IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on:28.02.2022*

\+ **O.M.P. (COMM) 178/2021**

MUMBAI INTERNATIONAL AIRPORT LIMITED ..... Petitioner

Versus

AIRPORTS AUTHORITY OF INDIA ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. P. Chidambaram, Senior Advocate withMs Kanika Singh & Mr Shailendra Slaria, Advocates.

For the Respondent :Mr Raghav Shankar, Mr Karan Lahiri, Ms Arshiya Sharda, Mr Prateek Arora and Ms Dristhi Rajain, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Mumbai International Airport Limited (hereinafter '**MIAL**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter '**the A&C Act**') impugning an Arbitral Award dated 13.03.2021 (hereafter '**the impugned award**'). The impugned award was delivered by the Arbitral Tribunal comprising of three members – Justice (Retd.) C.K. Thakker, Justice (Retd.) Mohit Shah and Justice (Retd.) R.C Lahoti as the Presiding Arbitrator (hereafter the '**Arbitral Tribunal**'). The impugned award was delivered by majority [Justice (Retd.) C.K. Thakker and Justice

(Retd.) R.C Lahoti]. Justice (Retd.) Mohit Shah entered a different opinion. The draft award rendered by Justice (Retd.) Mohit Shah is included as paragraphs M.1 to M.213. The award rendered by Justice (Retd.) C.K. Thakker span 105 paragraphs, which are numbered C.1 to C.105 and the opinion of the Presiding Arbitrator, Justice (Retd.) R.C. Lahoti is included as paragraphs R.1 to R.11.

2. The impugned award was rendered in respect of disputes that have arisen in connection with the Operation Management and Development Agreement (hereafter the **'OMDA'**) dated 04.04.2006, entered into between the parties.

Factual Context

3. MIAL is a company incorporated under the provisions of the Companies Act, 1956. It is a Joint Venture Company between GVK Airport Holdings Private Limited (hereafter '**GVK**') led consortium of private developers and the respondent.

4. The respondent (hereafter '**AAI**') is a statutory authority constituted under Section 3 of the Airports Authority of India Act, 1994 (hereafter **'the AAI Act'**) and is responsible for creating, upgrading, maintaining and managing civil aviation infrastructure in India.

5. On 21.03.2002, AAI and the Hotel Corporation of India (hereafter '**HCI**') entered into a Lease Agreement for the lease of 14,000 sq. meters of land forming a part of the Chhatrapati Shivaji

International Airport (hereafter '**the Mumbai Airport**') for a period of twenty nine years from 01.04.2002 till 31.03.2031 (hereafter the '**HCI Lease Agreement**')

6. Pursuant to the policy of the Government of India regarding privatization of certain airports, bids were invited for operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Mumbai Airport. Thereafter, on 02.03.2006, the consortium led by GVK was declared successful and MIAL was incorporated as a Special Purpose Vehicle (SPV) for developing, operating and financing the Mumbai Airport.

7. Thereafter, on 04.04.2006, MIAL and AAI entered into the OMDA. In terms of the said agreement, MIAL was awarded the rights for operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Mumbai Airport, on the terms and conditions stipulated therein.

8. On 26.04.2006, MIAL and AAI entered into a Lease Deed, whereby the site of the Mumbai Airport, subject to certain exceptions, was demised to MIAL for the purpose of, *inter alia*, the operation, management and development of the Mumbai Airport (hereafter the '**Lease Deed**').

9. Thereafter, AAI, by a communication dated 02.05.2006, informed MIAL that it "*shall perform under all existing contracts and agreements between AAI and other parties as relatable to the Airport from the Effective Date, as if MIAPL was an original party to such*

contracts and agreements instead of AAI and towards this end shall perform all responsibilities, liabilities and obligations of AAI at MIAPL's risk and cost (including payment obligations to counter parties)".

10. On 03.05.2006, MIAL took over the control and operations of the Mumbai Airport, as stipulated in the OMDA.

11. AAI issued a Circular dated 08.06.2006 to all operating airlines/user agencies/licensees informing that the Government of India had handed over the operation, maintenance and development of the Mumbai Airport to MIAL with effect from 03.05.2006. The said Circular also recorded that MIAL has "*rights over all the revenue accruals on account of Aeronautical and Non-Aeronautical streams getting generated at CSIA, Mumbai which used to be the rights of Airports Authority of India".*

12. It is averred in the petition that by a letter dated 09.06.2006, AAI agreed to novate the HCI Lease Agreement in favour of MIAL. MIAL responded to the aforesaid letter on 26.07.2006 approving the Agreement with certain minor modifications and requested AAI's approval for the same.

13. By a letter dated 01.08.2006, MIAL informed AAI that the Transition Phase was going to end on 02.08.2006 and MIAL would operate and maintain the Mumbai Airport from 03.08.2006.

14. Thereafter, by a letter dated 09.04.2007, the Ministry of Civil Aviation, Government of India (hereafter '**MoCA**') informed MIAL that since the land leased to HCI was excluded from the Lease Deed executed in favour of MIAL, the same could not form a part of the 'Demised Premises'. MIAL, by a communication dated 01.06.2007, responded to the aforesaid letter disputing the same and requested reconsideration of the matter. It also sought a direction to be given to AAI to novate all the current and subsisting leave and license agreements in its favour.

15. MIAL states that during various meetings of the OMDA Implementation Oversight Committee (hereafter '**OIOC**'), it requested AAI to transfer/novate the existing agreements in its favour, in accordance with Article 5.2 (b) (i) of the OMDA.

16. On 14.05.2012, the MoCA conveyed the opinion of the Ministry of Law and Justice (hereafter '**MoLJ**') to AAI. The said opinion was in favour of novating the existing lease agreements in favour of MIAL. The Minutes of the 16th OIOC Meeting held on 02.04.2013, records that the Committee had advised AAI to take necessary action as per the opinion of the MoLJ and to novate all the existing leases in respect of the Demised Premises in favour of MIAL and ensure that the revenue accrued from such premises is received by MIAL. By a letter dated 17.06.2013, MoCA also informed AAI to act in accordance with the opinion of the MoLJ

17. On 12.07.2013, MIAL informed AAI that the land admeasuring 14,000 sq. meters, which is in possession of HCI under the HCI Lease Agreement was required by it to access the road network for Terminal 2 of the Mumbai Airport. The said letter also recorded that the Chef Air Flight Kitchen operated by HCI on the said premises had not made any payment of lease rent since 03.05.2006.

18. By a letter dated 01.08.2013, MIAL once again requested AAI to novate the HCI Lease Agreement. The said letter was also forwarded to the Secretary, MoCA.

19. By a letter dated 25.11.2013, MIAL informed AAI that it had not received any payment from HCI towards lease rent and minimum guaranteed annual payment and the outstanding amount as on 31.10.2013 amounted to ₹8.11 crores. MIAL further stated that it had raised invoices till the month of March, 2011 however, it had stopped raising invoices thereafter, on account of non-payment of the same. It requested AAI to terminate the HCI Lease Agreement in terms of Clause 21(a)(i) of the HCI Lease Agreement.

