015) 3 SCC 49, a judgment is cited and relied by both the sides. The decision holds that Section 5 of the A&C Act bars Courts from intervening with the arbitration

award governed by Part-I, except on the grounds mentioned in Sections 34(2) and (3) of the A&C Act, which (including sub-section 2A) read as under:-

> "**34. Application for setting aside arbitral award**.—
>
> XXXXX
>
> (2) An arbitral award may be set aside by the Court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award

which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

> (2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
>
> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

99. Explaining the expression "public policy in India" in ***Associate Builders*** (supra), the Supreme Court referred to their earlier judgments in ***Renusagar Power Company Limited versus General Electric Company,*** 1994 Supp (1) SCC 644, ***ONGC Limited versus Saw Pipes Limited,*** (2003) 5 SCC 705, ***Hindustan Zink Limited versus Friends Coal Carbonisation,*** (2006) 4 SCC 445, ***McDermott International Inc. versus Burn Standard Company Limited,*** (2006) 11 SCC 181, ***Centrotrade Minerals & Metals Inc. versus Hindustan Copper Limited***, (2006) 11 SCC 245, ***DDA versus R.S. Sharma and Company***, (2008) 13 SCC 80, ***J.G. Engineering (P) Limited versus Union of India***, (2011) 5 SCC 758, ***Union of India versus***

Col. L.S.N. Murthy, (2012) 1 SCC 718 and thereafter had under the specific heading "Fundamental Policy of Indian Law" with sub-headings "Interest of India, 'Justice' or 'Morality' and "Patent Illegality" laid down specific parameters and principles, which are applicable while examining petitions under Section 34 of the A&C Act. The juristic principle of a 'judicial approach' demands that the decisions should be fair, reasonable and objective. Accordingly, on the observe side, anything which is arbitrary or whimsical would not be determination, which would be fair, reasonable or objective. This implies fair and equal treatment to parties and adherence to the principles of *audi alteram partem*. Another juristic principle is that the decision/award should not be perverse or irrational, i.e. findings based on no evidence, or the arbitral tribunal takes into account something irrelevant to the decision or ignores the vital evidence in arriving at the decision. This principle would also apply when the finding outrageously defies logic. Arbitration award is perverse and irrational if no reasonable person would have arrived at the same decision. However, the courts must exercise caution and not treat themselves as court of appeal and consequently correct errors of fact for the Arbitrator is the ultimate master of quantity and quality of evidence. Sub-section (2A) states and requires that patent illegality should be appearing on the face of the award. Re-appreciation of evidence is not permitted and should not be undertaken. An award based on little or no evidence which does not measure in quality to a trained legal mind would not be held to be invalid on this score. Under the heading 'Justice' it was observed that an award can be said to be against justice, when it shocks the conscience of the Court. Thereafter, the Supreme Court dealt with the concept and ground of 'morality' as distinct and separate from 'justice'.

Under the heading 'Patent Illegality' reference was made to Section 28(1)(a) and (3), which requires the Arbitral Tribunal to decide arbitration in accordance with the substantive law for the time being in force and in accordance with the terms of the contract and to take into account usages of the trade applicable to the transaction. The last principle, it was observed, must be understood with the caveat that the Arbitrator can construe the terms of the contract in a reasonable manner. Construction of the terms of the contract is primarily for the Arbitrator to decide. The Courts would only interfere when the Arbitrator construed the contract in a way that it can be said that no fair minded or reasonable person would do.

100. In the aforesaid background, we are not examining the issue whether the earlier cure notice dated 9th July, 2012 was bad and contrary to law as it was indeterminate and not specific. However, we would record that the DMRC had submitted that the cure notice under law must be exhaustive and specific and not vague and unspecific. Reliance was placed upon judgments in ***Heisler versus Anglo Dal Limited,*** [1954] 1 W.L.R. 1273 and ***Glencore Grain Rotterdam BV versus Lebanese Organisation for International Commerce,*** [1997] C.L.C. 1274.

Computation of the amount due under Article 29.5.2

101. DMRC has challenged inclusion of Rs.611. 95 crores in equity to compute adjusted equity and award of Rs. 983.02 crores as 130% of adjusted equity as termination payment due on DMRC's 'Event of Default' under Article 29.5 of the CA.

102. Article 29.5.2 reads as under:-

> "Upon termination by the Concessionaire on account of DMRC Event of Default, DMRC shall pay to the Concessionaire, by way of Termination Payment, an amount equal to
>
> a) Debt due;
> b) 130% of the Adjusted Equity; and
> c) Depreciated Value of the Project Assets, if any, acquired and installed on the Project after the 10th anniversary of the COD."

The aforesaid clause states that the termination on account of 'DMRC Event of Default', DMRC shall be liable to pay DAMEPL by way of termination payment an amount equal to the debt due and 130% of the adjusted equity. Clause (c) relating to depreciated value of the assets, if any, acquired and installed after 10th anniversary of COD, in this case does not apply. Article 29.5.2 draws a distinction between debt due and equity. In case of debt due no enhancement is given and the actual amount of debt due is paid. In case of equity, 'adjusted equity' enhanced to 130% is payable. Expressions debt due, equity and adjusted equity have been defined in the CA and quoted and interpreted below.

