Delhi Airport Metro Express Pvt. Ltd. vs Caf India Pvt. Ltd. & Anr. on 14 August, 2014

Author: Manmohan Singh

Bench: Manmohan Singh

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*       IN THE HIGH COURT OF DELHI AT NEW DELHI

%                           Judgment pronounced on: August 14, 2014

+                     I.A. No.10776/2014 in CS(OS) 1678/2014

        DELHI AIRPORT METRO EXPRESS PVT LTD        ..... Plaintiff
                     Through Mr.Arvind Nigam, Sr.Adv. with
                             Mr.Dinesh Pardasani, Ms.Milanka
                             Chaudhury & Ms.Isha J. Kumar,
                             Advs.

                            versus

        CAF INDIA PVT LTD & ANR.                  ..... Defendants
                      Through Mr.Arun Kathpalia, Adv. with
                                Mr.Bishwajit Dubey, Mr.Mohammad
                                Ali Khan, Mr.Aman Avinav &
                                Mr.Shantanu Tyagi, Advs.

        CORAM:
        HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.
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1. This is a suit for declaration and permanent injunction filed by the plaintiff against the defendants seeking declaration that the arbitration agreement under the contract between plaintiff and defendant No.1 is illegal, null and void and unenforceable; the commencement of the arbitration proceedings by the defendants at London before ICC is null, void and of no legal consequence; and a permanent injunction restraining the defendants from pursuing the arbitration proceedings at ICC London. Along with the suit an application being I.A. No. 10776/2014 under Order 39 Rule 1 and 2 CPC was also filed.

2. Brief facts for the purpose of adjudication of the present matter are that the Plaintiff Company is a Special Purpose Vehicle incorporated for the purposes of operating the Delhi Airport Metro Express Line (hereinafter referred to as the "Project"). The Project connects the Indira Gandhi International Airport, New Delhi, India with the city of New Delhi.

3. For the purpose of bidding in a tender issued by the Delhi Metro Rail Corporation (hereinafter referred to as "DMRC") for award of the Project, Reliance Infrastructure Limited (hereinafter

referred to as "Reliance") and Construcciones Y Auxiliar De Ferrocarriles, SA (Defendant No.2) formed a consortium. The consortium's bid for the Project was accepted and it was awarded the Project on 21st January 2008. Pursuant to the requirements of the bid, the consortium incorporated the plaintiff with Reliance holding 95% equity and defendant No.2 holding the remaining 5%. Subsequently, the Concession Agreement was executed between the plaintiff and DMRC on 25th August, 2008 (hereinafter referred to as the "Concession Agreement") for implementing the Project.

4. Pursuant to the Concession Agreement, the plaintiff and defendant No.2 entered into a Rolling Stock Supply Contract dated 30th June 2008 (hereinafter referred to as the "supply contract") for supply of Rolling Stock for the Project. The plaintiff and defendant No.2 also entered into the Maintenance Services Agreement dated 30th June 2008 ("Maintenance contract") for the purpose of maintenance of the Rolling Stock. The Maintenance Contract contained a Dispute Resolution clause (hereinafter referred to as the "Arbitration Clause"). The same is reproduced as following:

> "ARTICLE 14 DISPUTE RESOLUTION 14.1 In case of disputes, the Parties hereby agree to exhaust all informal senior level determination mechanisms before submitting a request to settle them under the formal dispute resolution system.
>
> 14.2 Any dispute arising in connection with the interpretation or performance of this Contract shall be finally settled by arbitration under the rules of the International Chamber of Commerce, Paris ("ICC"). The Arbitration Tribunal shall consist of three arbitrators.
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> One arbitrator shall be nominated by each of the Parties and the third arbitrator shall be a person nationality and origin other than India or Spain, and shall be appointed by the ICC in accordance with the "Rules of ICC as Appointing Authority in UNCITRAL or Adhoc Arbitration Proceedings";
>
> 14.3 The arbitration shall take place in London and the language of the arbitration shall be English.
>
> 14.4 The Parties expressly exclude the application of Part 1 of the Indian Arbitration and Conciliation Act 1996.
>
> 14.5 Continuation of performance;
>
> Pending final resolution of any dispute, the Parties shall continue to perform their respective obligations hereunder 14.6 Governing Law and Jurisdiction:
>
> 14.6.1 This Contract shall be governed by and construed in accordance with the laws of India.
>
> 14.7 Survival 14.7.1 It is expressly stated herein that the provisions of this Article 14 shall survive termination or expiry of this Contract."