20. MIAL states that by a letter dated 14.11.2014, it once again requested AAI to take action and terminate the HCI Lease Agreement and further, put AAI to notice that in the event it did not take the necessary action, the said letter be treated as an intimation of disputes between the parties.

21. On 14.11.2018, MIAL issued a letter to AAI and requested it to novate/transfer the HCI Lease Agreement in terms of Article 5.2(b) (i) of the OMDA within a period of thirty days.

22. The HCI Lease Agreement was not novated/transferred in favour of MIAL within the said period of thirty days. Consequently, on 15.12.2018, MIAL issued a Notice of Dispute under Article 15.1 of the OMDA and called upon AAI to resolve the dispute amicably within a period of sixty days.

23. The disputes remained unresolved. Consequently, MIAL issued a notice dated 16.02.2019 invoking the agreement to refer the disputes to arbitration, in terms of Article 15.2 of the OMDA. It nominated a former Judge of the Supreme Court as its nominee arbitrator and requested AAI to appoint its nominee arbitrator within a period of thirty days from issuance of the notice. AAI responded by a letter dated 07.03.2019, and requested MIAL to withdraw the Notice of Dispute as the matter had been referred to the MoCA for review.

24. On 29.04.2019, AAI informed MIAL that it had appointed Justice (Retd.) C.K. Thakker as its nominee Arbitrator. AAI also requested MIAL to withdraw its nomination of Justice (Retd.) Deepak Verma as its nominee arbitrator as he had been engaged as an arbitrator in several proceedings concerning both the parties. MIAL accepted the said request and by a letter dated 07.05.2019, informed AAI that it had substituted its nominee arbitrator and appointed Justice

(Retd.) Mohit Shah as its nominee Arbitrator. Thereafter, Justice (Retd.) R.C. Lahoti was appointed as the Presiding Arbitrator.

25. Before the Arbitral Tribunal, MIAL filed its Statement of Claims. A tabular statement stating the claims made by MIAL are summarized below:-

Claim No	Particulars	Amount
Claim no.1	Declaratory award that the AAI is required to transfer/novate the HCI Agreement in the favour of MIAL and to pass a direction for the same	
Claim no.2	AAI has not novated the HCI Lease Agreement and thus, to terminate the HCI Lease Agreement	
Claim no.3	Arrears of lease rental plus interest till 30.06.2019	₹7,46,45,436/- +₹6,09,08,689/-
Claim no.4	Minimum Guaranteed Amount Payment (MGAP) plus interest till 28.02.2019	₹4,04,06,896/- +₹3,13,20,502/-
Claim no.5	Reimbursement of electricity, water and utility dues which were required to be recovered by AAI from HCI which were paid by MIAL plus interest till 28.02.2019	₹1,24,45,070/- +1,07,76,066/-

26. AAI filed its Statement of Defence, however, it did not raise any counter-claims.

27. By the impugned award, MIAL's Claim no.1 was held to be non-arbitrable. Consequently, all other claims filed by it have also been rejected.

28. Aggrieved by the impugned award, MIAL has filed the present petition.

Submissions

29. Mr Chidambaram, learned Senior Counsel appearing for MIAL assailed the impugned award on, essentially, six fronts. First, he submitted that the impugned award failed to take into consideration the vital terms of their contract including Article 5.2(b)(i) of the OMDA, which provided for transfer of all existing contracts and agreements. The claim was to enforce obligations in terms of OMDA and was therefore, arbitrable.

30. Second, he submitted that the Arbitral Tribunal had failed to appreciate that no relief was claimed against HCI but only a direction was sought against AAI to transfer its interest in respect of the HCI Lease Agreement in terms of Section 109 of the Transfer of Property Act, 1882 (hereafter '**TPA**') and for such a transfer, no consent of the Lessee was required. Further, HCI had acknowledged the right of MIAL to collect the lease rent.

31. Third, he submitted that Clause 24 of the HCI Lease Agreement could in no way be construed as a 'contract to the contrary' as

contemplated under Section 109 of the TPA and this finding of the Arbitral Tribunal is erroneous and contrary to the Public Policy of India.

32. Fourth, he submitted that the finding of Justice (Retd.) R.C. Lahoti that an 'Existing Lease' was a 'Carved Out Asset' is patently erroneous and contrary to the definition of the terms 'Existing Leases' and 'Carved Out Assets' under OMDA. He stated that the 'Existing Leases' and 'Carved Out Assets' were specifically listed under two different Schedules of the OMDA and HCI Lease was not included in the Schedule of Carved Out Assets.

33. Fifth, he submitted that the impugned award ignored Section 40 of the AAI Act in terms of which, the Government of India could issue directions, which were binding upon the AAI. Thus, the directions issued for the transfer of the HCI Lease Agreement to MIAL, was binding.

34. Lastly, he submitted that the Arbitral Tribunal wrongly relied upon the judgment of the Supreme Court in ***Mumbai International Airport (P) Ltd. v Regency Convention Centre and Hotels Pvt. Ltd. & Ors.: (2010) (7) SCC 417*** as the said decision was inapplicable to the issue in the present case. In that case, there was a pre-existing dispute between AAI and the Lessee. A civil suit was pending when the Operation Management Development Agreement was executed and MIAL had sought impleadment in that suit. This was denied, as the Court found that MIAL had not acquired any interest in the leased property. He further contended that, the decision of the Supreme Court in ***Raghubir Buildcon Pvt. Ltd v IRCON International Ltd: 2021***

SCC Online Del 2491 relied upon by AAI to draw a parallel, regarding the limited scope of jurisdiction under Section 37 of the A&C Act was inapplicable to the present dispute as that was not a case where the petitioner had been non-suited in its entirety.

35. Mr. Shankar, learned counsel appearing for AAI, countered the aforesaid submissions. He submitted that Justice (Retd.) C.K. Thakker had found that the HCI Lease Agreement was in existence and operative prior to the parties entering into the OMDA and therefore, under Article 2.6.1 of the OMDA, the 'Existing Leases' (which included the HCI Lease Agreement) were excluded from the scope of 'Demised Premises' under the OMDA. He stated that the Arbitral Tribunal had concluded that it had jurisdiction only in respect of matters that arose out of or in relation to the OMDA and could not travel outside the scope of the said contract. Consequently, the Arbitral Tribunal found that any dispute relating to the HCI Lease Agreement, which fell outside the purview of the OMDA could not be adjudicated in arbitral proceedings under Article 15.2 of the OMDA.

36. He submitted that the question whether MIAL could claim any rights in the property not included in the Demised Premises but which may be so included upon happening of certain specified contingencies, was squarely covered by the decision of the Supreme Court in ***Mumbai International Airport (P) Ltd. v Regency Convention Centre and Hotels Pvt. Ltd. & Ors.*** (*supra*).

37. He submitted that MIAL's reference to the opinion of the MoLJ or the MoCA to direct AAI under Section 40 of the AAI Act to novate the HCI Lease Agreement in favour of MIAL, amounted to inviting

the Arbitral Tribunal to exercise plenary powers of a Writ Court which was impermissible and thus, the majority Arbitrators had rightly held that the Arbitral Tribunal did not have the jurisdiction to issue any such directions.