103. We must also reproduce Article 29.4 which applies on 'Concessionaire's Event of Default' in which case DMRC is liable to pay an amount equal to 80% of the debt due. No amount is payable on account of equity/adjusted equity to DAMEPL in case of 'Concessionaire's Event of Default'. Article 29.4 reads as under: -

> "29.4 Upon Termination by DMRC on account of a Concessionaire's event of Default during the Operations Period, DMRC shall pay to the Concessionaire by way of Termination Payment an amount equal to 80% (eighty percent) of the Debt Due. For the avoidance of doubt, the Concessionaire hereby acknowledges that no

Termination Payment shall be due or payable on account of a Concessionaire's Default occurring prior to COD."

104. DAMEPL it is accepted and admitted had applied for and was sanctioned project loans to the extent of Rs.1508.50 crores and US$ 106000000 by banks and financial institutions. The tripartite escrow agreement dated 24th March, 2009 was executed amongst DAMEPL, the lenders and DMRC. There is no dispute and DMRC does not challenge and question that Rs.1260.73 crores was due and payable under the Rupee term loan sanctioned as on 7th January, 2013. Computation made with reference to external commercial borrowings as on 7th January, 2013 of Rs.538.58 crores is also not disputed.

105. The dispute pertains to equity. In the balance sheets, books and records of the Registrar, paid up and issued share capital of DAMEPL is Rs.1 lakh. DAMEPL's claim letter dated 8th July, 2013 states that their equity share capital was Rs.1 lakh. On the paid-up and issued share capital also there is no dispute.

106. The dispute pertains to Rs.685 crores that was brought in as share application money and was so recorded in the balance sheet and books of DAMEPL for the year ending 31st March, 2010. However, in the balance sheet and books for the year ending 31st March,2011 Rs.685 crores was not shown as share application money. It was specifically shown as 'Subordinate Debt'. This conversion was pursuant to resolution of the Board of Directors of DAMEPL. Notice of termination dated 8th October,2012 had quantified 130% adjusted equity payable as Rs.1,30,000/-. In letter dated 1st December, 2012 the subordinate debt shown as payable by DAMEPL to M/s Reliance

Infrastructure Ltd. was Rs. 687.90 crores, which includes Rs.685 crores. DAMEPL in their claim letter dated 8th July,2013 had stated that subordinate debt of Rs.670.77 crores from M/s Reliance Infrastructure Ltd. had been used for the project assets.

107. Notwithstanding aforesaid categoric admissions and statements in the books, balance sheet and records submitted with the Registrar of Companies, DAMEPL in the claim statement filed before the Arbitral Tribunal had treated Rs.685 crores as share application money and, therefore, a part of equity. Accordingly, DAMEPL was entitled to payment of 130% of adjusted equity by including Rs.685 crores.

108. Inspite of overwhelming evidence and material against DAMEPL, Arbitral Tribunal has partly accepted the plea of DAMEPL by treating Rs.611.95 crores as equity share capital for the reasoning which reads as under:-

> "124. In fact, following different figures of Equity/ Subordinated debt as promoters contribution / Equity share capital appear in various statements submitted by DAMEPL.
>
> - Equity share capital Rs 1 lakh (appearing in Balance sheet) and also in DAMEPL's claim letter dated 08.07.2013 (CD - 17, page 316)
> - Equity by Promoters towards project of Rs. 685 crores in Annexure CC-1 of the Counter Claim
> - Net Subordinated Debt from R-lnfra of Rs. 687.90 crores worked out on page 26 of the details submitted by DAMEPL vide letter no. DJK/HM/1208 dtd. 01.12.2014
> - Subordinated debt of Rs. 670.77 crores from R-lnfra used for the project assets (DAMEPL's claim letter dtd. 08.07.2013)

- Subordinated debt (promoter's contribution) of Rs. 611.95 crores by transfer of Share application dtd. 16.03.2011 (page 55 of the details submitted by DAMEPL vide letter no. DJK/HM/1208 dtd. 01.12.2014.)

125. We have examined the above figures in the light of the provisions in the CA. First question is whether "subordinated debt from the promoters" is covered under the definition of subordinated debt given in the CA.

From the definition of subordinated debt given in the CA (reproduced on page 161), it is clear that only such subordinated debts which are advanced or provided by the lenders or the Concessionaire for meeting Concessionaire's Capital Costs and interest thereon as stipulated are to be treated as Subordinated Debt for the purpose of the CA. The amount contributed by a member of the Consortium or a shareholder of the Concessionaire to meet the Capital Costs of the Concessionaire in any form including any subordinated debt are not to be treated as Subordinated Debt under the definition of CA.

