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

RESERVED ON – 23.01.2025.

% ***PRONOUNCED ON – 07.03.2025.***

\+ O.M.P. (COMM) 185/2024

AIRPORTS AUTHORITY OF INDIA .....Petitioner

Through: Mr. Tushar Mehta, Learned SGI with Mr. Karan Lahiri, Mr. Prateek Arora, Ms. Rishieka Ray, Advs.

versus

MUMBAI INTERNATIONAL

AIRPORT LIMITED & ANR. .....Respondents

Through: Mr. Rajiv Nayar, Sr. Adv with Ms. Niyati Kohli, Mr. Mahesh Agarwal, Mr. Rishi Agrawal, Mr. Pratham Vir Agarwal, Mr. Sanjeev Sheshadri, Advs.

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J :

(A) PREFACE:

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

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

3. Mumbai International Airport Limited (hereinafter referred to as 'MIAL' or 'Respondent No.1') is a joint venture entity entrusted with the operation, management, and development of Chhatrapati Shivaji Maharaj International Airport, Mumbai ('CSMIA') under an Operation Management and Development Agreement (hereinafter referred to as 'OMDA') dated 04.04.2006 executed between AAI and MIAL.

4. State Bank of India, (hereinafter referred to as 'SBI' or 'Respondent No.2') a public sector bank and the designated escrow agent under the Escrow Agreement executed as part of the financial arrangement governing the OMDA.

(B) FACTUAL MATRIX:

5. Briefly stated the factual matrix of the case as stated in the present petition is that in March 2020, upon the outbreak of the COVID-19 pandemic and subsequent governmental restrictions aviation operations were severely disrupted. Consequently, MIAL issued a Force Majeure notice on 17.03.2020 under Article 16 of the OMDA, claiming that the pandemic constituted a Force Majeure event from 13.03.2020. MIAL sought suspension of its Annual Fee ('AF') obligations, citing an adverse financial impact. The said notice was responded by AAI on 24.03.2020, requesting MIAL to provide a Business Plan reflecting the financial impact of the pandemic. On the same day, MIAL requested AAI to instruct SBI within 24 hours to halt transfers from the Proceeds Account to the AAI Fee Account and instead transfer funds to the Surplus Account for operational expenses. AAI, in its reply dated 25.03.2020, pointed out that MIAL's request for a 24-hour response was inconsistent with the 15-day response period stipulated in the OMDA and sought financial records to substantiate MIAL's force majeure claims.

6. On 26.03.2020, MIAL submitted financial statements showing its fund position and urgent pending payments but failed to provide supporting audited records. AAI, upon review, noted that INR 65 crores allocated for debt servicing was unnecessary due to the Reserve Bank of India's loan moratorium and concluded that MIAL had sufficient financial capacity to meet its obligations.

7. On 30.03.2020, MIAL's Board of Directors unilaterally declared COVID-19 a Force Majeure event without conducting a financial impact assessment. On the same day, AAI formally disputed MIAL's Force Majeure claim but, as a goodwill gesture, permitted deferment of the Monthly Annual Fee payments for April–June 2020, requiring the deferred amounts to be paid by 15.07.2020. AAI also instructed SBI to transfer INR 82 crores from the AAI Fee Account to the Surplus Account to aid MIAL in meeting operational costs.

8. On 17.04.2020, MIAL reiterated its position, contending that its obligation to pay the Annual Fee should be suspended. AAI, in its reply dated 30.04.2020, refuted this assertion, emphasizing that an obligation capable of being performed could not be suspended under Chapter XVI of the OMDA. AAI rejected MIAL's interpretation that payment obligations should remain suspended until pre-pandemic revenue levels were restored.

9. MIAL subsequently initiated arbitration against AAI, leading to the constitution of the learned Arbitral Tribunal (hereinafter referred to as 'AT') on 17.12.2020. Prior to the constitution of the learned AT, on 09.07.2020, MIAL filed a petition under Section 9 of the Act before the Delhi High Court, seeking to restrain AAI from accessing funds in the Escrow Account. The Court, vide order dated 27.11.2020, directed that 38.7% of MIAL's revenue be deposited in the Escrow Account but did not issue any directives regarding past dues. This order was later modified by the Division Bench on 14.01.2021, requiring MIAL to maintain INR 153 crores in an interest-bearing account with SBI to secure AAI's claim for unpaid dues.

10. MIAL filed its Statement of Claim on 01.03.2021 and on the same day it communicated to AAI that the Force Majeure event had ceased. AAI filed its Statement of Defence and Counterclaims on 15.06.2021, and MIAL filed its response to AAI's Counterclaims on 05.08.2021.

11. During the arbitration proceedings, both parties filed applications under Section 17 of the Act and learned AT vide order dated 28.06.2021, partially allowed MIAL's application while rejecting the application u/s 17 of the Act filed by AAI, directing that while MIAL was to set aside AAI's revenue share, AAI was restricted from utilizing the funds.

12. Through a Procedural Order dated 09.08.2021, the learned AT framed the following issues for determination:

(i) Whether MIAL was entitled to the claims and reliefs sought in the proceedings.

(ii) Whether AAI, as the respondent and counterclaimant, was entitled to the counterclaims and reliefs sought.

(iii) Whether either or both parties were entitled to interest on their claims, and if so, for what period and at what rate.

(iv) Whether either or both parties were entitled to costs on their respective claims, and if so, for what amounts.

13. Final arguments were heard in November 2022 and the learned AT reserved its award 18.01.2023. An extension for the mandate of the learned AT under Section 29A(3) of the Act was sought and granted until 31.08.2023. Subsequently, another extension was granted on 24.08.2023, extending the mandate until 01.12.2023.

14. Learned AT delivered the arbitral award on 21.12.2023, which was formally pronounced on 06.01.2024 and thereafter vide order dated 16.01.2024, the learned AT passed an Order under Section 33 of the Act suo motu correcting the “stenographical errors" in the Impugned Award dated 21.12.2023.

15. In the above background, the petitioner has sought to assail the impugned arbitral award on the grounds that it conflicts with the public policy of India, violates fundamental principles of justice and morality, and suffers from patent illegality. The grounds for challenge as stated in the petition are as follows:

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

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

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

c. The interpretation of the contract contained in the impugned Award is not even a possible view of the contractual terms, which are explicit, unambiguous and irreconcilable. Learned AT rejected the submission of AAI that since AF is calculated as a percentage of revenue, it remains proportionate to revenue and is always capable of being paid and held that that it would be too simplistic to require MIAL to pay 38.7% of its earnings without considering its obligation to ensure smooth airport operations. It has been stated that the said interpretation of AAI was based on the plain and literal reading of Articles 11 and 16 of the OMDA and the decision of the learned AT is in the teeth of contractual provisions. Further, the learned AT's finding that the occurrence of a Force Majeure event is indisputable contradicts the express terms of the contract and disregards AAI's contention that the Covid-19 pandemic alone does not justify relief for MIAL unless all requirements under Chapter XVI are met. While the pandemic qualifies as a physical event under Article 16.1.3(vii), it can only constitute Force Majeure if it satisfies the conditions set forth in Articles 16.1.1 and 16.1.2. MIAL failed to demonstrate its inability to perform a specific obligation, a key requirement under these provisions. By ignoring these contractual conditions and treating the pandemic itself as Force Majeure, the learned AT arrived at a conclusion that no fair or reasonable person could have reached.

d. Learned AT has violated the letter and spirit of Section 28(3) of the Act and effectively rewritten Article 11 which required MIAL to pay 38.71% of its 'Revenue' to AAI. The definition of 'Revenue' and the language of Article 11 is clear and unambiguous and provides that payment of AF was not contingent on whether MIAL generated profits or incurred losses. The AT has erroneously converted the revenue-sharing mechanism contemplated under the OMDA into a profit-sharing contract by holding that, during the Force Majeure period, revenue receipts would first be used for running the airport, and only the surplus, if any, would be shared between MIAL and AAI in the contractual ratio

e. The impugned award has rewritten Chapters XVI and XVIII of the OMDA by allowing an extension of the OMDA term for a period commensurate to 13.03.2020 till 28.02.2022. Even assuming, on a demurrer, that MIAL was entitled to the benefit of the Force Majeure clause, the relief of extension of the contract term finds no mention in the Force Majeure clause itself. There is no contractual basis whatsoever for extending the concession period, and the award provides no reasoning for granting such an extension.

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

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

g. Impugned Award has altered the very basis on which bids were invited inasmuch as it alters the 'key features of the transaction"' as recorded in the Judgment of the Supreme Court in ***Reliance Airport Developers (P) Ltd. v Airports Authority of India & Ors.***, (2006) 10 SCC 1 by allowing MIAL to be completely excused from making payment of AF for the period 13.03.2020 to 28.02.2022, the only consideration behind the successful bid and also by extending the term of the contract which was proposed to

be and finally was, a period of 3 0 years (extendable for another 30 years at the option of MIAL).

h. Impugned Award altered the waterfall mechanism established in the Escrow Account Agreement dated 18.04.2018. Under the Escrow Account Agreement, the Escrow Bank was required to prioritize deposits as follows: first, statutory dues; second, the monthly AAI Fee; and third, any remaining balance into the Surplus Account. This structure clearly established that MIAL's obligation to pay the MAF to AAI took precedence over its operational expenses, except for statutory dues. Learned AT, however, held that during the Force Majeure period, revenue receipts should first be used for airport operations, with only any surplus to be shared between MIAL and AAI, thereby overturning the agreed-upon financial structure.