38. Lastly, Mr. Shankar submitted that this was not a case where the Arbitral Tribunal had declined to exercise its jurisdiction. Justice (Retd.) C.K. Thakker had interpreted the provisions of the OMDA and, on an interpretation of Article 2.6.1 of the OMDA, the majority Arbitrators held that (i) grant under the OMDA is limited to 'Demised Premises'; (ii) the land underlying an Existing Lease including the lease to HCI fell outside the 'Demised Premises'; (iii) MIAL could not claim any rights in respect of the land leased to HCI under the OMDA; and, (iv) MIAL could not claim any right whatsoever in any Existing Lease.

39. The Presiding Arbitrator [Justice (Retd.) R.C. Lahoti] had concurred with the opinion of Justice (Retd.) C.K. Thakker. He specifically noted that the HCI Lease Agreement stood expressly excluded from the 'Demised Premises' under the OMDA and the Lease Deed. In addition, the learned Arbitrator also concurred that the decision of the Supreme Court in ***Mumbai International Airport (P) Ltd. v Regency Convention Centre and Hotels Pvt. Ltd. & Ors.*** (*supra*) was applicable to the present case.

40. Mr. Shankar contended that the majority view was a plausible view and thus, could not be interfered with under Section 34 of the A&C Act. He also referred to the decision of the Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail***

Corporation Ltd.: 2021 SCC OnLine SC 695 and the decision of this Court in ***Siddharth Constructions Co. v. India Tourism Development Corporation Ltd.: 2021 SCC OnLine Del 4373*** in support of his contention.

Reasons and Conclusion

41. At the outset it is relevant to note that all the three members of the Arbitral Tribunal concurred that Claim nos.2, 3 and 4 of MIAL could not be entertained as the HCI was not a party to the arbitral proceedings and the said claims pertain to exercise of rights under the HCI Lease Agreement. However, the members of the Arbitral Tribunal entered differing opinions in connection with Claim no.1.

42. The principal issue raised before the Arbitral Tribunal was whether the claims raised by MIAL were arbitrable. In this regard, the members of the Arbitral Tribunal entered differing opinions. Justice (Retd.) Mohit S. Shah held in favour of MIAL. According to him, MIAL's Claim no.1 was arbitrable and MIAL was entitled to a declaration that AAI was obliged to transfer/assign its rights as the Lessor under the HCI Lease Agreement.

43. Justice (Retd.) C.K. Thakker, expressed a different view. He held that MIAL's Claim no.1 was not arbitrable and therefore, the other points of determination as framed by the Arbitral Tribunal did not survive.

44. Justice (Retd.) R.C. Lahoti considered the draft awards penned by the other two members of the Arbitral Tribunal [Justice (Retd.)

Mohit. S. Shah and Justice (Retd.) C.K. Thaker] and concurred with the award rendered by Justice (Retd.) C.K. Thakker. However, he also indicated his reasons for the same. There is a controversy with regard to his concurring opinion as the reasons articulated by him are somewhat different to the reasons as mentioned by Justice (Retd.) C.K. Thakker.

45. According to AAI, Justice (Retd.) C.K. Thakker's opinion must be considered as the operative award. This Court accepts this contention as Justice (Retd.) R.C. Lahoti had clearly expressed that he concurred with the draft award circulated by Justice (Retd.) C.K. Thakker.

46. The principal question to be addressed is whether the decision that MIAL's Claim no.1 is not arbitrable, is patently erroneous and the impugned award is vitiated by patent illegality on that ground.

47. At this stage, it would be relevant to briefly indicate the claims made by MIAL. MIAL claimed that in terms of Article 5.2(b)(i) of the OMDA, AAI was required to transfer / novate the existing contracts and agreements including the HCI Lease Agreement in its favour within a period of three months from the effective date. MIAL claimed that it had on, several occasions called upon AAI to do so. Further, MoCA had also conveyed the legal opinion of the MoLJ on the said issue. MIAL claimed that it was entitled to a declaration that AAI was required to transfer / novate HCI's Lease Agreement in its favour under various covenants of the OMDA (Claim no.1). It also prayed for a direction to AAI to terminate the HCI Lease Agreement

as according to it, HCI was in default of its Lease Agreement with AAI (Claim no. 2). Further, it claimed that AAI was liable to pay the land rent as per the invoices for the land leased to HCI, amounting to ₹7,46,45,436/- (Claim no.3). MIAL states that HCI was liable to pay 2% of the turnover or the Minimum Guarantee Amount, whichever was higher and, it was entitled to recover the said amount from AAI (Claim no.4). In addition, MIAL also prayed for costs (Claim no.5). AAI countered the aforesaid claims and also raised a preliminary objection as to the maintainability of the claims.

48. The Arbitral Tribunal considered the draft points of determination as submitted by the counsels for the parties and framed the following points for determination.

> "*1. Whether the disputes raised by the Claimant or part(s) thereof are not arbitrable for the reasons stated under heading (A) in Part II of the Statement of Defence?*
>
> *2. Whether the claims of* the *Claimant or part(s) thereof are barred by limitationas contended by the Respondent under heading (C) of Part II of the Statement of Defence?*
>
> *3. Whether Respondent is mandated under OMDA to transfer/novate HCI LeaseAgreement dated 21.03.2002 in favour of the Claimant? (Claim No.1)*
>
> *4. Whether Respondent is mandated to terminate the HCI Lease Agreement dated 21.03.2002 for default in payment obligations by HCI? (ClaimNo.2)*
>
> *5. Whether Respondent is liable to pay to the Claimant the land rentals along with interest as*

per the invoices for the land leased to HCI or an equivalent amount in the nature of damages? (Claim No.3)

6. *Whether Respondent is liable to pay MGAP along with interest to the Claimant as per the invoices raised by Claimant or an equivalent amount in the nature of damages? (Claim No.4- part I)*

7. *Whether Claimant is entitled to reimbursement of utility, electricity, water and other dues along with interest in relation to the subject lead as claimed in SoC.? (Claim No.4- part 2)*

8. *Relief and Costs? (Claim No.5)"*

49. As noted above, all the members of the Arbitral Tribunal unanimously held that Claim nos. 2 to 4 were not arbitrable as HCI was not a party to the Arbitration Agreement and those claims could not be adjudicated in its absence. MIAL does not contest the said conclusion. Mr Chidambram had confined the challenge to the impugned award to the extent that it rejects MIAL's Claim no.1. Thus, the controversy is confined to the first and third point of determination as framed by the Arbitral Tribunal.

50. Claim No.1, as set out by MIAL, in its Statement of Claims is reproduced below:

"CLAIM NO.1

41. That the Respondent in terms of Clause 5.2(b)(i) of the OMDA was contractually mandated to novate existing agreements in favour of the Claimant and the same was re-affirmed by the MOLJ in its opinion as conveyed by MOCA vide its letter dated 14.05.2012. That the Respondent extended every assurance that the said novation would be done and

detailed correspondence exchanged between the parties including exchange of draft of novation deed but despite the same, the Respondent has not executed the novation deed in respect of HCI Lease Agreement.