Second question is, can a project of this magnitude be executed with an equity of Rs. 1 lakh? No lender will fund a project of this size if Promoters intends to provide only Rs. 1 lakh as Equity. In the present case, it will tantamount to an irrationally high Debt Equity ratio. It is a common practice by lenders to fund the projects at around 60 : 40 to 80 : 20 as Debt: Equity ratio. The lenders do allow promoters (in the instant case R Infra) to bring in their part of contribution, representing equity, either in the form of equity share capital or preference share capital / subordinated debt or a mix thereof. Generally, a condition is imposed by the lenders on the promoters that till the time, the borrower has paid its part of proportionate equity contribution, it will not be entitled to receive loan.

126. At this stage, the definition of the word "equity" in the CA may be recapitulated. The said definition specifically covers not only the equity capital of DAMEPL, but includes "the funds

advanced by any member of the consortium or by any of its shareholders to the Concessionaire for meeting the equity component of the Concessionaire's Capital Costs". Thus, there is a specific definition of the word "equity" in the CA. The said definition of equity gets subsumed in the definition of "adjusted equity" in the CA which, in turn, means Equity which, apart from equity share capital of DAMEPL, also includes the funds advanced by any member of the consortium or by its shareholders to DAMEPL. DMRC has nowhere pleaded or shown that substantial money has not been advanced by the promoters. In view thereof, the argument that it is only equity share capital as understood within the meaning of Companies Act that is liable to be refunded to DAMEPL under Article 29.5.2 (b), in our view, is not correct. Now, a question arises as to how much of the subordinated debt received from Reliance Infra (Promoter) is to be treated as "Equity" for the calculation of "Adjusted Equity". In the absence of a clear cut documentary proof submitted by DAMEPL, this Tribunal has to go by the documents available with it. On page 55 of the document submitted on 01.12.2014 on behalf of DAMEPL, an amount of Rs. 611.95 crores appears as "Transfer from share application - BOD Resolution 16th March, 2011". This figure of Rs 611.95 crores also appears at page 35 in the calculations given by DAMEPL vide their letter dated 1.12.2014 quoted above. To support the figure of Rs 73.27 crores (Equity contribution after COD towards project assets), there is no authentic document provided by the Respondent. Therefore, we have decided to consider this amount as equity contribution from the Promoters as this is closest to the COD (23.02.2011). Adjusted equity will be worked out as per the formula given in CA taking this amount (Rs. 611.95 crores) as "Equity".

127. After having decided the equity amount, we proceed to work out the "Adjusted equity" in the manner stipulated in the CA.

- Equity funded till COD =Rs.611.95 crores
- WPI on Appointed date (August 2008) = 128.90

Appointed date taken as date of signing of Concession Agreement (25.08.2008) as date of financial close / date of

commencement of Concession Period is not available in the documents submitted by the parties.

• WPI on COD (23.02.2011)	=	148.10
• Variation in WPI	=	19.20
• Mean Variation	=	9.60
• % of mean variation	=	7.45%
• Base adjusted equity till COD	=	Rs.611.95x1.0745
		Rs.657.54 crores

After COD (February, 2011)

• WPI on COD	=	148.10
• WPI on the reference date i.e. the date of Termination (07.01.2013)	=	170.3
• Variation in WPI	=	22.20
• % variation	=	15%
• Adjusted equity	=	657.54x1.15
	=	Rs.756.17 crores
• 130% Adjusted Equity	=	Rs.983.02 crores

128. The other component of Termination Payment is "Debt due". "Debt due" comprises of two elements i.e. Rupee term loan and External commercial borrowing (in foreign currency). For the loan received and repaid, we have relied upon the information submitted by DAMEPL through their advocates vide letter no. DJK/HM/1208 dtd. 01.12.2014. In the absence of definition of "Transfer Date" in the CA, we have taken the date of termination i.e. 07.01.2013 as the reference date for the calculation of the "Debt due."

128.1 Details of Rupee Term Loan are given in page 28 to 30. On analyzing the said details, the following position emerges:

• Loan received till the date of termination (07.01.2013)	= Rs. 1273,05,68,176/-
• Loan repaid till 07.01.2013	= Rs. 12,32,78,012/-
• Net loan as on 07.01.2013	= Rs. 1260,72,90,164/-

Say Rs. 1260.73 crores

128.2 Details of External commercial borrowing is given in page 31 of the document mentioned in para 126 above.

• Loan received till termination date (07.01.2013)	= Rs. 541,16,47,984/-
• Repayment till termination date	= Rs. 2,58,14,928/-
• Net loan on 07.01.2013	= Rs. 538,58,33,056/-
	Say Rs. 538.58 crores"

109. We find that the reasoning is completely flawed and perverse and would falter when we apply the principles as held in ***Associate Builders*** (*supra*). The reasoning suffers from the patent illegality, defies logic and is irrational which no reasonable person would formulate. This is obvious and patent from the face of the Award itself. Claim statement is not evidence and material and cannot be read as evidence to state DAMEPL had given different figures of equity and subordinate debt. Rs. 611.95 crores was treated as equity on general assumption that debt equity ratio should be around 60:40 to 80:20 ignoring overwhelming evidence that the share application money by choice and election was converted as subordinate debt. This conversion was pursuant to resolution of the Board of Director of DAMEPL passed on 16th March.2011. The resolution though accepted and admitted was not filed and brought on record by DAMEPL. Claim made was therefore contrary to the books, records and even the Board resolution. Ms.Neena Goel, partner of T.R. Chadha & Co., Chartered Accountants, who was produced by DAMEPL to prove the claim in question, in her cross-examination had stated as under:-