i. Learned AT rendered that since force majeure steps in only upon the occurrence of an unforeseen event caused by a superior or irresistible force, an act of God, or an event entirely beyond human control (as opposed to a third-party event) and thus cannot be covered under Section 32contradicts the public policy of India as the said interpretation conflicts with settled law, as established in ***Associate Builders v. DDA***, (2015) 3 SCC 49 (paras 18 and 27) and reaffirmed in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***, (2019) 15 SCC 131. It has been stated that learned AT disregarded the binding judicial precedents—despite being made aware of them

j. Learned AT has granted MIAL relief in excess of what it sought in its letter dated 17.03.2020. MIAL only sought suspension of its obligation to pay MAF but learned AT granted complete excusal from making payment of AF for the period 13.03.2020 to28.02.2022 and also extended the term of the OMDA by a commensurate period. Learned AT failed to address AAI's objection that suspension or excusal of obligations applied only to those arising during the Force Majeure event which MIAL itself claimed ended on 11.03.2021, and that only the time for performing such obligations can be extended. Article 16.1.5(c) does not determine the right to excusal or suspension of obligations, which is governed by Articles 16.1.1 to 16.1.3, nor does it prescribe what relief can be granted under Chapter XVI. It has been stated that Article 16.1.5(c) applies only when obligations are suspended—not excused entirely as evident from the plain and ordinary meaning of the contract's terms, and any other view contradicts its clear and unambiguous language.

k. The allocation of Rs. 6.58 Cr. in costs to MIAL is patently illegal and lacks justification under Indian law. The award on interest is also unreasoned, patently illegal, and against the fundamental policy of Indian law.

l. AAI admitted the occurrence of Force Majeure in its letter dated 30.03.2020 is factually incorrect and contrary to the record. The letter, issued under Article 16.1.5(d) of the OMDA, explicitly disputed MIAL's claim that no Annual Fee was payable due to Force Majeure. While AAI, acting in good faith, granted MIAL an

extension until 30.06.2020 to submit its Annual Business Plan—given the difficulties cited due to the lockdown and this was a one-time dispensation and not a recognition of Force Majeure. Since the Business Plan determines the Annual Fee payable in monthly installments (MAF), AAI deferred MIAL's MAF payments for April–June 2020 until 15.07.2020, without interest, to align with the revised timeline. However, this was purely a procedural accommodation, not an acknowledgment of Force Majeure. The letter expressly rejected MIAL's entitlement under Chapter XVI of the OMDA, and the Tribunal's conclusion that it amounted to an admission is legally untenable and a patently erroneous finding that no fair-minded arbitrator could have reached.

16. It has further been stated in the petition that the Impugned Award warrants interference on two more counts. First, the learned AT's reliance on AAI granting relief to its own concessionaires to justify relief for MIAL is patently illegal and has no contractual basis under the OMDA. It has been stated that the learned AT ignored key evidence that MIAL itself did not extend revenue share relief to its own concessionaires at Mumbai Airport. Furthermore, AAI's argument that MIAL's claim was not contractual but premised on public law grounds beyond the jurisdiction was not even considered. The learned AT erroneously equated MIAL, an airport operator, with small retail concessionaires (such as cafés) at AAI-run airports, despite the fundamental difference in their roles. It has been stated that MIAL holds an exclusive right to operate Mumbai's only airport, with its

primary financial obligation being the payment of the AF, whereas AAI's concessionaires operate individual shops without comparable obligations. Notably, AAI never excused or suspended revenue share payments for its own concessionaires, making the learned AT's conclusion factually and legally flawed. Additionally, it has been stated the Impugned Award's reasoning is extra-contractual, relying on AAI's treatment of other agreements rather than the specific terms of the OMDA, rendering it liable for setting aside under Section 34(2)(A) of the Act. It has also been stated that the learned AT wrongly claimed that AAI ignored the term "excuse," despite AAI's written submissions addressing this distinction extensively. Furthermore, the finding that the contract would have become void "but for" the Force Majeure clause is entirely unsupported by evidence and overlooks the necessity of proving an actual inability to perform.

(C) <u>SUBMISSIONS ON BEHALF OF THE PETITIONER:</u>

17. Sh. Tushar Mehta, learned Solicitor General of India submitted that the impugned award is liable to be set aside as it is perverse, contrary to law, and fundamentally alters the contractual framework between the parties. It was submitted that an arbitral Award is liable to be set aside, if the arbitrator construes the contract in a manner that no fair-minded or reasonable person would, and the arbitrator's view is not even a possible view, or if the award wanders outside the contract. It has been submitted that the contract, which is the culmination of the parties' agency, is to be given full effect, and no provision thereof can be frustrated or rendered otiose. It has been submitted that an arbitral award can also be set aside if the award is (i) unreasoned, in

contravention of Section 31(3) of the Act; (ii) perverse and, hence, patently illegal; (iii) contrary to the fundamental policy of Indian law, *inter alia* for the reason that it disregards judgments/orders passed by superior courts. Reliance has been placed on ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***, (2019) 15 SCC 131to emphasize that if an arbitrator gives no reason for an award, it contravenes Section 31(3) of the 1996 Act that would certainly amount to patent illegality on the face of the award. It was submitted that though perversity may no longer be a ground for challenge "under public policy of India" it would certainly amount to patent illegality appearing on the face of the award.

18. Learned SG has also relied on the judgment in ***DMRC Ltd. v. Delhi Airport Metro Express Pvt. Ltd***., 2024 INSC 292 to emphasize that in a similar case involving public funds, the Apex Court approved the exercise of power under Section 34 to set aside an Award holding it to be perverse and resulting in a miscarriage of justice, on the ground that the Tribunal adopted an "unreasonable" and "uncalled for interpretation" of the contract which frustrated the relevant contractual provision(s). Learned SG submitted that in ***DMRC Ltd. v. Delhi Airport Metro Express Pvt. Ltd.,***(Supra) reliance was placed upon ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (Supra)*** wherein it was *inter alia* held that though construction of the terms of a contract is primarily for an arbitrator to decide. However, if the arbitrator construed a contract in a manner that no fair minded or reasonable person would or that the arbitrator's view is not even a possible view to take or if the arbitrator wanders outside the contract and deals with the

matter not allotted to him, the arbitrator commits an error of jurisdiction. Learned SG submitted that this ground of challenge now falls within the new ground added under Section 34(2)(A) of the Act. It was submitted that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be "perverse" and liable to be set aside on the ground of "Patent Illegality".

19. Learned SG has also relied upon ***Energy Watchdog v. CERC***, (2017) 14 SCC 80 in which reliance was placed upon ***Alopi Parshad & Sons Ltd. v. Union of India***, (1960) 2 SCR 793 : AIR 1960 SC 588 wherein it was *inter alia* held that the performance of a contract is never discharged merely because it may become onerous to one of the parties. In Energy Watchdog (Supra) reliance was also placed upon ***Naihati Jute Mills Ltd. v. Khyaliram Jagannath***, (1968) 1 SCR 821: AIR 1968 SC 522, wherein it was *inter alia* held that a contract is not frustrated merely because the circumstances in which it was made are altered. It was further *inter alia* held that the courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

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

not allow one of the parties to say that the contract was discharged by impossibility of performance.

21. Learned SG has also placed reliance upon ***NTPC Limited v Jindal ITF Limited & Anr.***2025 SCC OnLine Del 511 wherein it was *inter alia* held that despite the minimum judicial interference, the Court would not mechanically uphold the award of the learned AT without examining the same on the anvil of the settled judicial principles and principles of natural jurisdiction. In this case, it was inter alia held that the legislature may have circumscribed the jurisdiction of the Court but still it has bestowed a duty upon the Court to examine the same within a limited sphere

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

inability is a sine qua non for an event described in Article 16.1.3 to constitute "Force Majeure" under the OMDA and thereby avail the benefit of Chapter XVI.

23. Learned SG has submitted that in the present case, MIAL has not been able to prove that it was "unable" to pay the AF from 13.03.2020 onwards. It has been submitted that MIAL was undisputedly able to (and in fact did) render performance of all its obligations under the OMDA, including the obligation to share 38.7% of its revenue with AAI. It has been submitted that from 13.03.2020 to 28.02.2022, MIAL substantially paid AAI its share of revenue or kept AAI's share aside throughout the relevant period. It has been submitted that on July 7, 2020 where MIAL transferred INR 29.07 crores from the Proceeds Account to the AAI Fee Account as payment for the Monthly Annual Fee ('MAF') for July 2020. Shortly, thereafter on July 9, 2020, MIAL filed an application under Section 9 of the Arbitration Act seeking to restrain further transfers from the Proceeds Account to the AAI Fee Account. On July 15, 2020, the learned Single Judge of this court directed that the "money in the Escrow Account" remain in status quo until the conclusion of arguments the following day, a directive that remained in place until November 27, 2020. Later, on January 14, 2021, the Division Bench of this Court ordered MIAL to maintain a balance of INR 153 crores in a separate interest-bearing account with SBI to secure AAI's claims regarding pending AF for the period between April and November 2020. Finally, on March 11, 2021, MIAL wrote to AAI, acknowledging that the Force Majeure event had ceased. Notably, it has been submitted that this letter was issued just two days

before the expiration of the one-year period stipulated in Article 16.1.7 of the OMDA, upon which AAI would have been entitled to terminate the OMDA.

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

25. Learned SG has submitted that even in its Reply, MIAL itself candidly admitted that it had been "constantly making" payments of the Annual Fee. MIAL contended that it was not required to demonstrate such inability to claim the benefit of Chapter XVI—an argument that directly contradicts the requirement under Article 16.1.1 to demonstrate an inability to perform the obligation in question. Learned SG emphasized that when a party has in fact been able to perform its obligations, it cannot claim an inability to do so or seek an excuse from performance.