42. That is thus, respectfully submitted that the Claimant prays for a declaratory award that the Respondent is required to transfer / novate HCI Lease Agreement in favour of the Claimant under various covenants of OMDA and pass a direction to the Respondent to transfer / novate the same;

51. A plain reading of the Statement of Claims indicates that MIAL had founded its claim (Claim no.1) on Article 5.2(b)(i) of the OMDA. MIAL claimed that it was entitled to transfer / novation of HCI's Lease Agreement in terms of Article 5.2(b)(i) of the OMDA. MIAL had also relied on the opinion of the MoLJ, which was forwarded to AAI by the MoCA under the cover of its letter dated 14.05.2012. The said opinion also referred to Article 5.2(b) of the OMDA. The relevant extract of the said opinion as set out by MIAL in its Statement of Claims is reproduced below:

> *"….With regard to existing leases as per the provisions of Article 5.2(b) of the OMDA the same get transferred to the JVC. Therefore, all benefits, liabilities and obligations under such contracts or agreements including lease agreements also accrue to JVC."*

52. AAI had raised a preliminary objection that the disputes raised by MIAL were not arbitrable under Article 15.2.1 of the OMDA. The preliminary objection was pleaded under heading (A) in Part II of the Statement of Defence. It is important to note that the finding in respect

of the first point of determination – *Whether the disputes raised by the Claimant or part(s) thereof are not arbitrable for the reasons stated under heading (A) in Part II of the Statement of Defence* – was required to be returned on the basis of the preliminary objections as pleaded under heading (A) in Part II of the Statement of Defence.

53. AAI had pleaded that the Arbitration Clause (Article 15.2.1 of the OMDA) did not contemplate any disputes under the agreements with third parties including, the HCI Lease Agreement. It contended that, (i) Claims nos.2, 3 and 4 were premised on the obligations of HCI under the HCI Lease Agreement and therefore, were not arbitrable; (ii) MIAL's Claim no.1 for transfer/novation under Section 62 of the Indian Contract Act, 1872 could be carried out only through a mutual agreement with HCI and therefore, HCI's Lease Agreement could not be transferred or novated without the consent of HCI; and (iii) the dispute raised would necessarily involve interpretation of the provisions of agreements other than the OMDA to which MIAL is not a party and therefore, the disputes raised did not fall within the scope of matters that could be submitted to arbitration under Article 15.2.1 of the OMDA.

54. AAI also prayed that the Arbitral Tribunal should pass an order under Section 16 of the A&C Act returning a finding that it lacked the jurisdiction to adjudicate the disputes.

55. Paragraphs 19, 22 and 23, under heading (A) of Part II of the Statement of Defence, setting out the preliminary objections, relevant to the controversy in this petition, are set out below:

"19. As far as Claim No.1 is concerned, novation, under Section 62 of the Indian Contract Act, 1872, can only be carried out through mutual agreement of parties. In other words, the HCI Lease Agreement cannot be transferred / novated without the express consent of HCI, which position is brought out in Clause 24 of the HCI Lease Agreement. At best, assuming without conceding that the Claimant's interpretation of Article 5.2(b)(i) of the OMDA is correct and Existing Leases (including the HCI Lease Agreement) are covered by the said provision, it is for the Claimant to "take best efforts" to obtain novation / transfer of the said Agreement in its favour by seeking HCI's consent to the same, and AAI can only be directed to render "reasonable assistance" in this regard. Specifically, it was for the JVC i.e. MIAL, during the Transition Phase to expend such "best efforts" negotiate with third parties (including HCI) and secure transfer / novation in its favour on mutually acceptable terms. MIAL failed to do this at the relevant time, i.e. during the Transition Phase, and is now belatedly seeking orders directing novation which, by their very nature, cannot be passed without HCI being a party. The relief sought by way of the present Claim is in effect a direction to the third party to these proceedings, i.e., HCI, to grant consent for novation of an agreement entered into by it with the Respondent, which relief cannot be granted in arbitration proceedings between AAI and MIAL.

**** **** ****

22. In summary, it is submitted that the present dispute is not capable of adjudication by this Hon'ble Tribunal, inasmuch as it would necessarily involve interpretation of provisions of agreements other than the OMDA, to which MIAL is not a party, and would involve returning findings occasioning legal prejudice to a party, i.e. HCI, which is not before this Tribunal. The dispute raised in the Statement of Claim does not fall within the scope of matters that can permissibly be submitted to arbitration

under Article 15.2.1 and as such is not arbitrable in accordance with the contract between the parties.

**** **** ****

23. As such, the present case is a fit one for passing of an order by the Hon'ble Tribunal under Section 16 of the Arbitration and Conciliation Act, 1996 finding that it lacks jurisdiction to adjudicate the present dispute. With a view to aid in the swift progress of the present proceedings, the Respondent is however advancing its submissions in this regard along with its substantive reply to the Statement of Claim rather than filing a separate application under Section 16 praying for an appropriate declaration as to the lack of jurisdiction of the Hon'ble Tribunal. The Respondent will however be requesting the Hon'ble Tribunal to frame preliminary issue(s) in this regard and adjudicate the same at an appropriate stage of the proceedings."

56. It is apparent from the above that the preliminary objections raised by AAI regarding the arbitrability of disputes under Claim no.1 was mainly founded on the assertion that transfer / novation of HCI's Lease Agreement could not be done without the express consent of HCI. MIAL questioned the assumption that HCI's consent was required for 'transfer' of the HCI Lease Agreement. It claimed that under Section 109 of the TPA, AAI could transfer its rights under the HCI Lease Agreement, without the lessee's consent and AAI was obliged to transfer its rights under the HCI Lease Agreement in terms of Article 5.2(b) of the OMDA.

57. It was further contended on behalf of MIAL that, Section 62 of the Indian Contract Act, 1872 did not apply to 'transfer' as provided under Section 109 of the TPA. It claimed that since Article 5.2(b)(i) of

the OMDA uses both words 'transfer' and 'novation', AAI was obliged to transfer its rights under the existing lease agreements by way of an assignment if it could not novate the existing leases. According to MIAL, AAI did not require any consent from the lessee (HCI) in such cases.

The Impugned Award (Re: Claim No.1)

58. Justice (Retd.) Mohit S. Shah accepted MIAL's contention that AAI was obliged to transfer the Agreements under Article 5.2.(b)(i) of the OMDA. The learned Arbitrator observed that MIAL was neither seeking any leasehold rights in the land leased to HCI under the Lease Deed nor possession of the said land. He emphasized that MIAL was seeking only transfer / novation of rights of the Lessor (AAI) under the HCI Lease Agreement as flowing from the OMDA without curtailment of the rights of HCI as a lessee under the said lease. He observed that MIAL's Claim No.1 arises under the OMDA and therefore, rejected the contention that Claim no.1 was not arbitrable as HCI was not a party to the arbitral proceedings. The learned Arbitrator further held that Section 109 of the TPA permitted a Lessor to transfer its rights to a third party without requiring the consent of the lessor. The conclusion of the learned Arbitrator in this regard is set out below:

> "M.61. In view of the above, the Tribunal has no hesitation in holding that Claim No.1 made by the Claimant - seeking a declaration that the Respondent is under an obligation to transfer/novate the HCI lease agreement dated

> 21.03.2002 in favour of the Claimant and seeking a direction to that effect involves disputes which arise under OMDA and are arbitrable in the present arbitral proceedings."