> "Q53. In that case, madam, please justify in law the difference between the figure of equity by promoters as

reflected in annexure CC-1 to the counter claim and the audited balance sheet for the year ending 31-03-2013 of DAMEPL?
Ans. The figure of equity, I state once again, in the audited balance sheet for the year ended 31-03-2013 is as per Companies Act, 1956, i.e value for which shares have been issued. Regarding the definition of equity and debt as per the Concession Agreement there seems to be a case of interpretation of the definition as given in the Concession Agreement. The wording seems to suggest that subordinated debt may be included in "equity". Therefore I have stated earlier also that this is a matter which needs to be decided by the Learned Counsel and the Arbitral Panel.

Q54 Madam, whether as per the Company law, the definition of equity includes subordinate debts?
Ans No."

110. DMRC being aggrieved have highlighted the consequences of Rs.611.5 crores being treated as a part of equity in their written submissions stating;-

> "a. On Rs. 611.5 Crores which has been treated as equity and has been enhanced by WPI, and thus adjusted equity is Rs. 983 Cr. and the total interest of SBI PLI + 2% from August 2013 till date is approximately Rs. 834 Crore, which comes to Rs.1817 Crores.
>
> b. On treating this amount of Rs. 611.5 Crores as subordinate debt and therefore debt due, the interest amount would be zero as the carrying cost on this subordinate debt which is loan from promoters of DAMEPL is NIL as shown in the balance sheet of DAMEPL for FY 2012-13 at page No. 10 and 15 of the compilation dated 25.09.2018 tendered by DAMEPL to the Hon'ble Court, wherein no interest amount/rate has been shown as payable on the amount of subordinate debt. The difference between amount mentioned in Para (b) & (a) is Rs. 1205.50 Crore."

DMRC's calculation on interest on termination payment in the above computation in (b) as noticed below would not be entirely correct, *albeit* difference by including Rs.611.95 crores in equity which was enhanced by 15% and then given mark up of 30% to computed adjusted equity of Rs. 983.02 crores would be substantial. Interest payable on termination payment on differences between Rs.983.03 crores and 611.95 crores would be correspondingly higher.

111. It hardly requires any reasoning to understand why share application money Rs.685 crores were converted into subordinate debt. Under Article 29.4 of CA in case of DAMEPL's event of default termination payment would not have included equity or share application money, but 80% of the debt due including subordinate debt. Conversion of share application money into subordinate debt was by choice, intentionally and deliberately taken by DAMEPL, as it ran risk on converting share application money into equity or retaining its character. DAMEPL had therefore opted to convert it into subordinate debt to protect and insulate DAMEPL from the risk in terms of Article 29.4 of the C.A. The Arbitral Tribunal was conscious of the said position as in paragraph 125 of the award they had framed two questions /issues. The award contradicts admission made by DAMEPL in the balance sheet on equity share capital of Rs.1.0 lakh which was also the figures mentioned in the DAMEPL's claim letter dated 8th July, 2013 and earlier letter dated 8th October, 2012.

112. The expressions "equity", "adjusted equity", "debt due", "subordinated debt" and "concessionaire's capital costs" have been defined in the CA and read as under:-

> "***Equity***" means the sum expressed in Indian Rupees representing the equity share capital of the Concessionaire and shall include the funds advanced by any Member of the Consortium or by any of its shareholders to the Concessionaire for meeting the equity component of the Concessionaire's Capital Costs.
>
> "***Adjusted Equity***" means the Equity funded in Indian Rupees and adjusted on the first day of the current month (the "Reference Date"), in the manner set forth below, to reflect the change in its value on account of depreciation and variations in WPI, and for any Reference Date occurring:
>
> a) on or before COD, the Adjusted Equity shall be a sum equal to the Equity funded in Indian Rupees and expended on the Project, revised to the extent of one half of the variation in WPI occurring between the first day of the month of Appointed Date and the Reference Date;
>
> b) from COD and until the 4th (fourth) anniversary thereof, an amount equal to the Adjusted Equity as on COD shall be deemed to be the base (the "Base Adjusted Equity") and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following COD to the extent of venation in WPI occurring between the COD and the Reference Date.
>
> c) after the 4th (fourth) anniversary of COD, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by 0.42% (zero point four two per cent) (This number shall be substituted in each case by the product of 100 divided by the number of months comprising the Concession Period. For example, the figure for a 20 year Concession Period shall be 100/240 = 0.416 rounded off to decimal points

i.e. 0.42) thereof at the commencement of each month following the 4th (fourth) anniversary of the Project Completion Date and the amount so arrived at shall be revised to the extent of variation in WPI occurring between COD and the Reference Date; and the aforesaid shall apply, mutatis mutandis, to the Equity funded in Indian Rupees. For the avoidance of doubt, the Adjusted Equity shall, in the event of Termination, be computed as on the Reference Date immediately preceding the Termination Date; provided that no reduction in the Base Adjusted Equity shall be made for a period equal to the duration, if any, for which the Concession Period is extended, but the revision on account of WPI shall continue to be made.