26. Learned SG further submitted that on March 17, 2020, MIAL had invoked the Force Majeure clause seeking 'suspension' and not 'excusal' of payment of the Annual Fee with effect from March 13, 2020. However, it has been submitted that MIAL's notice neither stated nor demonstrated that it was "unable" to fulfill this obligation, thereby

failing to comply with the requirements of Article 16.1.5(a), which mandates that a notice must include details regarding the "manner in which the Force Majeure event(s) affect the Party's obligation(s)." Additionally, it has been submitted that Learned AT erroneously granted MIAL excusal from obligations arising after March 11, 2021, the date on which MIAL itself acknowledged that the Force Majeure event had ceased. Thus, it has been submitted that since necessary preconditions under Chapter XVI of the OMDA were not satisfied, and therefore, MIAL was not entitled to any relief under the Force Majeure provisions.

27. Learned SG submitted that in addition, the Impugned Award not only holds that MIAL is excused from making any payment of the Annual Fee to AAI during the period 13.03.2020 to 28.02.2022, but it also holds that MIAL is entitled to an extension of the very Term of the OMDA for a commensurating period, despite the fact that, no clause in the OMDA, including the Force Majeure clause, contemplates such relief and, further that no such relief was sought at the relevant time by MIAL while purportedly invoking Article 16 of the OMDA. It has been submitted that MIAL has been granted a "double dip" of both excusal of its obligation to pay the Annual Fee and also an extension of the term of the OMDA and has been unjustly enriched at the cost of public monies.

28. Learned SG submitted that the learned AT has rewritten the Contract between the parties and rendered otiose certain key provisions thereof. It has been submitted that MIAL's case was that Article 16 of the OMDA provided for suspension/excusal of MIAL's obligation to pay

the Annual Fee to AAI under Article 11 in the event the revenues received by MIAL during the corresponding period were insufficient to operate and manage the Airport. It has been submitted that nothing in the language of either Article 16 or Article 11 contains such a stipulation. It has been submitted that without explicitly giving expression to the term it was implying in the OMDA, the learned AT at para 105 concludes that during the so-called force majeure period, revenue receipts would have to be used "firstly for running the Airport, and in the event that there is a surplus thereafter, the surplus would have to be share". It has been submitted that this stipulation finds no place in the OMDA, but has been written into the contract by the Award.

29. Learned SG has submitted that an essential contractual precondition, i.e., that a party must be unable to perform a particular contractual obligation in order to claim the benefit of the force majeure provision, has been written out of existence by the Tribunal. It has been submitted that since MIAL actually paid/kept aside the Annual Fee, MIAL cannot possibly be said to be "unable" to perform its obligation under Chapter XI of the OMDA. Therefore, the decision to order a refund of amounts paid over by MIAL to AAI is a patently illegal conclusion.

30. Learned SG has submitted that learned AT has also inserted a provision on extension of the term of the OMDA. It has been submitted that no provision of the contract, either in Chapter XVI or XVIII or otherwise, contemplates the extension of the Term of the OMDA on account of force majeure events. It has been submitted that in its letter dated March 17, 2020, MIAL did not seek such an extension, and during the

arbitration proceedings, in the course of its oral submission, MIAL expressly admitted that there was no contractual basis for this relief, instead relied on the principles of "economic justice" for seeking the relief of such extension. It has been submitted that the Impugned Award does not examine or address these fundamental arguments, nor does it engage with the admission. It has been submitted that Ld. AT ignored the AAI's explicit contention that "the Claimant candidly admitted in the course of its submissions that there was no contractual basis for the aforesaid claim and that it relied on the principles of 'economic justice'," a position that MIAL has never denied. It has further been submitted that the learned AT summarily granted the relief of extension in a single paragraph, without substantive reasoning or contractual justification, thereby effectively rewriting the contract by altering the Term of the OMDA (Chapter XVIII), expanding the relief under the force majeure clause beyond what is permitted (Chapter XVI) and changing the basis on which bids were invited. It has been submitted that the learned AT erroneously inserted a provision for extension that does not exist in the contract.

31. Learned SG has submitted that learned AT's justification, as set out in paragraph 117 of the Impugned Award, is legally unsustainable and unreasoned, as it asserts that "in several contracts where the tenure spans a long term, alleviation/relief is accommodated by extending the tenure of the contract" without citing any legal authority, contractual provision, or factual basis. It has been submitted that learned AT misinterprets Article 16.1.5(c), which does not contemplate an extension of the Term and misconstrues AAI's letter dated March 30,

2020, which merely indicated AAI's willingness to extend the time for performance of an obligation (i.e., payment of the Monthly Annual Fee), not the Term of the OMDA itself. It has been submitted that the extension of the Term effectively grants MIAL an undue advantage by allowing it to benefit from the Force Majeure clause twice—first, through the excusal of the Annual Fee payments from March 13, 2020, to February 28, 2022, and second, by obtaining an approximately two-year extension of the contract—resulting in an unjust financial benefit for MIAL at the expense of public revenue.

32. Learned SG has submitted that learned AT has converted the OMDA into a Profit-Sharing Contract. It has been submitted that under the OMDA, MIAL shares 38.7% of its Revenue with AAI, and the said obligation to pay the Annual Fee is not contingent on MIAL being able to meet its operational costs or establishing that MIAL is encountering negative cash flow. It has been submitted that at paragraph 105 of the Award, the learned AT has converted the revenue-sharing mechanism contemplated under the OMDA into a profit-sharing contract by holding that, during the force majeure period, "the revenue receipts/collections would have to be used firstly for running the Airport, and only in the event that there is a surplus thereafter, the surplus would have to be shared…" Learned SG has submitted that this finding rewrites the OMDA and also has an effect of rewriting the Priority Cash-flow Application provided in clause 3.2(B) of the Escrow Account Agreement, wherein payment of AAI Fee is given precedence over meeting of MIAL's operational and other expenditure.

33. Learned SG submitted that the Impugned Award is unreasoned and perverse on multiple key issues. At paragraph 31, learned AT stated that the transpiration of a force majeure event is beyond cavil or disputation, thereby rendering otiose any notice as envisaged in Article 16.1.5 of the OMDA. It has been submitted that this observation by the learned AT effectively negates the contractual requirement of demonstrating an inability to perform obligations before invoking Force Majeure, thereby bypassing a fundamental prerequisite under the contract. It has been submitted that the learned AT fails to undertake any analysis of whether MIAL was actually unable to pay the Annual Fee which is a critical issue for determining the validity of its claim under Chapter XVI of the OMDA. Further, it has been submitted that at paragraph 93, the Tribunal holds that it was unnecessary for it to return an opinion on the question whether OMDA envisions either revenue sharing or profit sharing, despite AAI specifically arguing that acceptance of MIAL's claims would fundamentally alter the contractual framework. Learned SG has submitted that this failure to engage with AAI's argument undermines the reasoning of the Award. Additionally, it has been submitted that the Award is plainly perverse and internally contradictory as at paragraph 65, the learned AT recorded that MIAL conceded that all conditions under Article 16.1.2 must be satisfied in order to claim relief under Chapter XVI, yet at paragraph 67, it has been stated that MIAL argued that Chapter XVI does not require proof of inability to pay. Learned SG has submitted that this contradiction further underscores the perverse nature of the

Award, as it fails to provide a consistent and reasoned approach to the interpretation of the contractual provisions.

34. Learned SG has submitted that the impugned award is contrary to the public policy. It has been submitted that at paragraph 83, the learned AT held that Section 32 of the Indian Contract Act would only be attracted if the contingency of the outbreak of COVID or any other closely similar contagion had specifically been postulated and dealt with in the contract. However, it has been submitted that this statement disregards the binding effect of ***Energy Watchdog v. CERC***, (2017) 14 SCC 80, which clearly holds that Section 32 of the Indian Contract Act applies when a contract contains a force majeure clause, whereas Section 56 applies when there is no such provision.

35. Learned SG has submitted that the fact that MIAL's revenues are said to have dropped during the relevant period is not sufficient to avail the benefit of Chapter XVI. To avail the benefit of Chapter XVI, all conditions of Article 16.1.2 have to be satisfied. This is evident from the plain language of Article 16.1.2 as has also been held in the Impugned Award. This is also in accord with Article 16.1.3 which specifies that a physical event (such as the pandemic in the present) only constitutes "Force Majeure" if it also satisfies the requirements of Articles 16.1.1 and 16.1.2. Learned SG has submitted that the alleged temporary negative cash flow of MIAL only satisfies the requirement of Article 16.1.2(a) but not the requirement of Article 16.1.2(e) and Article 16.1.1, i.e., the requirement to prove inability. It has been submitted notwithstanding above and assuming that MIAL suffered a temporary negative cash flow and that such temporary negative cash

flow "materially and adversely affects the performance of an obligation", even in that case this in itself is not sufficient to claim the benefit of Chapter XVI without MIAL also proving that it was "unable to render such performance by an event of Force Majeure". In view of the decision of Supreme Court in ***Energy Watchdog v. CERC,*** (2017) 14 SCC 80, it has been submitted that a party is not discharged from its contractual obligations even if performance of the same has become more onerous. It has been submitted that it is not sufficient for MIAL to say that if its revenues drop, the provisions of Chapter XVI automatically trigger. The test is inability or impossibility to perform the obligation, i.e., inability to pay AAI its share of the Revenue and as stated previously, it has been submitted that this test is not satisfied, and, on the contrary, MIAL has in fact discharged its obligation by keeping aside / paying over AAI's share of Revenue while continuing to operate and maintain the Mumbai Airport. Thus, it has been submitted that the Impugned Award has substituted the contract between the parties with one of its own making inter alia by writing Clauses 16.1.1 and 16.1.2(e) out of existence, in an attempt to provide some basis for the grant of relief to MIAL.