59. However, the learned Arbitrator [Justice (Retd.) C.K. Thakker] did not accept the aforesaid view, he held that MIAL's claim was not arbitrable. The learned Arbitrator referred to the decision of the Supreme Court in ***MSK Projects India (JV) Ltd. v. State of Rajasthan and Anr.: (2011) 10 SCC 573*** and observed that it was not open for the Arbitral Tribunal to travel outside the contract and deal with any material not allotted to it.

60. In view of the said finding, the learned Arbitrator [Justice (Retd.) C.K. Thakker] declined to examine the question whether AAI could transfer/assign its rights under the HCI Lease Agreement in terms of Section 109 of the TPA. The relevant extract of the view expressed by the learned Arbitrator [Justice (Retd.) C.K. Thakker] is set out below:

> "C.93. We are not impressed by the argument. We have considered the relevant provisions of OMDA and Lease Deed executed by the Respondent in favour of the Claimant. Perusing various Articles, we have held that Existing Leases did not form part of property demised to the Claimant and, hence, the Claimant had no rights over such properties. Lease in favour of HCI was one of such properties. Since the lease in favour of HCI was executed prior to entering into OMDA and operative, it fell within "Existing Leases" to which OMDA would not apply and Claimant cannot invoke Arbitration Proceedings.

C.94. In view of the above findings, we do not intend to enter into larger issue as to distinction between "novation" and "transfer" or "assignment". We are also not inclined to consider the submission of the learned Senior Advocate for the Claimant that on the facts of the case, it was open to the Claimant to invoke Section 109 of the Transfer of Property Act, 1882.

C.95. Since we are of the view that the Arbitral Tribunal has no jurisdiction in the matter, we express no opinion on contentious issues raised by the parties and leave them to raise all such controversies before an appropriate forum. We also make it clear that we may not be understood to have expressed any opinion, one way or the other on all such issues."

61. The learned Arbitrator [Justice (Retd.) C.K. Thakker] further referred to the decision of the Supreme Court in ***Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels Pvt. Ltd. &Ors.*** *(supra)* and on the strength of the said decision, held that AAI had assigned the functions of the OMDA with reference to the demised area and, MIAL could not step into the shoes of AAI for performance of any functions with reference to an area that had not been demised or leased to MIAL. He reasoned that since the land leased under HCI's Lease Agreement was not a part of the Demised Premises, any dispute relating to the said land was not arbitrable.

62. MIAL had, during the course of the proceedings, referred to Minutes of the Meetings of the OIOC as well as the opinion of the MoCA and MoLJ. The learned Arbitrator held that it was exercising

its limited jurisdiction and could only adjudicate issues covered under the Arbitration Agreement. He further held that the Arbitral Tribunal had no inherent powers to entertain disputes in respect of matters not covered under the Arbitration Clause.

63. The conclusion drawn by the learned Arbitrator is set out below:

> "C.96. Thus, on overall consideration, in our view, the contention raised on the behalf of the Respondent that the Arbitral Tribunal has no jurisdiction to entertain the dispute raised by the Claimant is well founded and deserves to be upheld. We, therefore, hold that the dispute raised by the Claimant in the present proceedings, seeking reliefs in respect of lease granted by AAI in favour of HCI is not maintainable. The Arbitral Tribunal has no jurisdiction to entertain, deal with or decide/adjudicate such dispute in accordance with the provisions of OMDA dated 04-04-2006 and Lease Deed dated 26-04-2006 entered into between the Claimant (MIAL) and the Respondent (AAI). We, therefore, hold that Arbitration Proceedings initiated by the Claimant are not maintainable and deserved to be dismissed on this ground alone."

64. The learned Presiding Arbitrator Justice (Retd.) R.C. Lahoti, considered the draft awards penned by the other two Arbitrators and observed that he was inclined to agree with the draft circulated by Justice (Retd.) C.K. Thakker. He also indicated his reasons for the same. Justice (Retd.) R.C. Lahoti accepted that the lease in favour of HCI was an 'Existing Lease' as defined under the OMDA. He held that Section 109 of the TPA would come into operation only when

there is no contract to the contrary. And, in the present case, there is an existing contract. Consequently, an assignment in favour of MIAL, could not take place during the existence of the lease, without HCI's consent.

65. As noticed above, the draft award circulated by Justice (Retd.) C.K. Thakker must be accepted as the majority award (the impugned award) without considering the additional observations made by the Presiding Arbitrator, which were not a part of the reasoning articulated by Justice (Retd.) C.K. Thakker.

66. The controversy involved in the present petition is whether the impugned award is vitiated by patent illegality as the Arbitral Tribunal had found MIAL's claim that it was entitled to insist on transfer of the HCI's Lease Agreement under Article 5.2.(b)(i) of the OMDA as non-arbitrable.

67. Chapter XV of the OMDA contains provision regarding resolution of disputes. Article 15.1.1 of the OMDA provides that the parties would use their reasonable endeavors to settle any dispute amicably. However, if the dispute is not resolved within a period of sixty days after issuance of a written notice of dispute by one party to another, the provisions of Article 15.2 (Arbitration Agreement) of the OMDA would apply. Article 15.2 of the OMDA is set out below:

> **"15.2 Arbitration**
>
> 15.2.1 All Disputes arising under this Agreement, that remain unresolved pursuant to this Article 15, shall be referred to a tribunal comprising three (3) arbitrators under the (Indian) Arbitration and

Conciliation Act, 1996. Each Party to the arbitration shall appoint one arbitrator and the two arbitrators thus appointed shall choose the third arbitrator who will act as a presiding arbitrator of the tribunal (together forming the "Arbitral Tribunal").

15.2.2 The decision(s) of the Arbitral Tribunal, shall be final and binding on the Parties.

15.2.3 The venue of arbitration shall be New Delhi.

15.2.4 This Article 15.2 shall survive the termination or expiry of this Agreement.

15.2.5 The governing law of the arbitration shall be the substantive laws of India."

68. As noted above, it was MIAL's case that AAI was obliged to transfer / novate the HCI Lease Agreement in its favour in terms of Article 5.2(b)(i) of the OMDA. AAI had raised a preliminary objection in regard to this claim; according to it, the said claim was not arbitrable as Article 15.2.1 of the OMDA did not contemplate disputes under any agreements with respect to third parties. It contended that a novation under Section 62 of the Indian Contract Act, 1872, could be carried out only through a mutual agreement between the parties and the "HCI Lease Agreement" could not be transferred / novated without the express consent of HCI. In the alternative, AAI stated that if MIAL's interpretation of Article 5.2(b)(i) of the OMDA was accepted, it was for MIAL to take best efforts to secure novation / transfer of the HCI Lease Agreement.