"***Debt Due***" means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date:

a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the "principal") but excluding any part of the principal that had fallen due for repayment two years prior to the Termination Date;

b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default; and

c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;

"***Subordinated Debt***' means the aggregate of the following sums expressed in Indian Rupees or in the currency of debt, as the case may be, outstanding as on the date of termination:

a) the principal amount of debt provided by lenders or the Concessionaire for meeting the Concessionaire's Capital Cost and subordinated to the financial assistance provided by the Senior Lenders; and

b) all accrued interest on the debt referred to in Sub-clause (a) above but restricted to the lesser of actual interest rate and a rate equal to 5% (five per cent) above the Bank Rate in case of loans expressed in Indian Rupees and lesser of the actual interest rate and six-month LIBOR (London Inter Bank Offer Rate) plus 2% (two per cent) in case of loans expressed in foreign currency, but does not include any interest that had fallen due one year prior to the Termination Date.

provided that if all or any part of the Subordinated Debt is convertible into Equity at the option of the lenders and/or the Concessionaire, it shall for the purposes of this Agreement be deemed to be Subordinated Debt even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken.

"***Concessionaire's Capital Costs***" means following:

• Prior to COD, the cost of the Concessionaire's Works as set forth in the Financing Documents plus any further additional capital cost for any Change of Scope Instructed since the finalization of the Financing Documents; and

•After COD, the actual capital cost of the Concessionaire's Works upon Project Completion as certified by the Statutory Auditors."

113. The expression "equity" means sum expressed in Indian rupee representing equity share capital of the concessionaire. It also includes

funds advanced by any member of the consortium or by any of its shareholders for meeting equity component of concessionaire's capital costs. Therefore, all amounts or funds advanced by member of the consortium or shareholders do not qualify and are not treated as deemed equity. Amounts advanced to meet equity component concessionaire's capital costs qualify and are treated as equity. Adjusted equity literally adjusts equity by accounting for depreciation and variation in the wholesale price index from the reference date. Adjusted equity, therefore, does not postulate 'subordinate debt' being treated as equity.

114. The expression 'debt due' refers to aggregate of sums expressed in Indian rupees outstanding on the transfer date, which means the principal amount of debt provided by senior lenders under financing agreements for financing the total project cost, but excludes part of principal that had fallen due for repayment two years prior to the termination date, which in this case would not be relevant. 'Debt dues' also includes all accrued interest till the transfer date, but excludes interest which had fallen due one year prior to the transfer date, penal interest or charges payable under financing agreement to secure loan or any repayment charges. Lastly, it includes subordinate debt, which is included in the financial package and disbursed by the lenders for financing the total project cost. The expression 'subordinated debt' means aggregate of sums expressed in Indian rupees or in the currency of debt, as the case may be, outstanding on the date of termination. This means the principal amount of debt owed by the lenders or concessionaires, i.e., the promoters, for meeting the concessionaire's capital cost and subordinated to financial assistance provided by the senior lenders. It also includes interest

on the debt above, but restricted to lesser or actual interest and rate equal to 5% above bank rate in case of loans expressed in Indian rupees and lesser of the actual interest rate and six month LIBOR plus 2% in case of loan in foreign currency. It does not include interest that had fallen due one year prior to the termination date. The last part of the definition of 'subordinated debts' states that if all or any part of the subordinated debt is convertible into equity at the option of the promoters of the concessionaire, it shall be deemed to be subordinated debt even after the conversion. The principal thereafter will be dealt with as if conversion had not been undertaken. The expression 'concessionaire's capital cost' means cost of the concessionaire's works set forth in the financing documents plus any additional capital cost. After COD, the actual capital cost of concessionaire's work upon project completion as certified by the statutory auditors.

115. As noticed above, IRCON in their report had valued the cost of assets to clear overheads and other charges installed and created by DAMEPL at Rs.2273.67 crores. These details have been set out in paragraph 118 of the Award. Arbitral Tribunal had held that the question of actual capital cost of concessionaire's work was inconsequential.

116. The Award ignoring the clear position on both factual and legal has substantially allowed the claim of DAMEPL to hold that amount of Rs.611.95 crores should be considered as equity contribution by promoters as it was close to commercial operation dated 23rd January, 2011. Balance 73.05 crores was considered to be office and maintenance expenses. The date of 23rd February, 2011 with reference to commencement of commercial operation is not to be found in any of the clauses and at best would have

been rebuttable presumption that the money could be converted into equity but the fact that this amount was never converted into equity and in fact was treated and converted into subordinate debt. Thus, violation of Sections 28(1) (a) and (3) of the A&C Act as elucidated in ***Associate Builders*** (supra) is clearly attracted. The oscillating conduct and stand of DAMEPL with reference to the balance sheet, board resolution and even claim letter dated 8th July, 2013 and termination notice dated 8th October, 2012 have all been brushed aside for specious and illusive reason that a capital-intensive project would have required substantial equity component and therefore, amount of Rs.611.95 crores should be treated as equity for calculation of adjusted equity. This was notwithstanding the Arbitral Tribunal's observations and finding that there were no documents to support the said stand of DAMEPL.