36. Learned SG has submitted that the grant of relief until 28.02.2022 is unreasoned. It has been submitted that MIAL's reliance on Article 16.1.5(c) of the OMDA is misplaced and contrary to the meaning of the said provision. It has been submitted that a bare perusal of Article 16.1.5(c) makes it clear that the provision allows for the "The time for performance" to be "extended by the period during which such Force Majeure continues and by such additional period thereafter as is

necessary to enable the affected Party to achieve the level of activity prevailing before the event of Force Majeure." Therefore, Article 16.1.5(c) only provides for the period that a suspension could operate. Such a stipulation, it has been submitted, is not relevant to a whatsoever to "excusal" (which is the relief that has been granted in the Impugned Award). If an obligation has been excused, there is no question of extending the time for performance of the same. Further, learned SG has submitted that without prejudice to the above, and assuming (without conceding) the said Article has any relevance in this context, it has been submitted that Article 16.1.5(c) only allows for a time extension to perform those obligations that were affected during force majeure. It does not wipe out contractual obligations that arose for the very first time after the period of force majeure ceased to exist. It has been submitted that even according to MIAL itself, the force majeure event ceased on 11.03.2021, thus, no obligation that arose after 11.03.2021 could have been suspended by having recourse to Article 16.1.5(c). Be that as it may, it has been submitted that the learned AT has erred in not determining what is the "additional period thereafter as is necessary to enable the affected Party to achieve the level of activity prevailing before the event of Force Majeure". It has beens submitted that the sole basis on which MIAL has been granted relief till 28.02.2022 is the Supreme Court's Order extending limitation. However, it has been submitted that MIAL did not even attempt to justify this reasoning or even suggest that the Order of the Supreme Court extending the statutory period of limitation under several laws

has any relevance to the purely contractual issue of relief being claimed under a Force Majeure clause.

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

38. Learned SG has submitted that the submission of MIAL that Article 16.1.5(c) also provides for extension of the Term of the OMDA is incorrect and contrary to the plain language of the contract. It has been submitted that Article 16.1.5(c) only allows for the time for performance of an obligation affected by force majeure to be extended for a specified period within the Term. It does not allow a party to extend the Term of the Contract itself. It has been submitted that Article 16.1.5(c) only entails the "Procedure for Force Majeure" and only defines the period of suspension of performance of an obligation affected by Force Majeure under Article 16.1.1 and has no application to the enjoyment of rights granted to MIAL under the OMDA. If it were the intention of the parties that the force majeure clause would operate to extend the Term of the OMDA, the contract would have said as much. It conspicuously does not do so. It has been submitted that Article 16.1.5(c) does not provide a basis for claiming a relief over and above those contemplated under Article 16.1.1, namely suspension or

excuse of MIAL's obligations under the OMDA. In any case, it has submitted that MIAL's submission that Article 16.1.5(c) permits the extension of "any right affected" by Force Majeure and therefore the Grant itself is to be extended cannot be accepted for the simple reason that no such reasoning exists in the Award. It has been submitted that the fact that MIAL is relying on reasoning that forms no part of the Award to support the conclusions arrived at therein is sufficient proof that the Award is incapable of being defended. Therefore, it has been submitted that the Tribunal has granted reliefs that find no mention in Chapter XVI or anywhere else in the contract, thereby impermissibly rewriting the very Term of the OMDA under Article 18.1(e).

39. Learned SG has submitted that MIAL's reliance on the Email dated 30.03.2020 to contend that occurrence of force majeure was an admitted position between the parties is misplaced. It has been submitted that the email dated 30.03.2020 sent by AAI to the Escrow Bank has been written in terms of Paragraph 12 of the Letter dated 30.03.2020 issued by AAI to MIAL. It has been submitted that MIAL purportedly invoked force majeure on 17.03.2020 which was disputed by AAI vide letter dated 30.03.2020 which was specifically issued under Article 16.1.5(d) of the OMDA and specifically stated that AAI did not agree with the assertion of MIAL that no Annual Fee is to be paid due to suspension of obligations of MIAL on account of Force Majeure event. Therefore, it has been submitted that it is clear that AAI has never admitted to the occurrence of force majeure. However, on a without prejudice basis, it has been submitted that AAI offered a three month deferral to MIAL keeping in view MIAL's stated difficulty in

preparing its Business Plan for the Financial Year (which forms the basis of the computation and payment of Annual Fee for the Year and is ordinarily submitted at the beginning of the Financial Year) in view of Covid-19 related restrictions on movement. It has been submitted that AAI also in the said letter informed MIAL that it shall issue necessary instructions State Bank of India which were issued vide subsequent Email dated 30.03.2020 that has been relied upon by MIAL. Therefore, it is has been submitted that it is beyond the pale of doubt that AAI had always disputed the existence of force majeure from the very beginning and duly followed the procedure under the contract for disputing such force majeure notices.

(D) <u>SUBMISSION ON BEHALF OF THE MIAL:</u>

40. *Per Contra,* Sh. Rajiv Nayar, learned senior counsel for MIAL has submitted that the learned AT has rendered the award based on a thorough appreciation of evidence. It has been submitted that the grounds for challenging an arbitral award under Section 34 of the Act are well settled, and the scope of challenge is extremely limited. Reliance has been placed on ***Associate Builders v. Delhi Development Authority,*** (2015) 3 SCC 49; ***SsangYong Engineering and Construction Company Limited v. NHAI,*** (2019) 15 SCC 131.

41. Learned Senior Counsel submitted that, while exercising jurisdiction under Section 34 of the Act, courts should refrain from interfering with an arbitral award merely due to an erroneous application of law or by re-appreciating evidence. It has been submitted that the court does not sit in appeal over the arbitral award, and its interference does not entail

a review of the merits of the dispute. Moreover, it has been submitted that only an arbitrator's view which is impossible can be interfered with by courts, whereas a possible view taken on facts must be respected. Reliance has been placed on ***MMTC Limited v. Vedanta Limited***, (2019) 4 SCC 163; ***Konkan Railway Corporation Ltd. v. Chenab Bridge Project***, (2023) 9 SCC 85; and ***OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions India (P) Ltd***., 2024 SCC OnLine SC 2600.

42. Learned Senior Counsel submitted that courts should not interfere with an award merely because an alternative view on facts and interpretation of contract is possible. It has been submitted that if the arbitrator's interpretation is plausible, it cannot be subjected to judicial review, even if the contract is capable of two interpretations. It has been submitted that the courts under Section 34 cannot substitute its own view in place of the interpretation accepted by learned AT. Further, even if an arbitral tribunal commits an error in the construction of the contract, such an error falls within its jurisdiction and cannot be a ground for challenge under Section 34. The Court cannot act as an appellate forum over the findings of the tribunal. Reliance has been placed on ***Kwality Manufacturing Corporation v. Central Warehousing Corporation***, (2009) 5 SCC 142; ***Pure Helium India (P) Limited v. Oil & Natural Gas Commission,*** (2003) 8 SCC 593; and ***Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran,*** (2012) 5 SCC 306.

43. Learned Senior Counsel submitted that in the present case, none of the grounds for challenge under Section 34 are available to AAI as all

critical facts, events, and evidence are undisputed. It has been submitted that the Learned AT's interpretation of Chapter XVI of the OMDA, the primary clause under consideration, is both plausible and well-reasoned, having been arrived at after appreciating the evidence on record. It has further been submitted that AAI, in the present petition, has merely reiterated its previous arguments, which have already been duly addressed by the learned AT.

44. Learned Senior Counsel, in respect of the objection of AAI that the interpretation of the OMDA by the Learned AT is erroneous, has submitted that the Learned AT correctly interpreted the clause in question by considering all its terms. It has been submitted that Learned AT rightly rejected AAI's interpretation, which rendered the word "excuse" otiose and introduced terms like "deferral" that were not present in the clause.

45. Learned Senior Counsel submitted that AAI has not challenged the factual findings of the learned AT. It is an admitted position that COVID-19 is a force majeure event and that a decrease in ATM and PTM adversely affected MIAL's ability to generate revenue due to the outbreak of COVID-19 which significantly impacted MIAL's capability to operate the airport, leading to expenses exceeding receipts. Despite this, it has been submitted that MIAL was required to continue airport operations due to its legal obligations under OMDA.

46. Learned Senior Counsel submitted that AAI itself, in its Annual Report for FY 2020-2021, admitted the severe impact of COVID-19 on the aviation sector. It has been submitted that there is essentially no dispute on facts, and since AAI has not challenged the factual findings, they

have attained finality. Nonetheless, it has been submitted that findings of such nature cannot be challenged within the limited jurisdiction available under Section 34.

47. Learned Senior Counsel submitted that the Learned AT's findings on the interpretation of Articles 16.1.1, 16.1.2, and 16.1.5 of the OMDA are correct, reasonable, and based on the evidence and material before it. It has been submitted that COVID-19 was undeniably a force majeure event, as acknowledged by both AAI and the Government of India. Moreover, it has been asserted that AAI itself granted relief to its concessionaires due to COVID-19, which the Learned AT deemed an admission of the occurrence of a force majeure event. Additionally, it has been submitted that MIAL's financial statements indicated that its total revenue from airport operations was insufficient to meet its operational expenses, thereby demonstrating its inability to discharge its obligations under OMDA. It has been submitted that these financial statements were neither challenged nor questioned by AAI during cross-examination and despite the drastic reduction in aircraft and passenger movement due to various government notifications and circulars restricting air travel, MIAL was legally obligated to incur all costs associated with the maintenance and operation of the airport. It has been submitted that AAI's contention that MIAL's continued payment of the Annual Fee negates its claim of "inability" is misplaced. It has been submitted that these payments were made pursuant to the Order dated December 22, 2021, which was based on a Joint Application dated December 13, 2021, explicitly stating that the

payments were made without prejudice as a purely interim arrangement.

48. Learned Senior Counsel in respect of the AAI's argument that the Learned AT has rewritten the OMDA and Escrow Agreement has submitted that the same is misplaced and unfounded. It has been submitted that the award does not alter the OMDA but rather applies the force majeure clause as per the contract. Further, it has also been submitted that AAI's submission that relief of extension of the term of OMDA amounts to rewriting the contract is erroneous as the Learned AT has rightly relied on Article 16.1.5(c) of the OMDA, which provides a contractual basis for granting the relief of extension. It has been submitted that the Learned AT rightly held that the necessary consequence of a force majeure event was a corresponding extension of OMDA for such a period as the learned AT recognized the force majeure conditions to have existed.