69. MIAL contended that it was not necessary to join HCI as a party as it was merely seeking that AAI perform its obligations under

Article 5.2(b)(i) of the OMDA. It also submitted that even if it is concluded that novation is envisaged under Section 62 of the Indian Contract Act, 1872 and the same was not possible; it was, nonetheless, open for MIAL to claim transfer of lease under Section 109 of the TPA. However, the learned Arbitrator [Justice (Retd.) C.K. Thakker] declined to examine the said question in view of his finding that the HCI Lease Agreement was an 'Existing Lease' and did not form a part of the property demised to MIAL. The relevant extract of the view expressed by the learned Arbitrator is set out below:

> "C.93. We are not impressed by the argument. We have considered the relevant provisions of OMDA and Lease Deed executed by the Respondent in favour of the Claimant. Perusing various Articles, we have held that Existing Leases did not form part of property demised to the Claimant and, hence, the Claimant had no rights over such properties. Lease in favour of HCI was one of such properties. Since the lease in favour of HCI was executed prior to entering into OMDA and operative, it fell within "Existing Leases" to which OMDA would not apply and Claimant cannot invoke Arbitration Proceedings.
>
> C.94. In view of the above findings, we do not intend to enter into larger issue as to distinction between "novation" and "transfer" or "assignment". We are also not inclined to consider the submission of the learned Senior Advocate for the Claimant that on the facts of the case, it was open to the Claimant to invoke Section 109 of the Transfer of Property Act, 1882.
>
> C.95. Since we are of the view that the Arbitral Tribunal has no jurisdiction in the matter, we express no opinion on contentious issues raised by the parties

> and leave them to raise all such controversies before an appropriate forum. We also make it clear that we may not be understood to have expressed any opinion, one way or the other on all such issues."

70. MIAL's claim that AAI is obliged to transfer the HCI Lease Agreement in its favour under Article 5.2(b) of the OMDA is, undoubtedly, a claim arising under OMDA. The Arbitral Tribunal was fully competent to decide the dispute whether AAI was obliged to transfer the HCI Lease Agreement in terms of Article 5.2(b) of the OMDA or not. The Arbitral Tribunal did not require to look any further than the Indian Contract Act, 1872, TPA and OMDA to decide this dispute.

71. This Court in ***Salter India Pvt. Ltd. v. Rakesh Nayyar: 2009 SCC OnLine Del 3049*** following the decision in ***A.M. Mair& Co. v. Gordhandass Sagarmull: AIR 1951 SC 9,*** has observed as under:

> "10. That brings me to the core question for adjudication in this appeal i.e. whether the Arbitral Tribunal is right in holding the disputes to be not arbitrable. The Supreme Court in ***A.M. Mair & Co. v. Gordhandass Sagarmull MANU/SC/0040/1950: AIR 1951 9*** held that the test to determine whether a claim in dispute is covered by arbitration Clause in a contract is whether it is necessary to have recourse to the contract to settle the dispute that has arisen. The same principle has been reiterated in ***Tarapore and Co. v. Cochin Shipyard Ltd. MANU/SC/0002/1984: AIR 1984 SC 1072*** and in ***Rajasthan State Mines & Minerals Limited v. Eastern Engineering Enterprises: MANU/SC/0601/1999: AIR 1999 SC 3627.*** The test formulated is that in setting a

> dispute, a reference to the contract is necessary, then such a dispute would be covered by the arbitration clause.
>
> 11. In the present case, it cannot be disputed that the claims of the appellant whether maintainable or not were arising out of the relationship with the respondent as Managing Director of the appellant. The said relationship emanated from the agreements aforesaid providing for arbitration. It cannot thus possibly be said that the said disputes, controversies or differences are not in relation to the agreement.
>
> 12. The reasoning given by the arbitrator that since the reliefs claimed for breach of agreement were different from the remedies provided under the agreement for such breach, in my view is not a reasoning under Section 16 of the Act. The same would, in the light of wide amplitude of arbitration clause, not make the dispute non-arbitrable even if the same is found by the arbitral tribunal to be a good reasoning for defeating the claim on merits."

72. As noted above, AAI's preliminary objection regarding arbitrability of MIAL's claim in question, was premised on the assertion that the said dispute could not be adjudicated without joining HCI as a party. MIAL had disputed the same as according to MIAL, AAI could transfer the HCI Lease Agreement under Section 109 of the TPA without HCI's consent. This controversy is also squarely covered within the scope of the Arbitration Clause.

73. The question as to whether a party is required to perform any act as a part of its obligation, in terms of a contract is indisputably, a question that arises in connection with the contract. In all fairness, Mr Shankar also did not contest this proposition. On the contrary, he submitted that a meaningful reading of the impugned award indicates

that the learned Arbitrator [Justice (Retd.) C.K. Thakker] had adjudicated the aforementioned dispute.

74. It is thus clear that the issue arising from the preliminary objections raised by AAI and MIAL's defense to those objections were, in effect, not answered by the learned Arbitrator.

75. The learned Arbitrator [Justice (Retd.) C.K. Thakker] proceeded on the basis that the HCI Lease Agreement, being an Existing Lease, was excluded from the Demised Premises under the Lease Deed granted to MIAL. He reasoned that the disputes were not arbitrable as the existing leases were excluded from the operation of the OMDA and therefore, the Arbitration Clause (Article 15.2 of the OMDA) would not be applicable to the said leases. The relevant extract of the said reasoning of Justice (Retd.) C.K. Thakker is reproduced below:

> "C.55 It is thus clear that on 04-04-2006, when OMDA was entered into between the Claimant (MIA) and Respondent (AAI), Lease Agreement between AAI and HCI was very much there since it was executed on 23-01-2002 and also operative since it was for 29 years. Since "Existing Leases" were excluded from operation of OMDA entered into between the Claimant and the Respondent, Arbitration Clause (Article 15.2 of OMDA) cannot apply to the said lease.
>
> C.56. In our view, the submissions of the Learned Senior Advocate for the Respondent are well founded and must be upheld. In our opinion, liberal interpretation sought to be canvassed by the Learned Senior Advocate for the Claimant would not help the Claimant. To us, the ration laid down

by the Hon'ble Supreme Court in *Renusagar* has no application to the facts of present case.

**** **** ****

C.61. In our considered opinion, in the case on hand, the Arbitration Clause (Article 15.2) is amply clear and leaves no room for doubt as to its application. It states that all disputes arising under the Agreement (i.e. OMDA) that remain unresolved shall be referred to a Tribunal. Parties to OMDA are (1) Airports Authority of India (AAI) and (2) Mumbai International Airport Private Limited (MIAL). "Dispute" is defined to mean "any dispute, difference, question or controversy between the parties arising out of, in connection with or in relation to this Agreement" i.e. OMDA.