5. It is stated in the plaint that subsequently, defendant No.2 vide Assignment Agreement dated 17th May, 2010 (hereinafter referred to as the "Assignment Agreement") novated the Maintenance Contract in favour of defendant No.1 which is a wholly owned subsidiary of defendant No.2. It is the case of the plaintiff that the terms and conditions, including the Arbitration Clause, remain unchanged and since defendant No.1 is a wholly owned subsidiary of defendant No.2, after the execution of the Assignment Agreement, for all intents and purposes, the Maintenance Contract was now between the plaintiff and the defendant No.1. In other words, the Maintenance Contract was now between two Indian companies incorporated under the laws of India. It has been stated that defendant No.1 has been providing maintenance services to the plaintiff and raising invoices.

6. Due to certain circumstances, the Concession Agreement was terminated by the plaintiff, pursuant to which the plaintiff handed over the Project to DMRC with effect from 1st July, 2013. Consequently, the Maintenance Contract was terminated in terms of provisions of the Maintenance Contract.

7. It has been stated in the plaint that there were (and still are) certain disputes/differences between the parties under the Maintenance Contract. There are disputes pending between the plaintiff and defendant No.2 also in relation to the supply contract for the Rolling Stock.

8. It has further been stated that in accordance with Article 14.1 of the Maintenance Contract, the parties were to first resolve their disputes through senior level determination. However, to the shock and surprise of the plaintiff, the defendant No.1 without resorting to the same, pursuant to the Arbitration Clause, commenced arbitration under the International Chamber of Commerce, Paris (hereinafter referred to as "ICC") by submitting its Request for Arbitration (hereinafter referred to as "RFA") on 21st January, 2014 jointly with defendant No.2. It has been stated that the defendants, in a vexatious and malafide manner sought to refer their disputes under both the Maintenance Contract and supply contract to the ICC seeking adjudication of their disputes in single arbitration proceedings. Defendants have appointed their nominee arbitrator, and the plaintiff has nominated their arbitrator. The presiding arbitrator is yet to be appointed. The plaintiff submitted its Answer (on 28th April, 2014) to the RFA submitted by the defendants.

9. It has been stated by the plaintiff that the said action of the defendant No.1 to refer the disputes between the plaintiff and defendant No.1 under the Arbitration Clause is barred by law, illegal and against the public policy of India. The Arbitration Clause is unlawful, illegal and unenforceable due to the following reasons:

> (i) The Arbitration Clause provides for the seat of arbitration to be outside India i.e. London (Article 14.3);
>
> (ii) The Arbitration Clause excludes application of Part-I of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") (Article 14.4);

10. It has been further stated that under the laws of India, two Indian residents or companies incorporated in India entering into a contract must be governed by the laws in force in India and the

intention of the legislature while enacting the Act was also that two Indian companies cannot be permitted to derogate from Indian laws. This principle is a part of the public policy of India. Any provision in the contract attempting to avoid the applicability of laws of India is unlawful and unenforceable. The parties cannot enter into a contract so as to have the seat of arbitration outside India.

11. It is contended by the plaintiff that since defendant No.1 and the plaintiff are two Indian companies, they cannot, by any stretch of imagination, exclude the applicability or the operation of Indian law, by contract or otherwise. It is submitted that the Supreme Court has, in a number of cases, held that two domestic parties cannot by agreement or otherwise contract out of the municipal laws of India. Any clause providing for the same is illegal and unenforceable. The Part I of the Act necessarily applies to all arbitrations arising between domestic parties. In other words, two Indian parties involved in a domestic dispute cannot contractually agree to denude the Courts of this country of their jurisdictions with respect to a legal dispute arising between the two parties in India. Two Indian parties cannot agree to exclude Part I of the Arbitration Act, and that Part I will mandatorily apply to arbitration between two Indian entities.

12. It is submitted that Article 14.3 of the Arbitration Clause which provides that the seat of arbitration to be outside India (i.e. London) is also illegal and unenforceable under the laws of India. As per the provisions of the Arbitration Act, Part I of the Act is applicable only where the place of arbitration is in India. If the defendant No.1 is allowed to pursue arbitration (under the Arbitration Clause) in London, the provisions of Part I will not be applicable and the defendant No.1 will be able to circumvent the laws of India.

13. It is submitted that there are three potential laws that govern an agreement:

(i) The proper law of contract;
(ii) The law governing the arbitration agreement; and

(iii) The law governing the conduct of the arbitration, also known as the curial law or lex arbitri.

Two Indian parties cannot by agreement or otherwise (in all the above three cases) agree to any law other than Indian laws. Further, considering that the Maintenance Contract is between two Indian parties, the Contract was signed in India and the performance of the contract was in India, adjudication proceedings, including arbitration can only be held in India and in no other country.