49. Learned Senior Counsel in respect of the AAI's contention that the email dated 30.03.2020 by AAI to the Escrow Bank did not constitute an admission of force majeure, has submitted that the same is incorrect and an afterthought. It has been submitted that the said email explicitly recorded AAI's acknowledgment that COVID-19 constituted a force majeure event and deferred the Monthly Annual Fee payments on that basis. Furthermore, it has been submitted that AAI, having chosen not to lead a fact witness before the learned AT to explain away its admission, cannot now dispute the force majeure claim. In light of the foregoing, Learned Senior Counsel has submitted that the challenge under Section 34 is wholly without merit and deserves to be rejected.

(E) FINDING AND ANALYSIS:

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

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

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

52. Bare perusal of this makes it clear that if the award provides no reasoning at all then it falls in the category of unintelligible. Even otherwise it would be hit by Section 31(3) of the Act which provides that the arbitral award must state the reasons upon which the award is

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

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

arriving at its decision. Reliance can be placed upon ***Associate Builders v. DDA***, (2015) 3 SCC 49.

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

55. In ***Rashtriya Ispat Nigam Limited vs Dewan Chandram Saran (Supra)*** wherein it was *inter-alia* held that if the terms of a contract are capable of two interpretations and the view taken by the arbitrator is a possible if not a plausible one then it is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. Reliance can also be placed upon ***SAIL v. Gupta Brother Steel Tubes Ltd.*** [(2009) 10 SCC 63]. In ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd.***[(2010) 11 SCC 296] it was inter alia held that if the umpire has considered the fact, situation and placed a construction on the clauses of the agreement which

according to him was the correct one, one may at the highest say that one would have preferred another construction, but that cannot make the award in any way perverse. It was further inter alia held that in such a situation, the Court cannot substitute its own view in place of the view taken by the arbitrator as it would amount to sitting in appeal.

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

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

58. In ***Mumbai Metropolitan Region Development Authority v. Unity Infraprojects Ltd.***, 2008 SCC OnLine Bom 190 it was *inter-alia* held that a business like interpretation of contractual provisions must be adopted in construing contracts entered into by persons of business to govern business dealings. It was further inter alia held that the Court

must ensure that interpretation of law in commercial cases must not be disjointed from the intent and object which those having business dealings seek to sub-serve. It was noted that unless interpretation of contracts effectuates a business meaning for persons of business, the law will not fulfill its purpose and object of being a facilitator for business and providing a structure of ordered certainty to those who carry on business here. It is necessary to note that the judicial dispensation system cannot remain static and has to be dynamic and required to innovate constantly itself to keep abreast with rapid changes in business terms.

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

whether during the period of the pandemic, the general provisions of the contract, which mandates the respondent to pay an annual fee at a certain percentage will continue even during the pandemic. It cannot be disputed that during the period of COVID-19, life had come to a standstill. The case of the respondents are that though they continue to run the operation but their revenues had fallen down so much that they were unable to meet even the expenses. On the contrary the case of the petitioner is that; firstly it cannot be said that the respondent were "unable to pay" the fee as the MIAL had in fact substantially paid the fee and thus, was in a position to pay the fee, secondly, the conditions as provided in Article 16 of the OMDA regarding the force majeure never existed in entirety. Learned AT agreed with the contentions of the respondents and passed an award against the petitioner.

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

61. In ***UHL Power Company Ltd. Vs. State of Himachal Pradesh***(2022) 4 SCC 116 it was inter alia held that the law is not divorced from business realities nor can the vision of the Judge who interprets the law be disjointed from the modem necessities to make business sense to business dealings. In ***UHL Power Company Ltd. (Supra)*** the Apex Court while relying upon the Hudson's elaboration in his seminal work

on Engineering Contracts inter alia held that the task of the Court is to ascertain the objective and intention of the contract as evidenced by the words used and not by the subjective intentions of the parties. It was emphasized that the rule of evidence is that the whole of the contract should be examined before construing an individual part.

62. Petitioner in the present case has heavily relied upon the finding of ***Energy Watchdog*** (Supra) case to submit that a contract cannot be discharged merely because the same has become onerous. However, this Court considers that the findings in the ***Energy Watchdog*** (Supra) are respectfully distinguishable to the facts and circumstances of the case. In the present case, it is not the case of either of the parties that performance of the contract had become onerous. It was never an option for the MIAL to close down the operation of the airport. It is a settled proposition that the force majeure clause will not generally be invoked, if the contract provides for an alternative mode of performance. Reliance can be placed upon Treitel on Frustration and Force Majeure, 3rd Edition. The Court is of the considered view that 'a force majeure clause' in a contract is generally an exception or an eclipse provision, meaning thereby if a force majeure is enforced the performance as mandated in the other terms of the contract will remain eclipsed till the force majeure event persists. Whether the force majeure has taken place or not or it exists or not or the time till when it exists is a question of fact to be determined by the Arbitral Tribunal.

63. It is pertinent to mention here that there cannot be any dispute to the proposition as laid down in ***NTPC Limited v Jindal ITF Limited & Anr. (Supra)***.This Court is fully conscious of the fact that if the award

suffers from patent illegality, the Court can certainly interfere to avoid the miscarriage of justice. However, whether the award suffers from 'patent illegality' is a matter of fact which varies from case to case and has to be determined after taking into account the peculiar facts and circumstances of the case. While deciding a petition under Section 34 of the Act, Courts cannot adopt the approach of one-size-fit-for-all. Courts can interfere into the award only if it shocks the conscience of the Court and is prone to adversely affect the administration of justice.

64. In ***Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*** (2019) 7 SCC 236, the Apex Court after relying upon a catena of judgments *inter alia* held that an Arbitral Tribunal must decide in accordance with the terms of the contract, and if an Arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside. It was *inter alia* held that construction of the terms of a contract is primarily for an Arbitrator to decide and the award can be set aside if the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It was further *inter alia* observed that when a court is applying the 'public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. It is pertinent to mention here that it was *inter alia* held that a possible view by the Arbitrator on facts necessarily has to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is also *inter alia* held that an award based on little

evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

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

66. In the present case, the AAI has challenged the impugned award *inter alia* on the ground that learned AT has fallen into error by *inter alia* holding that the outbreak of Covid-19 pandemic is a force majeure event and does not even call for consideration. As far as the happening of the epidemic i.e. COVID-19 is concerned, that cannot be disputed. The question is whether merely happening of the COVID-19 or anyone epidemic within India is sufficient to invoke force majeure. In this regard, learned AT has accepted the reliance of DIAL on various Central Government notifications, State Government notifications to

hold that outbreak of Covid-19 pandemic is a force majeure event. The contention of the petitioner is that for an event to be force majeure, it has to fulfill the conditions as being laid down in Article 16.1.1, 16.1.2 and 16.1.3**.** It is the contention of AAI that under Article 16.1.1, the party can only claim 'to suspend' or 'to excuse' the obligation only 'to the extent' that the party "is unable to render such performance". Thus, the contention is that there can only be "suspension" or "excusal" to the extent that the party is unable to render such performance. Further, the contention of AAI is that the force majeure can only be invoked if there is a strict compliance of Article 16.1.5. Learned SG has argued vehemently that since there was no inability on the part of MIAL to pay the fee, the force majeure event on the face of it could not have been held to have occurred. It has also been submitted that even as per Article 16.1.2(e) the events as described in 16.1.2 from to (a) to (d) should be read alongwith Article 16.1.1. Though it has not been disputed that as per Article 16.1.3(VII) there was an epidemic within India. However, it has been submitted that this itself alone is not sufficient to invoke Chapter-XVI. The another contention is that the procedure for force majeure as prescribed in Article 16.1 has not been complied with.

67. Learned AT while determining the question of occurrence of event of force majeure has taken into account various circumstances including the AAI's letter dated 30.03.2020 and noted that AAI on the account of the prevailing circumstances at the relevant time decided to defer the obligations of AF. Learned AT took this as tacit admission. Learned AT had also taken into account the position taken by the Government

of India that Covid-19 is a force majeure event. Reliance has been placed upon the various circulars, notifications and orders issued from time to time. In this regard, learned AT in Para-80 of the impugned award i*nter alia* held as under:

> *"80. In the factual matrix of the present case, as regards Articles 16.1.1 and 16.1.5 (a), the contention of Respondent No.1 that the Claimant has not validly invoked the force majeure clause is misconceived because in its letter dated 30th March 2020 deferring the obligation to pay the Monthly Annual Fee for the months of April, May, and June 2020, it has made a tacit admission that force majeure has occurred; and keeping in view the circumstances prevailing at the relevant time, it had decided to defer certain obligations mentioned in its 30th March 2020 letter. Indeed, it is disingenuous for Respondent No.1 to contend that a force majeure event had not occurred in light of the promulgations of the Central and State Governments, the Orders of the Supreme Court of India, and significantly its own decision to grant repeated relief to an overwhelming majority of its own concessionaires. This Tribunal holds that a force majeure event within the postulation of Chapter XVI of the OMDA had occurred. The duration / period when force majeure subsisted shall be adverted to later."*

68. Learned senior counsel for MIAL has invited the attention of the Court to Question 10 & 11 put in the cross-examination of RW-1 wherein the expert witness admitted that she had not examined the effect of force majeure. Question 10 & 11 are reproduced as under:

> *"Q.10 Is it your evidence that apart from Chapter XI of the OMDA you have not read and interpreted any other provisions of the OMDA?*
>
> *Ans. I have read the OMDA and commented only on Chapter-XI - Fees in the OMDA in my Report at paragraphs 7.2 to 7.13 on pages 24 to 27 of my Report.*

[Shown paragraph 3.1 of the Expert Report attached with witness affidavit at page 11]

Q.11 Is it your evidence that despite of being instructed to examine "...AAI contends that the Claimant has failed to demonstrate that it is unable to render its obligation to pay MAF by virtue of an event of force majeure", you have not examined the effect of force majeure in the present case?