117. During the course of arguments before us and even in the written submission DAMEPL being aware of their weakness in alternative and without prejudice had pleaded that amount of Rs.611.95 crores can be equated to subordinate debt. It cannot be considered as a gift by the members of the consortium of the promoters to the DAMEPL. We cannot amend and modify the Award. We can set aside the finding in the Award. In view of the above, we disapprove and set aside the finding that Rs.611.95 crores out of Rs.685 crores should be treated as equity for computing adjusted equity, as entirely fallacious, absurd and perverse. These findings of the Arbitral Tribunal are set aside on the ground of irrationality and no reasonable person in the given circumstances would have arrived and reached. Sections 28(1)(a) and (3) of the A&C Act are also attracted as the

contractual terms have been completely ignored or misconstrued in a way that no fair minded and reasonable person would do.

INTEREST

118. The award under challenge on several claims has awarded interest to DMRC and DAMEPL @ 11% per annum which would accrue from the date of payment of requisite stamp duty. This was in view of the Article 36.2.6.1, which reads as under:-

> "36.2.6.1 Where the arbitral award is for payment of money, no interest shall be payable on the whole or any part of the money for any period till the date on which the award is made"

119. However, the award has awarded interest @ SBI PLR plus 2% for delay in payment of termination payment, in view of article 29.8 of the C.A., which reads as under:-

> "29.8 **Termination Payments**: The Termination Payment pursuant to this Agreement shall become due and payable to the Concessionaire by DMRC within thirty days of a demand being made by the Concessionaire with the necessary particulars duly certified by the Statutory Auditors. If DMRC fails to disburse the full Termination Payment within 30 (thirty) days, the amount remaining unpaid shall be disbursed along with interest an annualised rate of SBI PLR plus two per cent for the period of delay on such amount."

120. The award thus draws a difference between the 'termination payment' which are covered and on which interest would be payable under Article

29.8 post thirty days after demand for payment of termination payment is made by DAMEPL, and interest payable on other amounts awarded. This finding in the award is reasonable and we do not think that it can be challenged under section 34 of the A&C Act. Termination payments have been classified separately and interest is payable by DMRC to the concessionaire after thirty days of demand by the concessionaire with necessary particulars certified by the statutory auditors. Rate of interest payable in case of default and failure by DMRC to make payment has been specified. The findings of the Arbitral Tribunal with reference to Article 29.8 would also be in consonance with law of contract and other clauses of the C.A. relating to subordinate debt which stipulates computation the interest on a different basis i.e. lessor of actual interest rate or Bank Rate plus 5% in case of loans expressed in Indian rupees. Article 1.4.1 (i) of the CA states that in case of ambiguities or discrepancies between two or more articles, the provisions of specific article relevant to the issue under consideration shall prevail. Between Article 29.8 and Article 36.2.6.1 in respect of termination payment, Article 29.8, which is specific to termination payment, will prevail.

121. The contention of DMRC that there would be unjust enrichment, as the award itself accepts and records that the secured loan account by DAMEPL carried interest of Rs.12.75% per annum and foreign currency loan account carried interest in the range of 4.83% to 5.6% per annum, has been rightly rejected by the Arbitral Tribunal as it would amount to change, alteration or modification of Article 29.8 of the C.A. Article 29.8 of the C.A. does not include penal interest and other charges which could be

payable by the concessionaire to the lenders. Article 29.8 consciously and deliberately does not refer to the actual interest being paid by the concessionaire but rate of interest as stated therein i.e. SBI PLR rate plus 2% per annum is payable. Actual interest rate applicable to the concessionaire could be less or even more than the rates specified in Article 29.8. Difference in language of Article 29.8 and interest component to be included in 'subordinate debt' as noticed above is perceptible. In latter case, till termination payment becomes due, actual interest payable restricted to an upper limit is payable. Article 29.8 is differently worded and applies on DMRC's failure to make payment within 30 days after termination payment becomes due. For the same reason it would not matter whether interest free loan or debt was granted.

122. In the written submission filed by the DMRC, they have submitted that no interest should be payable on Rs.611.5 crores by treating the said amount as subordinate debt, even under Article 29.8. In terms of above reasoning this argument cannot be accepted and must be rejected. Period covered under 'subordinate debt' clause and Article 29.8 relating to termination payment has to be dealt with differently. Rate of interest payable is different. Even otherwise, nothing prevents DAMEPL from paying interest to its promoters on the money advanced on receipt of payment etc. by modifying the terms mutually agreed. The transaction between the two is not at arm's length. Promoter in the present case has stated that they have borrowed money on interest to finance the costs incurred by DAMEPL.