14. It is also submitted that Section 23 of the Indian Contract Act, 1872 specifically prohibits the agreements/contracts entered into by any Indian party of which the object is unlawful. Since the Arbitration Clause would circumvent the laws of India and defeat the provisions of law, and also denude the Courts of this country of their jurisdiction, the objective of the Arbitration Clause is unlawful and therefore is liable to be declared null and void. An agreement contrary to the provisions of law would be unenforceable and that it would not be permissible to any person to rely upon the contract the making of which the law prohibits. A contract forbidden by law cannot become valid even if the parties act according to the contract. It is further submitted that the Arbitration Clause is also contrary to the provisions of Section 28 of the Indian Contract Act, as it

restrains the parties from exercising their legal rights under the laws of India.

15. It is submitted that, after the execution of the Maintenance Contract, the execution of the Assignment Agreement has made it legally impossible for the parties to seek redressal of their disputes in accordance with the Arbitration Clause since the essence of the jurisdiction of the arbitration tribunal does not exist anymore.

16. In view of the above, it is submitted that the Arbitration Clause has become illegal, void and unenforceable. Hence, the disputes between the parties cannot be decided in accordance with the Arbitration Clause.

17. It is submitted by the plaintiff that by initiating vexatious arbitration proceedings against the plaintiff under an illegal Arbitration Clause, the defendants are harassing the plaintiff and playing fraud upon the plaintiff for the sole purposes of extracting money. It is contended that such vexatious arbitration proceedings are causing grave and unnecessary hardship to the plaintiff as the plaintiff cannot be obligated to participate in such arbitration proceedings which are being conducted in London. Plaintiff cannot be subjected to any unnecessary hardship or put to inconvenience on the basis of an Arbitration Clause which is illegal, null and void on the face of it.

18. Arbitration Clause of the Maintenance Contract is unenforceable and the defendants cannot be permitted to proceed with the arbitration proceedings against the plaintiff and the plaintiff cannot be harassed or subjected to inconvenience.

19. The plaintiff, by virtue of the present suit, seeks a decree of declaration in its favour and against Defendant No.1 that the Arbitration Clause contained in the Maintenance Contract is void, illegal and unenforceable and is thus not binding upon the parties and for permanent injunction restraining the continuation of the vexatious arbitration proceedings bearing No.19997/TO pending before the ICC, London and seeks interim relief in terms of IA No.10776/2014

20. In the written statement filed by the defendants, the defendants have denied and disputed the contentions made by the plaintiff. It is stated that the defendants have the right to have the inter party disputes resolved by ICC, London in terms of Article 22.2 and 22.3 of the supply contract and Article 14.2 and 14.3 of the Maintenance Agreement. Though the plaintiff has only sought to challenge the viability of the dispute resolution arrangement in the Maintenance Agreement, and has not raised even a single averment with regards to the Supply Agreement, yet injunction has been sought against the entire arbitration proceedings.

21. It has been stated that the suit and the application pursuant to which the plaintiff is seeking judicial interference of this Court is barred by section 5 of the Act. Reliance has been placed on the matter of Chatterjee Petrochem and Anr. vs. Haldia Petrochemicals Ltd. and Ors. 2013 (15) SCALE 45 and Bhushan Steel Ltd. vs. Singapore International Arbitration Centre and Anr. (2010) ILR Delhi 295.

22. The defendants have stated that suit is also barred by Section 14(2) of the Specific Relief Act as the suit is in respect of a subject matter which the plaintiff has contracted to refer to arbitration. The very existence of such an arbitration agreement bars the suit. Reliance in this regard has been made to Bharat Aluminium Company and Ors. vs. Kaiser Aluminium Technical Service, Inc and Ors. (2012) 9 SCC 552, ("BALCO").

23. It is stated in the written statement that this Court lacks jurisdiction to entertain the present matter as admittedly the seat of arbitration under the Maintenance Agreement is London. The arbitration agreement is therefore governed by a foreign law i.e. the English Arbitration Act, 1996. In accordance thereof and the law in London, it is the courts of London who have exclusive jurisdiction to deal with all disputes under the arbitration agreement. Hence this Court's jurisdiction is ousted by the agreement of the parties. Reliance in this regard has been placed upon Shashoua vs. Sharma (2009) EWHC 957, C vs. D (2007) EWCA Civ 1282, Bharat Aluminium Company Ltd. vs. Kaiser Aluminium Technical Service, Inc in Civil Appeal No. 7019 of 2005.