C.62. Admittedly, HCI is not a party to OMDA nor is before the Arbitral Tribunal. On the contrary, Article 2.6.1 of OMDA excluded "any Existing Lease(s)" from the operation of OMDA. Moreover, Lease Deed executed between AAI and HCI provided Arbitration Clause for settlement of dispute between the parties to Lease Deed.

C.63. Thus, in our view, the Respondent is right in submitting that the Arbitral Tribunal has no jurisdiction to deal with the dispute raised by the Claimant."

76. There is no dispute that the HCI Lease Agreement is an Existing Lease under the OMDA and was not a part of the Demised Premises under the Lease Deed. MIAL had not claimed (under its Claim no.1) that the HCI Lease Agreement was a part of the Demised Premises or, that AAI had created any interest in respect of the said premises. MIAL's claim that AAI was obliged to transfer the HCI Lease

Agreement in its favour, rested on its interpretation of Article 5.2(b)(i) of the OMDA, which reads as under:

> 5.2(b)(i) **Existing Contracts**: The JVC shall take best efforts, and AAI shall render all reasonable assistance, to transfer /novate AAI under all existing contracts and agreements between AAI and any third party, as relatable to the Airport, with the JVC, on the principle that such transfer/ novation would release AAI of all liabilities and obligations under such contracts or agreements as arising from and after the Effective Date (except those pertaining to Legacy Matters). The Parties, along with relevant third parties shall execute necessary documentation or put in place necessary arrangements for the aforesaid transfer / novation. The Parties expressly agree that in respect of existing arrangements of Indian Airlines Ltd. and Air India Ltd. for usage of land and/or building at the Airport and Public Sector oil companies in respect of common hydrant-infrastructure for aircraft fuelling at the Airport, for which no express written contract has been executed or presently exists, such existing arrangements shall continue for a period of six (6) months from the Effective Date and the JVC shall during such period mutually agree with Indian Airlines Ltd. Air India Ltd. and Public Sector Oil companies in respect of such arrangements going forward. Provided however that any third party contract that cannot be specifically novated lo the JVC for any reason whatsoever shall be performed by the JVC (at its own risk and cost) for and on behalf of AAI (as if the JVC was an original party to the said contracts, in place of AAI). Provided further that JVC shall indemnify and keep indemnified the AAI against any liability or costs arising under such contracts (including for the avoidance of doubt, contracts relating to capital works-in-progress included in the list of Mandatory Capital Projects), including specifically, payments due to the counter-parties of such contracts or to any other entities pursuant to such contracts. Any benefits arising from such contracts shall also vest

> with JVC. Nothing contained in this Article 5.2(b)(i) shall prejudice the payment obligation of the JVC in respect payments due from August 30, 2005 under contracts .for capital works-in-progress as contained in Article 5.2(b)(ii) hereof."

77. The dispute whether MIAL was correct in its assertion, was clearly an arbitrable dispute and the finding that such dispute is not arbitrable is patently erroneous.

78. The learned Presiding Arbitrator [Justice (Retd.) R.C. Lahoti] had found that Section 109 of the TPA was not applicable as in his view, the same would come into operation only if there was no contract to the contrary and in the present case, such a contract existed. The learned Presiding Arbitrator also held that assignment of the HCI Lease Agreement to MIAL could not take place during the term of the said lease except with the consent of HCI. He also observed that HCI had certain rights and privileges under administrative law being a tenant of a public authority and the same would be lost once it became a tenant of MIAL. Therefore, HCI could not be forced to become a tenant of MIAL unless permitted by a contract or by its consent or by operation of law. Whether this view is correct is not relevant as no such findings were returned by Justice (Retd.) C.K. Thakker. As noted above, Justice (Retd.) C.K. Thakker had declined to examine these questions in view of his finding that the disputes were not arbitrable.

79. Mr. Shankar had earnestly contended that this was not a case where the Arbitral Tribunal had declined to examine the disputes on

the ground that they were not arbitrable; the Arbitral Tribunal had in fact interpreted the Contract (that is, OMDA). And, the question regarding interpretation of a contract was within the jurisdiction of the Arbitral Tribunal and therefore, the impugned award did not warrant any interference under Section 34 of the A&C Act.

80. He submitted that the findings in the majority award regarding jurisdiction of the Arbitral Tribunal amounts to an examination on merits. He submitted that once the majority Arbitrators had concluded that the OMDA did not vest any rights with MIAL in respect of the existing Leases, it is implicit that they had also concluded that MIAL did not have any right to obtain novation / transfer of the HCI Lease Agreement in its favour under any provisions of the OMDA. It is thus, apparent that the Arbitral Tribunal had rejected MIAL's contention that it was entitled to transfer of the HCI Lease Agreement under Article 5.2(b)(i) of the OMDA.

81. He also submitted that the majority Arbitrators were also of the opinion that the issue raised is covered by the decision of the Supreme Court in ***Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels Pvt. Ltd. & Ors.*** *(supra)*. In that case, the Supreme Court had held that MIAL had no right, title or interest in such property and, the fact that it expected that the property would be leased to it in the future on happening of a specified event, could not be construed to mean that MIAL had any semblance of right, title or interest in the property. He submitted that this clearly indicates that the majority Arbitrators were of the opinion that MIAL had no right,

title or interest in respect of HCI's Lease Agreement under the OMDA and therefore, its claims were not sustainable.

82. It is palpable that the reasons that persuaded the learned Arbitrator, Justice (Retd.) C.K. Thakker, to hold that the disputes were not arbitrable may be relevant for adjudication of the question whether AAI was required to transfer the HCI Lease Agreement under the OMDA. The HCI Lease Agreement was an Existing Lease and therefore, the majority had held that disputes arising in respect of the said lease were not arbitrable. If this reasoning is extended, it may be construed that MIAL had no right to seek transfer of the HCI Lease Agreement under Article 5.2(b)(i) of the OMDA and therefore, its claim was unmerited. But that is a question that the Arbitral Tribunal was required to address. It is certainly a dispute that is arbitrable.

83. However, it is necessary to bear in mind that it was MIAL's claim that notwithstanding that the HCI Lease Agreement is excluded from the Demised Premises (as it was an Existing Lease) and MIAL had not acquired any leasehold right in respect of the land leased to HCI; it was, nonetheless, entitled to transfer of AAI's rights in respect of the HCI Lease Agreement in terms of Article 5.2(b) of the OMDA. This dispute does not appear to have been addressed as the learned Arbitrator Justice (Retd.) C.K. Thakker found that the disputes were not arbitrable.

84. It is important to note that the entire discussion in the award penned down by Justice (Retd.) C.K. Thakker relates to the first point for determination as framed by the Arbitral Tribunal – *Whether the*

disputes raised by the Claimant or part(s) thereof are not arbitrable for the reasons stated under heading (A) in Part II of the Statement of Defence?" [underlined for emphasis]. The third point for determination – *"(iii) Whether Respondent is mandated under OMDA to transfer / novate HCI Lease Agreement dated 21.03.2002 in favour of the Claimant?*" was not decided.