123. We have quoted above the definition of the term "subordinate debt" which in Clause B refers to 6 months LIBOR rate plus 2% in case of loan based upon foreign currency. Questions would necessarily arise as to application of provisions of Article 29.8 of the C.A. to subordinate debt expressed in foreign currency. This aspect has not been considered in the award. Neither has this aspect been raised by the DMRC in the objections or during the course of arguments before us. We do not therefore, make any comment on the said aspect.

CONCLUSION AND RESTITUTION

124. We have already referred to the interim order passed by the learned Single Judge and thereafter in the present appeal by which DMRC has undertaken and is bearing the interest burden on the debt taken by DAMEPL. DMRC is not paying any debt or interest taken by the promoters.

125. Facts emerging from the aforesaid discussion are as under:-

(i) Findings of the Arbitral Tribunal on 'Termination for DMRC's Event of Default' under Article 29.5 of the CA are set aside and quashed.

(ii) Finding of the Arbitral Tribunal that Rs.611.95 crores was equity for the purpose of Article 29.5.2 is also set-aside and quashed.

(iii) In view of the above, Award of Rs.2782.33 crores to DAMEPL under Article 25.2 as termination payment under Article 29.5.2 on 'DMRC Event of Default' including the finding of Rs.611.5

crores should be treated as equity in adjusted equity, is set aside and quashed.

(iv) Direction/award for payment of interest under Article 29.8 would become infructuous.

126. We had during the course of arguments called upon the parties to respond to the issue of restitution and whether an award can be partly, substantially or fully modified or set aside by this Court in this appeal. This issue becomes important and relevant in view of the limited powers of the Court under Section 34 of the A&C Act. Supreme Court in ***Mc Dermott International Inc. versus Burn Standard Company Limited and Ors.,*** (2006) 11 SCC 181, states that A&C Act makes provision for supervisory role of the Court for review of the award only to ensure fairness and interference in cases of fraud, bias, violation of principles of natural justice etc. but the Court cannot correct errors of arbitration. It can only quash the award leaving the parties to free to begin the arbitration again if they so desire. Court's interference is, therefore, to be minimum and confined to issues:

(i) Whether the award is contrary to the terms of the contract, and therefore, no arbitrable dispute arose between the parties.

(ii) Whether the award was in any way violative of the public policy.

(iii) Whether the award is contrary to substantive law in India, which would include Sections 55 and 73 of the Contract Act.

(iv) Whether the reasons are vitiated by perversity in evidence in contract.

(v) Whether adjudication of a claim has been made in respect whereof there was no dispute or difference or whether the award is vitiated by internal contradictions.

127. Supreme Court in this case had also examined the issue of partial award and observed that this expression is not used in the A&C Act. Sub-section 6 to Section 31 contemplates an interim award which is not one in respect of which final award can be made but can be a final award on the matters covered by it made at the interim stage. Reference can be made to the earlier decision in the case ***Hindustan Zinc Ltd. versus Friends Coal Corbonisation,*** (2006) 4 SCC 445 wherein the Supreme Court has held that it was impermissible for the Appellate Bench of the High Court to do re-calculation after it had failed to interfere with the portion of the award on the ground that it was opposite to the specific terms of the contract. Reference was also made by DMRC to judgment of the Madras High Court and Bombay High Court in ***Central Warehousing Corporation versus A.S.A. Transport,*** (2008) 3 MLJ 382 and ***R.S. Jiwani versus Ircon International Ltd,.*** (2010) 1 Bom. CR.529. In the former case it was held after relying upon the ***Mc Dermott International Inc. (Supra)*** that once an award has been set aside consequential reliefs cannot be granted and the parties have been left to begin with the arbitration if they so desire. Decision of the Full Bench of Bombay High Court, however, takes a somewhat different view and states that Court has the power to set aside the award partly or wholly depending upon the facts of each case and principle of severability can be applied where the matters can be clearly separated from the matters not referred to arbitration. There are a number of decisions of this Court both Single as well as Division Bench in ***Bharti Cellular Limited versus***

Department of Telecommunications, *(*2012) 192 DLT 729, ***State Trading Corporation of Indian Ltd. versus M/s.Toepfer International Asia Pte Ltd.,*** (2014) 3 Arb.Law Reporter 109; ***DDA versus Bhardwaj Brothers,*** AIR 2014 Delhi 147 and ***Puri Construction Pvt. Ltd. versus Larsen and Toubro Ltd. and Another,*** 2015 SCC online Delhi 9126 holding the Court cannot modify, amend and rectify the award.

128. The respondents have primarily relied upon the Full Bench decision of the Bombay High Court in ***R.S. Jiwani (Supra)*** and our attention was also drawn to the decision of the Supreme Court in ***Kinnari Mullick and Anr. versus Ghanshyam Das Damani,*** (2018) 11 SCC 328. In the said decision the Supreme Court had interpreted Section 34 (4) of the A&C Act on the power of the Court to remand the matter to the arbitral tribunal. It was held that the said power can only be exercised when there is a written request made by the party to the arbitration proceedings; where an arbitration award has not already been set aside; and challenge to the arbitration award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing arbitral tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. This judgment in paragraph 15 has referred to the decision in ***Mc Dermott International Inc.*** (Supra) and has made observations on the assumption, without expressing any opinion on the correctness and application of the principle that an appeal is *in continuum* of the application under Section 34 of the Act.