24. It has been stated that plaintiff has not disclosed certain material facts before this Court. Defendant No.2 has moved a petition under Section 9 of the Act with respect to the supply contract which is numbered as OMP No.385 of 2014 and is titled as Construccioners Y Auxiliar De Ferrocarriles, S.A. (CAF) vs. Delhi Airport Metro Express Private Limited. The plaintiff has filed its counter affidavit in the said matter and has taken a stand that since an arbitral tribunal is seized of the matter, it would be contrary to law for the Court to interfere under Section 9 of the Act. The plaintiff is trying to incapacitate the proceedings pending before this Court in OMP No. 385 of 2014 on the pretext that judicial intervention in an ongoing arbitral proceeding would be detrimental to the ends of justice and object of the Act. The plaintiff in the said matter has gone to the extent of asserting that the Arbitral Tribunal is fully empowered to adjudicate upon all potential issues and it intends to file its counter claim against the defendants.

25. It is stated that the parties had agreed to the ICC Arbitration Rules which provide that arbitral tribunal is empowered in all respect to decide the question related to its jurisdiction and other preliminary matters. Reliance in this regard is placed on Oval Investment Pvt. Ltd. & ors. vs. Indiabulls Financial Services Ltd. & Ors. 2009 (4) Arbitration Law Reporter 284.

26. It is denied that the assignment agreement between the defendants novated the Maintenance Contract, rather it was an agreed arrangement between defendant No.2 and the plaintiff for greater efficacy of the Project. It was merely a supplementary agreement to facilitate the working model of the project.

27. It is stated that a communication dated 20th December, 2013 invoking Article 22.1 of the supply contract was sent to the plaintiff for senior level determination. However, parties were unable to arrive at any settlement. Subsequently, the plaintiff invoked the Bank Guarantee of Euro 4,761,963/-. In view of such hostile conduct by plaintiff, all chances of conducting a senior level determination in respect of Maintenance Contract were foreclosed. Even otherwise the prerequisite of a senior level determination was not intended to be a mandatory requirement as such clauses are included in a routine manner in multi tier dispute resolution mechanism.

28. Various judgments have been referred to state that the Arbitration Clause is not illegal or unenforceable under the laws of India or against the public policy of India.

29. The plaintiff in the replication has denied the assertions of the defendants and reiterated and reaffirmed its stand taken in the plaint.

30. The matter came for hearing when Mr. Arvind Nigam, learned Senior counsel appeared on behalf of plaintiff and Mr. Kathpalia, learned counsel appeared on behalf of the defendants.

31. Mr. Nigam, learned Senior counsel for the plaintiff has made his submissions which can be outlined in the following manner:

> a) Firstly, Mr. Nigam, learned Senior counsel argued that the present suit is necessitated on account of the entering into the assignment agreement dated 17th May, 2010, the effect of which is that the defendant No. 2 who was the foreign party under the agreement is no longer a party to the agreements including the maintenance agreement. In effect, the obligations to be performed between the parties under the maintenance contract is between the two Indian entities and thus the arbitration clause containing the exclusion of part I of the Arbitration and Conciliation Act does not survive as the said clause is clearly contrary to the express wordings of the Arbitration and Conciliation Act which defines the international commercial Arbitration and earmark the applicability of Part I and Part II of the Act in respect of domestic and international commercial arbitrations respectively. In this way, it is submission of the learned Senior counsel, the present suit is distinct from the previous cases where such situation had never fallen for consideration before this court and thus the court should not just believe the stand of the defendants that the present suit is barred by the provisions of Section 5 of the Act.

This is due to the reason when the arbitration clause is itself against the public policy, then question of Section 5 of the Act coming in the way of the court does not arise.

b) Secondly, Mr. Nigam, learned Senior counsel for the plaintiff has argued that the arbitration clause is unlawful, illegal and unenforceable due to the following reasons:

> The arbitration clause provides for the seat of arbitration to be outside India i.e. London.
>
> The arbitration clause excludes the applicability of Part I of the Act.
>
> It has been argued that due to operation of subsequent events, the agreement between the parties have become an agreement between two Indian parties and thus such an exclusion of the jurisdiction and contracting out part I of the Act, when the said part is applicable to the Indian parties is clearly against the public policy which is impermissible in law and the same is required to be held unenforceable. The said

clause contained in the maintenance agreement dated 30th June, 2008 is also against the provisions of Section 23 of the Act as it has unlawful object of taking away the power of the Courts to adjudicate upon the disputes, which otherwise fall within the jurisdiction of the courts.

c) It has been argued by Mr. Nigam that the assignment agreement has made the redressal of the dispute through the arbitration impossible in as much as the essence of the arbitration tribunal does not exist anymore. The said arbitration clause in the present form also violates the provisions of Section 28 of the Indian Contract Act as it restrains the parties from exercising their legal rights under the laws of India.

d) Mr. Nigam, learned Senior counsel for the plaintiff in order to substantiate his submissions has relied upon the following judgments:

Gas Authority of India Ltd. v. Spie Capag, S.A. and Others, 1993 (27) DRJ 562 at page 586 and 587 wherein the learned Single Judge of this court explains what constitutes the international commercial arbitration and international commercial transaction. TDM Infrastructure Pvt. Ltd. v. UE Development India Private Ltd, (2008) 14 SCC 271 wherein the Supreme Court has held that the when both the parties to the arbitration agreement are registered as companies in India, it is a case of domestic arbitration and the provisions of section 2 (1) (f) of the Arbitration and Conciliation Act 1996 cannot be invoked in such a case. This judgment was relied upon in order to support the plea that two Indian parties cannot fall within the ambit of the international commercial arbitration and thus cannot exclude the applicability of the part I of the arbitration and Conciliation Act.