Ans. Yes, it is correct."

69. It is pertinent to mention here that Article 16.1.2 stipulates condition (a) to (e) for making any event or circumstances as the force majeure. Perusal of the record indicates that the learned AT has duly taken this into account. This Court also considers that it cannot be disputed Covid-19 was an event which was not within the reasonable control of MIAL and could not have prevented or overcome the sane with the exercise of good industrial practice or reasonable skill or care. Nor did it happen from the negligence or misconduct of MIAL or the failure of the MIAL to perform its obligations. Thus on the face of it conditions (b), (c) and (d) stand satisfied. The financial statements submitted by the MIAL on record during the arbitral proceedings also shows that the pandemic had 'materially and adversely' affected the performance of an obligation. Learned AT has rightly noted that aeronautical and non-aeronautical services are directly dependent on the ATM and PTM and therefore in the event of decrease in the ATM and PTM, MIAL failed to generate requisite revenue and certainly got impacted detrimentally. The impact of Covid-19 on the revenue of the respondent was

discussed by the learned AT in its Para-106 to 109 which are reproduced as under:

> *"106. We next proceed to examine the impact of Covid-19 on the Airport operations. The Claimant, as on 26th March 2020 intimated to Respondent No.1, its fund position, including payments to be made by 31st March 2020. As per the Standalone Ind AS Financial Statement for the year ended 31st March 2021, the total income/receipts/collections/revenue from the sundry operations of the Airport aggregated Rs.1826.64 Crores, whilst the total expenses aggregated Rs.2311.21 Crores. Similarly, the Standalone Ind AS Financial Statement for the year ended 31st March 2022 shows that the total income/receipts/collections/revenue from the Airport were less than the expenses incurred for its operation. It will be advantageous to reproduce the relevant extracts of the Annual Report of Respondent No.1 itself, for the year 2020-21:*
>
> > *"...*
> >
> > *The Covid-19 pandemic has substantially altered the global economic landscape. A far-reaching impact of the global crisis on the aviation section was due to the imposition of travel restrictions and a decimation in passenger demand. The shock posed by Covid-19 disrupted the long spell of robust growth enjoyed by the aviation section in the last few years. According to ICAO, in 2021 there was an overall reduction of 50% in air passengers (both international and domestic) couples with a 40% reduction in seats offered by airlines as compared to 2019. Moreover, the losses of global airlines in gross passenger operating revenues have mounted to approximately USD 323 to 330 billion.*

Aircraft & Passenger Movement

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

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

107. As per the details of Aircraft and Passengers movement submitted by the Claimant, (which in turn have been taken from the website of Respondent No.1), for the period of March 2019 to January 202259, the impact can be seen as under:

Table A
Aircraft Movement International

Month	2019	2020	2021	2022
January	7892	7256	2642	3794
February	6934	6739	2394	-
March	7068	3967	2723	-
April	5649	630	2377	-
May	5878	1060	1969	-
June	5768	1642	1892	-
July	6121	1909	2109	-
August	6681	1745	2564	-
September	6726	1863	2812	-
October	6979	2132	3136	-
November	6964	2329	3149	-

December	7266	2597	3853	-

Table B
Aircraft Movement Domestic

Month	2019	2020	2021	2022
January	20196	20523	13789	13057
February	16288	19368	13295	-
March	15699	14117	14323	-
April	15160	305	11386	-
May	18556	781	5178	-
June	19682	2594	6366	-
July	20105	3515	9351	-
August	20402	4133	11644	-
September	19619	6644	12319	-
October	20844	9053	15460	-
November	19841	10989	17518	-
December	20424	12777	18720	-

Table C
Passengers Movement International

Month	2019	2020	2021	2022
January	13,54,746	12,42,827	1,77,974	3,70,681
February	11,68,148	10,36,205	1,67,159	-
March	11,59,726	4,71,278	1,76,444	-
April	9,93,144	7956	1,37,213	-
May	10,53,465	10,380	54,185	-
June	10,25,564	38,234	61,717	-
July	10,01,859	65,930	1,01,203	-
August	10,37,839	67,567	1,84,787	-
September	9,96,676	77,594	2,34,963	-
October	10,58,983	1,03,250	3,10,370	-
November	11,75,318	1,44,461	3,70,850	-
December	12,62,394	1,81,563	4,51,212	-

Table D
Passengers Movement Domestic

Month	2019	2020	2021	2022
January	29,84,842	30,59,644	15,52,969	13,83,435
February	25,29,642	29,45,619	16,12,934	-
March	24,12,096	16,71,216	14,04,250	-

April	23,28,891	1095	9,03,905	-
May	28,39,095	37,937	3,80,495	-
June	28,91,923	2,23,810	6,33,178	-
July	28,67,461	2,71,430	10,05,761	-
August	29,65,436	4,07,883	14,02,369	-
September	28,41,489	6,52,626	14,88,254	-
October	29,14,226	9,56,728	20,05,635	-
November	30,74,219	13,13,451	24,30,735	-
December	31,18,558	14,01,186	25,37,960	-

108. A perusal of the above tables would show that the international aircraft movement reduced from 7068 in March 2019 to 630 in April 2020; and domestic aircraft movement reduced from 15699 March 2019 to 305 in April 2020. These numbers gradually increased May 2020 and as on January 2022, the international aircraft movement stood at 3794; and domestic aircraft movement as on January 2022 stood at 13,057. Similarly international passengers numbers reduced from 11,59,726 in March 2019 to 7956 in April 2020; and domestic passengers reduced from 24,12,096 in March 2019 to 1095 in April 2020. These numbers gradually increased in May 2020 and as on January 2022, the international passenger movement stood at 3,70,681; and domestic passenger movement as on January 2022 stood at 13,83,435. It is noted that the domestic passenger movement stood at 20,05,635, 24,30,735, and 25,37,960 in October, November, and December 2021 respectively.

109. These statistics show beyond disputation that the capability of the Claimant to earn revenues was adversely and acutely affected commencing from the last week of March 2020. Although the figures placed on record refer to the monthly aircraft and passenger movement, however, the restrictions were imposed by the Government between 15th and 22nd March 2020. Therefore, the impact of these restrictions was eventually evident from April 2020 onwards. The impact, as is seen from the aforesaid statistics, which are taken out from the website of

Respondent No.1, was acute/severe and therefore, we are convinced that the outbreak of Covid-19 had adversely/materially impacted the capability of the Claimant to operate the Airport, such that the expenses were greater than and exceeded the receipts. We cannot agree with the Expert witness produced by Respondent No.1 that investments made by the Claimant in the normal course of business in the previous financial years (such as in the Navi Mumbai Airport) could be taken into reckoning to conclude that profits were available with the Claimant even during the force majeure period."

70. Perusal of the above said para(s) would indicate that the total income/receipt/collection/revenue from the airport were less than the expenses incurred for its operation as on the year ending 31.03.2021 and 31.03.2022. There was a drastic fall in the aircraft and passenger movement on the both domestic and international sector. It is also pertinent to mention here that there was no option for the respondent to close the operation. It has also to be taken into account that the MIAL was running the Chhatrapati Shivaji Maharaj International Airport, Mumbai which is one of the landmark airports of this country and as per the OMDA, MIAL was under obligation to incur all cost in the maintenance and operation of the said airport. It is also a matter of record that MIAL had written several communication dated 17.03.2020, 24.03.2020 and 26.03.2020 in this regard.

71. The perusal of the impugned award indicates that the learned AT had taken into account the financial statements of MIAL for the financial years 2018-19, 2019-20, 2020-21 and audited financial statement of financial year 2021-22. Learned AT noted that these figures in these statements were not questioned or challenged by AAI in the cross-

examination. In regard to the inability of MIAL to pay the annual fee, learned AT in para-131 inter alia held as under:

> *"131. Pertinently, copy of the Claimant's financial statement of FY 2018-2019 (Ex CW-1/82), copy of Claimant's financial statement of FY 2019-2020 (Ex CW-1/83), copy of Claimant's audited financial statement of FY 2020-2021 for the year ended 31st March 2021 (Ex CW-1/62) and copy of Claimant's audited financial statement of FY 2021-2022 (Ex RW-1/X/F), which contain the figures referred to in the above table, have not been questioned or challenged by Respondent No.1 in cross-examination. It is noteworthy that the Claimant in its letter dated 17th March 202070 addressed to Respondent No.1 invoked the provisions contained in Article 16 of OMDA with effect from 13th March 2020 i.e. date of notification issued by GoM under Epidemic Diseases Act, 1897; having received no response from Respondent No. 1, the Claimant issued another communication dated 24th March 2020 informing Respondent No.1 about the drastic impact of Covid-19 on its activities. Relying upon Circular dated 19.03.2020 issued by Office of Director of Director General of Civil Aviation and Order dated 23.03.2020 issued by Ministry of Civil Aviation, the Claimant stated that "as a result, airport operations have come to a grinding halt though without reduction in operating expenditure. With complete choking of revenues without any reduction in operating expenditure, a situation has come where cash flow has turned negative. MLAL has no funds available for meeting its immediate requirements as revenue inflow has completely stopped. Only amounts available which can be utilised to meet immediate obligations is in AAI Fee Account." The Claimant has asserted, with this position being reiterated by CW-1 in his evidence, that the Claimant had suffered a 'negative net cash flow' after 23rd March 2020. It is also pertinent to note that it has been admitted by CW-1 in his cross-examination that even in those years when the Claimant had incurred losses prior to FY 2019-2020, the*

Claimant had paid Annual Fees to the Respondent No.1 (Question No. 43 and 45). It is not in dispute that the Respondent No.1 is a shareholder in the JVC, holding 26 percent of equity in the Claimant and a significant presence on its Board, and is therefore fully aware of the losses being incurred by the Claimant in the maintenance and operation of the Airport and the veracity or correctness of the Claimant's financial statements/ position. The opposition to payment of Annual Fee in the relevant period is predicated not on the ground of the Claimant having incurred losses (since it is correct that the OMDA does not guarantee profits to the Claimant), but owing to the occurrence of force majeure circumstances arising out of Covid-19 pandemic."