129. In ***R.S. Jiwani*** (*supra*), the Full Bench of Bombay High Court while applying the doctrines of severability and partial validity had clarified that

the said principles can be applied only when portions of claims/counter claims are capable of being severed and separated from the rest and not when the decisions on issues are inter-connected and bifurcation would alter the scope of the Award. Reference was made to ***Shin Satellite Public Co. Ltd. versus Jain Studios Ltd.,*** (2006) 2 SCC 628, where the Supreme Court was dealing with the issue whether an arbitration clause could be invoked inasmuch as a particular clause of the agreement was against public policy and unenforceable. Reference was made to paragraph 430 of Halsbury Law of England, 4th Edition, Volume 9, page 297 drawing four general principles applicable to severance in case of contracts. The second principle states that severance can be allowed where it is possible to strike out the offending parts, without re-writing or re-arranging the contract. Thirdly, the court would not alter entirely the scope and intention of the agreement and, fourthly, shorn of offending parts, the contract must retain characteristics of a valid contract, otherwise the other parts of the contract would also become unenforceable. Chitty on Contracts (29th Edn. Vol. 1) pages 1048-49 also draws distinction between cases where provisions are wholly void and where good part is severable and not dependent upon the bad part, which can be then severed, in which case good can be retained and bad can be rejected. Care must be taken that the Court do not re-write or create a new contract or an Award in which case it is impermissible to dissect and segregate. Reference was made to Section 23 of the Contract Act. These principles, it has been held, can be applied to an award after referring to the decision of the Supreme Court in ***J.C. Budhraja versus Chairman, Orissa Mining Corporation Ltd.***, (2008) 2 SCC 444 wherein it was held that the entire

award need not be set aside and part of the award which is valid and separable can be upheld.

130. We would, therefore, in the present case following the aforesaid dictum and principle completely set aside the Award except to the extent we have upheld the conclusion of the Arbitral Tribunal on the question of waiver. As noticed, prayer for specific performance has not been pressed by DMRC. We have also made observations upholding the Award on the interpretation placed on Article 29.8, which deals with interest payable on termination payment, but the direction to pay interest under Article 29.8 has become infructuous. The direction of the Arbitral Tribunal awarding Rs.46.94 crores as concessionaire fee though not challenged by DAMEPL is inter-connected with the other portions of the Award, which we have set aside. It would not be fair and correct to segregate this part and uphold the direction to pay Rs.46.94 as concessionaire fee notwithstanding that we have set aside the main portion of the Award. The award that DMRC must pay DAMEPL net amount of Rs.147.76 crores towards net operating costs from operations between 7th January, 2013 to 30th June, 2013 and net debt servicing costs, Rs. 62.07 crores with interest on account of bank guarantee and bank commission and Rs. 56.8 lakhs with interest for refund of security deposit is liable to be set aside in view of the findings recorded on termination on 'DMRC Event of Default'. The matter would have to be adjudicated afresh if either DMRC or DAMEPL is to invoke and initiate arbitration proceedings. Our directions for a fresh adjudication would apply to validity or invalidity of non-exhaustive notice dated 9th July, 2012 on which we have made no specific pronouncement as the issue is

interconnected and linked with the findings in the Award set aside and quashed by the present judgment. This observation and finding would equally apply to claims of DMRC and counter claims of DAMEPL rejected and dismissed for various reasons/grounds. The award on these aspects will not be treated as binding and final, and these can be made subject matter of fresh adjudication.

131. On the question of restitution and whether any orders or directions are required, we leave it open to the DMRC and DAMEPL to file appropriate application under Section 9 or other provision of the A&C Act. It will also be open to the DMRC to file an application relying on Section 144 read with Section 151 of the Code of Civil Procedure, 1908, before the Division Bench in this appeal. Notwithstanding disposal of the present appeal we have given the said option and liberty as number of issues and contentions would arise if and when we apply the principles of restitution. We had called upon DMRC to consider the said aspect, including effect of non-servicing/payment of debt due and payable by DAMEPL, 'termination payment', if payable, under Article 29.4 read-with the interest liability under Article 29.8, etc. However, counsel for the DMRC were unable to obtain instructions possibly because they could not have and would not have known the outcome of the appeal and the final order which would be passed. These would require due and deeper consideration on several aspects including commercial consideration. Accordingly, we would leave it open to both DMRC and DAMEPL to file application under the A & C Act/Code of Civil Procedure. If deemed appropriate and proper, DMRC can file an application for restitution in view of the interim orders passed. We refrain and do not go

into the said aspect at this stage, for it would have been inappropriate for us to have heard arguments on mere assumptions.

132. The appeal is accordingly partly allowed setting aside the award in the terms indicated above with liberty to the parties to invoke arbitration clause for fresh adjudication on their claims and counter claims. Liberty is also granted to the DMRC to move an application for restitution and both parties to move applications under the A & C Act. In the facts of the case, there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

JANUARY 15th, 2019
NA/VKR/SSN