Renusagar Power Co Ltd v. General Electric Company and Another, (1984) 4 SCC 679 at page 723 para 50 wherein the Supreme Court has analysed the enactment of the 1940 Act and analysed the provisions relating to foreign award and how the foreign trade gained the importance and the Act of 1940 recognising the international commercial arbitration was aimed at facilitating the international trade.

Videocon Industries Limited v. Union of India, (2011) 6 SCC 161 was relied upon to show how proper law of contract, lex arbitri and curial law operates in an international commercial arbitration and further that the facts in the present case are distinguishable from that of Videocon's case and in the present case two Indian parties cannot be relegated to arbitrate in the foreign court excluding Indian laws altogether.

By raising the aforementioned submissions, it is prayed by the learned Senior counsel for the plaintiff that this court should pass interim orders in terms of IA No.10776/2014 restraining the continuation of the arbitral proceedings pending between the parties in London during the pendency of the present suit.

32. Per contra, Mr. Kathpalia, learned counsel for the defendants has made his submissions which can be outlined in the following manner:

a) Learned counsel for the defendants has argued that the present suit is barred under the provisions of Section 5 of the Arbitration and Conciliation Act which limits the extent of the judicial interference in the arbitration proceedings. It has been argued by the learned counsel for the defendants that the provisions of Section 5 of the Act are as much applicable to the international commercial arbitration as they are applicable to the domestic arbitration and there is no quarrel to this proposition as per the well settled law. Learned counsel relied upon the judgment of the Supreme Court in the case of Chatterjee Petrochem and Anr v. Haldia Petrochemicals Ltd. and Others (supra) and also the case of Bhushan Steel Ltd. v. Singapore International Arbitration Centre and Anr., (supra) in order to support his contention. Thus, as per the learned counsel for the defendants, the present suit clearly falling within the ambit of Section 5 of the Arbitration and Conciliation Act, 1996 is barred under the said provision.

b) Learned counsel for the defendants has argued that the suit is also barred by the provisions of Section 14 (2) of the specific Relief Act, 1963 and in support of the said plea, the defendants relied upon the observations in the case of Bharat Alumunium Company and Others v. Kaiser Alumunium Services, Inc, (supra). It has been argued that though the operation of the judgment in the case of BALCO (supra) is prospective but the statement of law as to the bar of the provisions of Specific Relief Act can never be prospective as Specific Relief Act existed even prior to the passing of the judgment in the case of BALCO and thus this court should hold that the present suit is barred under the provisions of Section 14(2) of the Specific Relief Act.

c) Learned counsel for the defendants has argued that this court does not have jurisdiction to entertain the anti arbitration suit.

To this effect, the following judgments have been relied upon by the defendants:

a. Shashoua v. Sharma (supra) b. C vs. D (supra) c. Bharat Aluminium Company Ltd. vs. Kaiser Aluminium Technical Service, Inc(supra) d. Havels India Ltd. vs. Electrum Sales Ltd. C.s. (OS) No. 2221/2012 (decision dated 16.04.2013) e. Oval Investment Pvt. Ltd. & ors. vs. Indiabulls Financial Services Ltd. & Ors.(supra)

d) Learned counsel for the defendants has urged that the arbitration agreement between two Indian parties having seat outside India is valid one and as such it cannot be said that the arbitration proceedings in instant case are against the public policy or the essence of the arbitration has died or lost the significance. In support of the submission, learned counsel has relied upon the following judgments:

1. Reliance Industries and Anr v. Union of India, Civil Appeal no. 5765/2014 decided on 28.5.2014 by Supreme Court.

2. Videocon Industries Limited v. Union of India (supra).

3. Videocon Industries Limited v. Tamil Nadu Electricity Board & Anr. E.P.SR. No. 25064 of 2004 decided on 09.12.2004.

4. Modi Entertainment Network & Anr. v. W.S.G Cricket PTE. Ltd. (2003) 4 SCC 341.

5. TDM Infrastructure Pvt. Ltd. v. UE Development India Private Ltd (supra).

e) Learned counsel for the defendants has also argued that the arbitration clause in the agreements in the present case including the assignment agreement cannot be said to be against the provisions of Section 28 of the Indian Contract Act as it falls within the explanation appended to the Section 28 of the Contract Act. It has been argued that two entities signing an agreement with open eyes to arbitrate the disputes at the forum of their choice cannot be said to be against the restraint of the legal proceedings. In context, learned counsel for the defendants relied upon the observations of Supreme Court in the case of Reliance (supra).