72. It is also a matter of the record that the restrictions were imposed/extended from time to time on domestic and international travel which resulted in the reduction of ATM and PTM. This court finds no fault in the learned AT's finding that capability of MIAL to generate revenue was materially and adversely affected starting from the last week of March 2020. The outbreak of Covid-19 had materially and adversely affected the airport's operational capacity, resulting in expenses surpassing the receipts. It may also be reiterated even at the cost of the brevity that there was no option for MIAL to close down the airport. There is a force in the contention of MIAL that the finding of learned AT qua "inability" is a finding of fact based on evidence presented before it and there is no jurisdiction with the Court under Section 34 to interfere into the same.

73. AAI has taken a plea that since MIAL continued paying actual fee therefore it cannot be said that it was "unable to pay". However, there is a force in the contention of MIAL that these payments were made

were pursuant to the order dated 22.12.2021 which was based on the joint application dated 13.12.2021. It has to be noted that the MIAL had stated that the said orders were made without prejudice as an interim arrangement. The question here is not that whether it was made voluntarily or involuntarily, the question is that whether merely factum of payment of AF will negate the plea of MIAL that in view of the reduction in the ATM & PTM, they were unable to pay the fee in accordance with the Article 11. MIAL was certainly at the receiving end, they had to run the operations of the Airport as well as, as a commercial venture had to fulfill their obligations. The Court does not find any fault with the finding of the learned AT that merely because the payment was made, it cannot be held that they were unable to make payment of the fee. It is also pertinent to mention here that the testimony of the expert witness was threadbare examined by learned AT, in para-103 of the impugned award and same is reproduced herein below:

> *103. However, RW-1 in her cross-examination has admitted to not examining the effect of Force majeure in the present case (Q.11) and not undertaking a forensic accounting (Q.255). RW-1 has added payments from FY 2017-2018 and FY 2018-2019 including amounts invested in the Navi Mumbai International Airport Limited. RW-1 has stated that the Claimant was not in a cash deficit position on 26th March 2020 but in fact had a cash surplus of at least INR 106 crores or INR 320 crores on that date, and in support of her averments adjusted the following categories of payments: (1) investment in Navi Mumbai Airport (NMIAL) of INR 905 crores; (2) unexplained transfers of INR 214.52 crores; (3) debt servicing obligations of INR 65 crores not paid; (4) costs amounting to INR 29 crores unrelated to*

MIAL's operations; (5) Inflated expenses of INR 22 crores. The Claimant has countered the statements made by RW-1 in the following manner:

On the Claimant's Investment in NMIAL of INR 905 crores	The investments in NMIAL were done pursuant to right of the Claimant under Article 2.2 of the OMDA and 3.4 of the State Support Agreement. with Respondent No. 1's permission and approval through letter dated 5.12.2014.[47] Respondent No. 1 has never objected to the same, nor advised the Claimant to bring this payment back from NMIAL. Furthermore, these investments were done in the FY 2017-2018 and FY 2018-2019 which was much before the Force majeure event. No reference has been made in the entire Report of RW-1 to any exact entry of the Financial Statement of the Claimants, to conclusively say that the Claimant had amounts available to make payment of Annual Fee and the only reliance has been to add back amounts which otherwise could not be added back as per law or any accounting standards. While agreeing that there is no Accounting Standard which provides for 'exclusion of investment in yester years and treat the same as cash in hand in later years', the justification given by RW-1 for considering the cash invested in NMIAL is *"since such cash invested is not connected with MIAL's operations"* (Q.182), however she could not show any accounting standard or from the documents that 'cash invested in NMIAL in yesteryear can be treated as cash in hand' (Q.62, 64, 65, 176, 177, 178, 182, 187). She has agreed that it was not her instructions to assess the correctness of previous year's expenses and treat them as s cash in hand at the time of beginning of Force majeure (Q.111)
On Claimant's unexplained transfers of INR 214.52 crores	RW-1 did not inspect to whom these payments were transferred, which were made to Respondent's National Aviation Security Fee Trust (i.e. a fund maintained by RW-1), pursuant to a Demand Letter

	dated 20.03.2020[48] so there is no basis for asserting that the payment was transferred to an unknown source. A perusal of Q.87, 88, 89 and would depict that the calculation of RW-1 cannot be relied upon, as she has admitted that she neither enquired from Respondent No.1 about the alleged 'unexplained transfer' from the bank of the Claimant nor was she aware of the payee since only the Bank Statement of the Proceeds Account had been made available to her by the Respondent.
On debt servicing obligations of INR 65 crores not paid	The RBI Moratorium was granted on 27th March 2020. Therefore, this amount could not have been excluded from the calculations as on 26th March 2020. Respondent No.1's letter dated 30th March 2020 has considered the RBI Moratorium and thereafter issued directions to SBI to transfer Rs. 82 Crore from AAI Fee Account to Surplus Account. Nevertheless, the RBI moratorium has merely deferred the repayment of the debt obligations and not extinguished them. Further the Claimant will have to pay interest for the deferred period.
On costs unrelated to MIAL's operations amounting to INR 29 crores	Classifying salary as cost unrelated to MIAL's operations under the guise that these employees belonged to NMIAL is a flawed assertion as at the time the salary was being paid, the employees formed a part of MIAL and not NMIAL. The absorption was done prior to the *force majeure* event, and Respondent No.1 has never objected to such absorption of employees. During this period, these employees have rendered certain services to NMIAL for which MIAL has recovered costs from NMIAL.[49] Reliance is placed on Q. 95, 96, 99, 101 to contend that RW-1 did not have information as to whether these employees at the time of disbursement of salary were employed by MIAL or NMIAL and has further stated that if the salary was disbursed at the time

	when the employees were employed by MIAL, then she would consider not including Rs. 29 Crore as the deduction
On inflated expenses amounting to INR 22 crores	RW-1 has used a fallacious method of calculation which are based on assumptions and which does not consider that for a particular month the expenses towards contractors may be more and in certain other months it may be less; she has not perused the actual utility bills. Reliance is placed on her replies to Q.115, 116, 118, 120, 121 and 253

74. The said testimony was rejected by the learned AT and it was *inter alia* held that the Tribunal could not agree with the Expert witness produced by the Petitioner herein that investments made by Respondent No.1 herein in the normal course of business in the previous financial years (such as in the Navi Mumbai Airport) could be taken into reckoning to conclude that profits were available with Respondent No.1 even during the force majeure period.

75. This Court considers that there is no ground to interfere into the finding of the learned AT on this ground.

76. The next contention of AAI is that the learned AT has fallen into error of granting the relief to the MIAL of being "excused" from its obligation as per Article 16.1.1 of OMDA. Article 16.1.1 of OMDA is reproduced as under:

> "*16.1 Force Majeure*
>
> *16.1.1 The JVC, or AAI, as the case may be, shall be entitled to suspend or excuse performance of its respective obligations under this Agreement to the extent that AAI or JVC, as the case may be, is unable to render such performance by an event of Force Majeure (a "Force Majeure").*"

77. Learned AT, in this regard gave its finding in para-115 which is reproduced herein below:

> *"115. It is also noteworthy that the arguments on behalf of Respondent No.1 almost entirely ignore the word 'excuse. The Tribunal cannot countenance an interpretation which would render either of the words 'suspend' or 'excuse' to be superfluous and a surplusage. For this proposition we need only mention J.K. Cotton Spinning & Weaving Mills v State of U.P. AIR 1961 SC 1170. When construing any provision it is salutary to assume that every word has been employed for a specific reason and intent; the use of 'or' is indicative of the contemplation of a different factual matrix. It is tell-tale that the Respondent has preferred to use the word 'defer' in its Written Arguments; equally tell-tale is the absence of the use of explanation of the word 'excuse" without making any effort to establish that both words have the same effect. This is especially so since what is being dealt with in this Article is the occurrence of a very rare event ie. of force majeure. Considering that two separate consequences of an event had been postulated, it still remains the difficult task of the Tribunal to determine whether a temporary deferment or a complete excusal is the apposite conclusion."*

78. As it has been discussed in detail herein above that the interpretation of a contract falls within the domain of Arbitral Tribunal. The interpretation of contract if it is plausible or even may be possible cannot be set aside only because there can be alternative interpretation. The interpretation adopted by an Arbitral Tribunal can be set aside only if it is perverse. This Court considers that the interpretation adopted by the learned AT in the present case in this regard cannot be termed to be perverse. It is pertinent to reproduce further findings of the learned AT

in this regard as contained in para-105 and 116 which is reproduced as under:

> *"105 It cannot be anyone's case that the Claimant had an option not to operate the Airport in which event, the revenues, if any, would have been reduced to zero, nullifying the entire object of the Contract to redundancy. Therefore, it is important to test the veracity and the strength of the Claimant's "inability" in this context. It would be too simplistic a proposition to say that the Claimant must pay 38.7 percent of whatever its earnings are without taking into consideration the fact that the Claimant is obligated to ensure smooth functioning of the Airport in entirety without any support from Respondent No.1. In our view, a reading of Chapter XVI would show that the Claimant was unable to render the operation and maintenance of all functions/activities of the Airport with whatever revenues it was earning at the relevant time. If the receipts and earnings from the operation of the Airport are inadequate for maintaining and servicing the Airport, it is illogical to nevertheless maintain that the Claimant would be liable to pay a percentage of the receipts towards the MAF. The Tribunal is of the considered opinion that during the force majeure period the revenue receipts/collections would have to be used firstly for running the Airport, and in the event that there is a surplus thereafter, the surplus would have to be shared between the Claimant and Respondent in the contractual ratio. This conclusion will fulfil the intent and postulation of Chapter XVI. The fact that Respondent No.1 had itself waived the dues of its concessionaires, justifies repetition. The Claimant has, indubitably, been bearing the burden of all the expenses for ensuring the smooth running the Airport. If the cumulative revenue from the operation of the Airport post parting with 38.7 percent thereof to Respondent No.1 remains deficient, OMDA does not envisage of require the Claimant to make up the shortfall from any other sources.*