85. This is amply clear from the following extracts of the award rendered by Justice (Retd.) C.K. Thakker:

> "C.25. Having gone through the entire record, our findings on the above Points for Determination are as under:
>
> **FINDINGS**
>
> 1. Disputes raised by the Claimant are not arbitrable.
> 2. Does not survive.
> 3. Does not survive.
> 4. Does not survive.
> 5. Does not survive.
> 6. Does not survive.
> 7. Does not survive.
> 8. Does not survive.
>
> *** *** ***
>
> C.100. Since we have upheld the Preliminary Objection raised by the Respondent and have held that the Arbitral Tribunal has no jurisdiction to deal with and adjudicate the dispute raised by the Claimant, we do not intend to consider individual claims of the Claimant.
>
> C.101. We may, however, clarify that in view of our findings on Point no. 1, we express no opinion on those claims.

C.l02. Points 2 to 8, thus do not survive and, therefore, have not been decided.

C.l03. Since we are disposing the matter on the ground of absence of jurisdiction of the Tribunal, we are not expressing any opinion on the merits of the matter on contentious issues raised by the parties. We also make it clear that we may not be understood to have expressed any opinion one way or the other on these issues. As an when such issues will be raised by the parties before an appropriate forum, they will be decided on their own merits without being influenced or inhibited by any observations made by us in the present award.(Point no. 2 to 8)"

[underlined for emphasis]

86. It is clear from the aforesaid extract of the impugned award that Justice (Retd.) C.K. Thakker had, in unambiguous terms, clarified that he had not expressed any opinion regarding Points nos. 2 to 8 which includes Point no. 3 as mentioned above. It would thus, not be open to AAI to contend to the contrary.

87. Mr. Shankar had also contended that the Arbitral Tribunal had not expressed any opinion regarding the question whether AAI was obliged to transfer the HCI Lease Agreement in favour of MIAL as MIAL had founded its claim on grounds of public law which was outside the scope of the OMDA. The Arbitral Tribunal had held that it did not have any plenary powers and therefore, had left the said question open. The said contention is unmerited as Point no. 3 specifically requires the Arbitral Tribunal to determine whether AAI was *"mandated under OMDA to transfer / novate HCI Lease*

Agreement" in favour of MIAL. The said point for determination was framed by the Arbitral Tribunal in unambiguous terms and did not require the Arbitral Tribunal to decide whether AAI was obliged to transfer the HCI Lease Agreement on the basis of any public law principle. The Arbitral Tribunal was merely to decide whether AAI was obliged to do so in terms of the OMDA. As noticed above, no finding in this regard was rendered by Justice (Retd.) C.K. Thakker.

88. The contention that the decision in the case of ***Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels Pvt. Ltd. & Ors.*** *(supra)* squarely covers the controversy, is erroneous. The said decision was rendered by the Supreme Court in regard to MIAL's plea to be impleaded in an action instituted by AAI in respect of a lease / licence. The Supreme Court had held that MIAL had no locus as it had no right, title or interest in the property and it could not seek impleadment as it was not a necessary or proper party in an action between AAI and a third party. In the present case, MIAL was not seeking any right, title or interest under the HCI Lease Agreement but it was seeking a declaration that AAI was obliged to transfer / novate the HCI Lease Agreement. The question of MIAL claiming any interest in the HCI Lease Agreement would arise only once AAI had transferred the same. The question whether AAI was obliged to do so was precisely the dispute before the Arbitral Tribunal.

89. Mr. Shankar had referred to the decision of the Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*** *(supra)*. He had submitted that construction of the

terms of a contract is primarily for the Arbitrator to decide and therefore, no interference is warranted. There is no cavil with the aforesaid proposition. The Supreme Court had in a number of decisions clarified the limited scope of interference under Section 34 of the A&C Act. In ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*** *(supra)*, the Supreme Court had faulted the approach of Courts to set aside arbitral awards after dissecting and reassessing the factual aspects of cases. The Supreme Court had stated that this approach would lead to corrosion of the object of the A&C Act to provide minimal judicial interference with the arbitral awards. It is relevant to refer to paragraph 29 of the said decision, which reads as under:

> "**29.** Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the

> arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."

90. In the present case, this Court is of the view that the impugned award does fall within the narrow scope where interference is permissible. This Court is of the view that the conclusion of the Arbitral Tribunal that it did not have jurisdiction to decide the question – *"(iii) Whether Respondent is mandated under OMDA to transfer / novate HCI Lease Agreement dated 21.03.2002 in favour of the Claimant?*" [Point no. 3] is *ex facie* erroneous and not a view that can be accepted as a plausible one. The Arbitral Tribunal had declined to exercise the jurisdiction to address the aforesaid question, which strikes at the root of the matter.

91. In view of the above, this Court is of the view that the impugned award to the extent that the majority Arbitrators have held that the Claim no. 1 is not arbitrable, is liable to be set aside.

92. Justice (Retd.) Mohit Shah had analyzed the provisions of the OMDA. The learned Arbitrator had found that Claim no. 1 was arbitrable since it related to interpretation of the OMDA. The learned Arbitrator had also observed that in terms of Article 2.1.1 of the

OMDA, it conferred the *"exclusive right and authority to undertake the functions of operation and ..... management of the Airport,"* which were earlier performed by AAI. This also included the right to *"regulate the use by the third party of the Airport"*. The learned Arbitrator was of the view that the expression 'Airport' was not confined to only the Demised Premises leased to MIAL but would also include other areas if the context so demanded. It was obvious from certain clauses that the word 'Airport' was not used in a limited sense. Articles 5.1 and 5.2 of the OMDA also use the expression *"as relatable to the Airport"*, which is wide and does not confine the matter to Demised Premises alone. The learned Arbitrator was of the view that since the HCI Lease Agreement was relatable to the Airport, it was required to be transferred / novated in favour of MIAL in terms of Article 5.2(b) of OMDA.

93. MIAL prays that the opinion of Justice (Retd.) Mohit Shah be accepted as an award in place of the majority opinion. This relief cannot be granted. This Court has not examined the dispute on merits as it is not required to do so. In any view this Court cannot supplant its view over that of the Arbitral Tribunal. The scope of examination in this case is limited to the question whether the conclusion that the dispute is not arbitrable is patently erroneous. The contention advanced on behalf of AAI that this Court cannot substitute or modify an Arbitral Award is merited. This has been authoritatively held by the Supreme Court in ***The Project Director, NHAI v. M. Hakeem & Anr.: 2021 SCC OnLine SC 473.*** A minority opinion or a dissenting note entered by an arbitrator, may be referred for considering the

challenge to the majority award. A party challenging the award is entitled to refer to it for its persuasive value. However, the minority opinion / dissenting award cannot by any stretch substitute the arbitral award. The majority opinion (in this case the award penned down by Justice (Retd.) C.K. Thakker) is to be construed as the arbitral award and the same cannot be substituted by the opinion of Justice (Retd.) Mohit Shah. In view of the above, MIAL's prayer to consider the view of Justice (Retd.) Mohit Shah as a binding award is unsustainable and, is accordingly rejected.

94. In view of the above, the impugned award is set aside. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

FEBRUARY 28, 2022
'gsr'/v

Click here to check corrigendum, if any