f) Learned counsel for the defendants has also read over the terms of the assignment agreement dated 17th May, 2010 and it has been argued that though by virtue of clause C of the agreement, the rights and obligations of the defendant No. 2 under the maintenance agreement has been transferred in favour of defendant No.1. However, the defendant No. 2 shall still continue to be responsible and liable to Project Company for the maintenance services under the maintenance agreement by way of clause 2.3 of the assignment agreement. By reading the two clauses together, it has been argued that assignment agreement was only supplementary in nature and intended to operate within the four corners of the principal maintenance agreement. The two agreements ought to be read compositely and harmoniously which point out the complete understanding between the parties.

In view of the aforementioned submissions advanced by the learned counsel for the defendants, it has been prayed that this Court should dismiss IA No.10776/2014 and also hold that the suit of the plaintiff is barred under the provisions of Section 5 of the Act.

33. I have gone through the plaint, written statement, replication and the documents filed along with the same by the parties. I have also given my careful consideration to the submissions advanced by the learned counsel for the parties at the bar. Now, I shall proceed to discuss the various aspects which fall for consideration in the present case and alongside answer the submissions of the learned counsel for the parties.

34. After going through the entire plaint and the submission of the learned Senior counsel for the plaintiff, it is apparent that the entire case of the plaintiff rests on the premise that pursuant to the assignment agreement dated 17th May, 2010, the rights and obligations of the defendant No. 2

which is foreign company stood transferred to the defendant No. 1 and essentially now the maintenance agreement and rights and obligations arising out of the agreements entered into between the parties in form of disputes are required to be determined between two Indian entities and thus, it becomes a case of domestic or local arbitration as against the international commercial arbitration and thus the arbitration clause in the present form as it exists violates the public policy of India.

35. In order to ascertain the correctness of the said premise on the basis of which the suit has been filed, the question which falls for consideration is as to whether pursuant to the assignment agreement dated 17th May, 2010, the rights and obligations of the defendant No. 2 which is a Spanish Company are completely discharged under the maintenance agreement and other agreements between the parties so as to say that it has no role to play in the rights and obligations of the parties under agreement and had exit completely from the agreement. If the answer to the said question is in affirmative, then only the case of the plaintiff and grounds stated therein merits further consideration and on the other hand if the answer is in negative, then the case of the plaintiff is not even required to be further considered as the entire premise of the suit may fail.

36. Let me therefore examine the clauses of the agreements in order to weigh the correctness in the stand of the plaintiff. There are two agreements which are available on record namely Maintenance contract dated 3rd June, 2008 and assignment agreement dated 17th May, 2010 which are also relevant for the purposes of the present discussion. The relevant clauses of the agreements are reproduced hereinafter:

> 1. The maintenance agreement dated 3rd June, 2008 was entered into between Construcciones Y Auxiliar De Ferrocarriles SA (CAF) and Delhi Metro Express Limited (which is named as Project Company under the agreement).
>
> 2. There are various obligations which are laid down in the maintenance agreement both on the part of the CAF and Project Company. There is an Article 8 in the Maintenance Agreement which provides for the assignment and subcontracting of the rights and obligation and the same reads as under:
>
> "ARTICLE 8 ASSIGNMENT AND SUBCONTRACTING 8.1 Neither Party may assign, transfer, sell or in any way encumber its rights and/or obligations under this Agreement, without the prior written consent of the other Party.
>
> 8.2 Notwithstanding anything contained in the Agreement, the Project Company shall be fully entitled, without the consent of the other, to assign its rights and benefits under this Agreement or part thereof to or in favour of its lenders (including the right to further assign such rights and benefits by the lenders) as security for financial assistance provided by them. It is clarified for the avoidance of doubt that the assignment of rights and benefits to the lenders under this Agreement shall not affect the Project Company's obligation under the Agreement.

8.3 Notwithstanding anything contained in this Agreement, each Party shall be fully entitled, without the consent of the other Party, to (i) create a charge in favour of its lenders and bankers for any money due or to become due under the Agreement; and (ii) to assign to such Party's insurers (in cases where the Party's insurer's have discharged such Party's loss or liability) of the assigning Party's right to obtain relief against any other third party liable, provided that an assignment pursuant to 8.3(i) or (ii) above shall not relieve or absolve the assigning Party of its obligations under this Agreement.