116. The Tribunal must not lose sight of the fact that it is seized of a force majeure event during which the Claimant had perforce to perform all its obligations as envisaged in the OMDA. Indeed, even if the Claimant was desirous of terminating the contract/OMDA it could not have done so because the Airport services were mandated to continue to function for handling permitted flight operations/transportation for essential goods/ medicine, and to ensure law and order and emergency services, and hence, even though the aircraft and passenger movement had drastically reduced, the Claimant was compelled by law to incur all costs in the maintenance and operation of the Airport. The force majeure doctrine contemplates the continuance in contradistinction to the cancellation of a contract on the grounds of frustration or impossibility of performance (the latter being covered by Section 56 of the Contract Act), the sine qua non being that neither party (or only one of them) should be unduly made to suffer losses. The Claimant cannot be heard to complain that it was entitled to reasonable profits as in yesteryears; equally the Respondent cannot be heard to demand its MAF even though this payment would add to the losses being incurred in this period by the Claimant. In these circumstances the Tribunal concludes that during the continuance of force majeure the Claimant is excused/exempted from payment of MAF until the time its revenue or receipts or collections had exceeded its expenses in maintaining the Airport and ensuring its proper operability, as conceived in the OMDA."

79. This Court does not find any fault with the finding of the learned AT that MIAL cannot be forced to pay the fee irrespective of the revenue, despite the fact that there is an obligation on the MIAL to ensure smooth functioning of the airport. The first and foremost duty of the MIAL is to ensure that the airport is duly maintained and serviced. This Court is conscious of the fact that while entertaining a petition under

Section 34, the Court does not have the appellate jurisdiction and therefore even if some alternative view could be taken, it is not permissible to set aside the view taken by the arbitrator. The purpose of the force majeure clause in any contract is to ensure that the business must continue and should not come to an end. The purpose is to prevent the party from suffering the losses or to mitigate the same. Learned AT has rightly noted that MIAL cannot be permitted to say that it is entitled to reasonable profit as previous years and in the same fashion AAI cannot be allowed to demand its AF even though this payment would add to the losses being incurred in this period by MIAL. As stated above, force majeure clause is like an eclipse to the general clauses i.e., if the force majeure clauses comes into the existence the general clauses eclipses during that period.

80. This Court considers that the interpretation adopted by the learned AT is correct and in furtherance of business efficacy and the object of the OMDA. Hypothetically, if the reverse view is taken that is even despite reduction in the revenue, MIAL is made to pay the fee even out of its nose, this Court considers that the same would be against the object and intention of the OMDA. Petitioner has taken a plea that the MIAL vide its letter dated 11.03.2021 itself has stated that force majeure had ceased and therefore no relief could have been granted thereafter. In this regard it is necessary to reproduce Article 16.1.5 clause (c) which reads as under:

> *"16.1.5 Procedure for Force Majeure*
>
> *(c) The time for performance by the affected Party of any obligation of compliance by the affected Party with any time*

limit affected by Force Majeure, and for the exercise of any right affected thereby, shall be extended by the period during which such Force Majeure continues and by such additional period thereafter as is necessary to enable the affected Party to achieve the level of activity prevailing before the event of Force Majeure."

81. The bare perusal of this makes it clear that there is a concept of achieving the level of activity prevailing before the event of force majeure. Learned AT returned a finding of the fact that the exact date on which activities would return to the pre-force majeure level could not be determined and left it open. However, after considering the financial statements of MIAL upto December 2021 and the data of ATM, and PTM available on AAI's website, which indicated that pre-Covid activity levels had not been reached by 28.02.2022. Learned AT noted that while gross revenue was Rs. 182.09 crores, expenditure stood at Rs. 191.06 crores. It was also noted that neither party provided records regarding the date when Covid-19/force majeure ceased to exist or when MIAL's cash flow turned positive. Learned AT took into account that the Government of India lifted restrictions on aeronautical and non-aeronautical services in a phased manner starting from 25.05.2020, permitting essential domestic operations in limited capacity, though international travel remained suspended until 31.03.2021. The learned AT further noted that the second wave of Covid-19 impacted India in March 2021. In these circumstances, the learned AT adopted 28.02.2022 as the effective date, based on the Supreme Court of India's review regarding the period of limitation due to Covid-19. While it is true that the learned AT's approach was based

on some guess work, however, it was the best alternative view available in the absence of concrete evidence. This Court finds no perversity in the learned AT's decision.

82. Petitioner has assailed the impugned award on the ground that the learned AT has re-written the terms of the OMDA and Escrow agreement by turning the 'Revenue Sharing Contract' into 'Profit Sharing Contract'. It has already been discussed herein above that there was no option for the MIAL but to operate the airport. The contention of MIAL in this regard is that the learned AT after duly taking into account the revenue generated during this period and the fact that expenditure was more than the revenue interpreted Chapter-XVI of the OMDA and granted relief to MIAL. The Court finds substance in the contention of the MIAL in this regard and is unable to persuade itself to agree with the contention of the AAI that the learned AT has re-written the contract while granting the relief to MIAL. In regard to the extension of the term of OMDA, learned AT has relied upon Article 16.1.5(c) of the OMDA.

83. An Operation Management and Development Agreement ('OMDA') was entered into between the parties on 04.04.2006 and the genesis of entire dispute between the parties is the interpretation of Article 16 of the said agreement executed between the parties. Before proceeding further, it is advantageous to look at some of the salient features of the OMDA. The preface of the OMDA reads as under:-

WHEREAS:

(A) AAI is an authority established under the Airports Authority of India Act, 1994 (the "AAI Act"), which is responsible for

the development, operation, management and maintenance of airports in India.

(B) AAI, in the interest of the better m3nogement of the Airport (as defined herein) and/or overall public interest is desirous of granting some of its functions, being the functions of operating, maintaining, developing, designing, constructing, upgrading, modernising. financing and managing the Airport to the JVC and for this purpose to lease the premises constituting the Airport Site (as defined herein), in accordance with the terms and conditions set forth herein.

(C) JVC is a company established, inter-alia with the objectives of operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport (as defined herein).

(D) JVC is desirous and agreeable to undertake the function of operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport (as defined herein) on and subject to the terms and conditions set forth herein.

84. It is also necessary to refer to Article 2.1.1 which reads as under:

"*2.1.1 AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and to perform services and activities constituting Aeronautical Services, and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and at all times keep in good repair and operating*

condition the Airport and to perform services and activities constituting Aeronautical Services and Non-Acronautical Services (but excluding Reserved Activities) at the Airport, in accordance with the terms and conditions of this Agreement (the "Grant")."

85. The perusal of the OMDA makes it clear that the MIAL was tasked with the operation, maintenance, development, design, construction, upgradation, modernization, and financing of the Mumbai Airport, a responsibility that required significant investment. It is a well-known fact that no one could have predicted the onset of a pandemic like COVID-19. When the pandemic began in March 2020, its full impact was not understood by anyone. Initially, people assumed it would last for a few days, then weeks, and eventually, months. However, as the pandemic unfolded, it caused severe disruption during the first wave and returned in 2021 with a second wave, inflicting unimaginable losses both in terms of human lives and the economy. God forbid such an event should occur again.

86. The learned AT has returned a finding of fact that there was indeed a force majeure period and thus, while exercising its jurisdiction, the learned AT granted a two-year extension for the OMDA under Article 16.1.5(c).

87. This Court finds that the learned AT's direction to extend the term of OMDA is consistent with its findings regarding the payment of fees. It considers that the learned AT rightly took into account the commercial realities and extended the contract's term appropriately.

88. It may also be prudent to refer to the letter dated 30.03.2020 from AAI which reveals that their tacit admission to the occurrence of Force

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

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

90. The facts and contentions of the parties as well as the finding in the award as challenged in both O.M.P. (COMM) 186/2024 and O.M.P. (COMM) 185/2024 are similar. The terms and conditions of the OMDA dated 04.04.2006 are also identical. The entire case revolves around the interpretation of Article XVI of the OMDA. The question was that whether the force majeure event had taken place in terms of Article XVI and further, whether the petitioner can be excused from paying the AF as provided under Article 11 for the period till 13.03.2020 to 28.02.2022. Another major bone of contention was the

extension of the term of the OMDA for the period of two years. The plea of the petitioner was the force majeure event had not taken place and there was no question of excusal of the payment of fee in terms of the OMDA and furthermore, there was no provision for the extension of the contract. Per contra, the contention of the respondents was that the learned AT has granted the relief in terms of the terms of contract. It is a settled preposition that interpretation of the terms of the contract falls within the domain of the Arbitrator. The entire dispute in both the cases revolved around the interpretation of the terms of the contract. The discussion made hereinabove makes it clear that the learned AT had passed a speaking order after taking into account the material and the evidence available on the record. The perusal of the award makes it clear that it cannot be said that the view taken by the Arbitrator is not a possible and plausible view. It is also a settled preposition that even if the alternative view is available, the Court cannot substitute its own. This Court did not find any material to say that there was perversity in the award passed by the learned AT.

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

DINESH KUMAR SHARMA, J

MARCH 7, 2025
AR/SMG