8.4 CAF may assign and/or sub-contract its obligations:

(i) to any wholly owned subsidiary of CAF without the prior consent of the Project Company; or

(ii) to any member of CAF's group or any other sub contractors subject to the approval by the Project Company (such consent not to be unreasonably withheld).

CAF shall retain responsibility in full for all its obligations and shall be responsible for any acts, omissions, breach or negligence in case of any such assignment.

8.5 Assignment of warranties 8.5.1 The Project Company shall assign all warranties (including any defect liability period) or any equipment available to the Project Company under any other contract, in favour of CAF, if maintenance of such equipment is within the scope of the Services. CAF shall be responsible for maintaining records of warranty claims and remaining warranty periods for the inspection of the Project Company in relation to all such warranties assigned to CAF."

1. The recital of the assignment agreement dated 17th May, 2010 reads as under:

"A. Delhi Airport Metro Express Private Limited (DAMEPL) (hereinafter the "Project Company") and CAF have entered into Maintenance Agreement (hereinafter defined), for the maintenance of rolling stock in relation to the Airport Metro Express Line Project in New Delhi, from New Delhi Railway Station to Dwarka via international airport (hereinafter the "Project") which, inter-alia, sets out the respective rights and obligations of the Project Company and CAF in relation to the maintenance of rolling stock for the Project; B. During the negotiations held between CAF and the Project Company, prior to the execution of the Maintenance Agreement, both parties agreed on the convenience of having the maintenance services carried out by a local subsidiary of CAF, in India, due to operative and tax-legal reasons."

2. Article 2 of the assignment agreement reads as under:

"Article 2: Assignment 2.1 The parties hereby agree that with effect from the date hereof ("Assignment Effective Date"), all rights, obligations, benefits and interests

whatsoever of CAF under and/or arising out of the Maintenance Agreement are and shall stand transferred by way of Assignment to, vest with and/or be performed by CAF India.

2.2 CAF India hereby undertakes that it shall assume all the rights and shall perform all the obligations of CAF under the Maintenance Agreement, in all respects as if CAF India was a party to the Maintenance Agreement in place of CAF.

2.3 However, notwithstanding the assignment of the Maintenance Agreement to CAF India, CAF shall continue to be responsible and liable to Project Company for the Maintenance Services under the Maintenance Agreement.

2.4 Maintenance Agreement shall remain in full force and effect, except as modified in this Assignment Agreement."

Article 6 of the assignment agreement reads :

"Article 6: Miscellaneous 6.1 Amendments No amendment or waiver of any provision of this Assignment Agreement, nor consent to any departure by any of the Parties therefrom, shall in any event be effective unless the same shall be in writing and signed by the Parties hereto and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which it is given.

6.2 Agreement to Override Other Agreements; Conflicts This Assignment Agreement together with the Maintenance Agreement constitutes a complete and exclusive understanding of the Parties in relation to the subject matters of this Assignment Agreement and the Maintenance Agreement.

6.3 No Waiver; Remedies No failure on the part of any Party to exercise, and no delay in exercising, any right, power or privilege hereunder shall operate as a waiver thereof or a consent thereto; nor shall any single or partial exercise of any such right, power or privilege preclude any other of further exercise thereof or the exercise of any other right, power or privilege. The remedies herein provided are cumulative and not exclusive of any remedies provided by applicable law.

6.4 Severance of Terms If for any reasons whatsoever any provisions of this Assignment Agreement are declared to be void, invalid, unenforceable or illegal by any competent arbitral tribunal or court of competent jurisdiction, such invalidity, unenforceability or illegality shall not prejudice or affect the remaining provisions of this Assignment Agreement which shall continue in full force and effect and in such event, the Parties shall endeavour in good faith to forthwith agree upon a legally enforceable substitute provision as will most closely correspond to the legal and economic contents of the unenforceable provision.

6.5 Language All notices, certificates, correspondence or other communications under or in connection with this Assignment Agreement and Maintenance Agreement shall be in English.

6.6 Counterparts This Assignment Agreement is made in two (2) original copies, each having the same contents and the Parties have read and thoroughly understand the contents hereof and have hereby affixed their respective signatures and seals before witnesses. All counterparts shall constitute but one and the same Agreement.

6.7 Costs and Expenses Each Party shall bear its own costs (and expenses, including without limitation any fees payable to its advisors) in connection with the negotiation, preparation and execution of this Assignment Agreement.

6.8 No Agency The Parties agree that nothing in this Assignment Agreement shall be in any manner interpreted to constitute an agency or partnership for and on behalf of any other Party and the relationship between the Parties is as a principal to principal and on an arm's length basis. Except as otherwise expressly agreed to, nothing contained herein shall confer, on any Party, the authority to incur any obligation or liability on behalf of the other Party or bind the other.

CAF's Account under the Maintenance Agreement shall mean CAF INDIA's following designated bank account:-

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Account Name :        CAF INDIA PRIVATE LIMITED

Account No.     :     0520148019

Branch Address:        Jeevan Bharti Building, 4th Floor,
                       124     Connaught          Circus,
                       Connaught Place, New Delhi -
                       110001

MICR            :     110037002

IFSC CODE       :     CITI0000002

Swift Code      :     CITIINBX

6.9 Notices
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All notices, requests, demands or other communication required or permitted to be given under this Assignment Agreement and /or the Maintenance Agreement and the provisions contained herein shall be written in English and shall be deemed to be duly sent by registered post, postage prepaid or email to the persons and addresses stated in this Assignment Agreement, or at such other address as the party to whom such notices, requests, demands or other communication is to be given shall have last

notified the Party giving the same in the manner provided in this Article, but no such change of address shall be deemed to have been given until it is actually received by the Party sought to be charged with the knowledge of its contents. Any notice, request, demand or other communication delivered to the Party to whom it is addressed as provided in this Article 6.10 shall be deemed (unless there is evidence that it has been received earlier) to have been given and received, if:-

(i) sent by mail, except air mail, 10 (Ten) Business Days after posting it.

(ii) sent by air mail, 6 (Six) Business Days after posting it;

and

(iii) sent by e-mail, when confirmation of its transmission has been recorded by the sender's e-mail account.

(iv) sent by registered post acknowledgement due or speed post acknowledgement.

For abundant caution it is clarified that legal notices and other important communications shall only be sent through registered post or by way of hand delivery.

6.10 Exclusion of Implied Warranties etc. This Assignment Agreement expressly excludes any warranty, condition or other undertaking implied at law or by custom or otherwise arising out of any other agreement between the Parties or any representation by any Party not contained in a binding legal agreement executed by the Parties."

37. From the conjoint reading of the aforementioned provisions, the following position qua the rights and obligations of the parties under the maintenance agreement and the assignment agreement can be easily discerned:

a) That by way of article 8 of the maintenance agreement, the assignment and/or subcontracting in general is not permissible with an exception that CAF may assign or sub-contract its obligations to any of wholly owned subsidiary of CAF without any prior consent of the project company. Thus, the assignment of the obligations by CAF to the wholly owned subsidiary by CAF is permissible under the maintenance agreement itself.

b) The close reading of the recitals alongside the maintenance agreement would show that the assignment agreement has been signed in the backdrop of the existence of the maintenance agreement and is aimed at implementing the terms and conditions of the maintenance agreement and is not in breach or contradiction to the terms of the maintenance agreement. This is due to the reason that when it was contractually permissible under the maintenance agreement for CAF to assign the rights and obligations to its wholly owned subsidiary, then assignment of the rights and

obligations in the form of assignment agreement is clearly aimed towards implementing the obligations of the maintenance agreement in consonance with the same as against in contradistinction to the same or to discharge the obligations of CAF from the maintenance agreement.

c) In order to clarify the position that the rights and obligations of CAF under the maintenance agreement is not discharged, there is a non obstante clause in the form of article 2.3 of the assignment agreement which is explicit in terms when it states that notwithstanding the assignment of the maintenance agreement to CAF India, CAF shall continue to be responsible and liable to project company for the maintenance services under the maintenance agreement. The existence of article 2.3 in the assignment agreement is clarificatory in nature and is a clear indicator towards the intention of the parties which was not to completely discharge the obligations of the CAF/ defendant No. 2 herein from the rights and obligations or responsibilities and liabilities to the project company which is plaintiff company and the defendant No. 2 continues to remain the participant in the maintenance agreement even after the signing of the assignment agreement which is plain from the conjoint reading of the clauses including the non obstante clause Article 2.3 of the assignment agreement.

38. In view of the aforementioned analysis of the combined reading of the agreements, it is clear from the plain reading of the provisions of the agreement that the rights and obligations of the defendant No. 2 is not completely discharged under the maintenance agreement and defendant No. 2 continues to remain one of the participants under the agreement having obligations to perform under the maintenance agreement. The said position also raises prima facie doubts on the premise on which the suit rests in as much as if the defendant No. 2 which is a Spanish entity continues to remain participant under the maintenance agreement even after the execution of the assignment agreement, then it passes human comprehension as to how it can be conceived or even contended that post entering into the assignment, the agreement essentially becomes an agreement between two Indian entities. This is due to the reason that if defendant No. 2 continues to remain the participant under the maintenance agreement, then the rights and obligations to be performed and disputes pursuant to termination of maintenance agreement between the parties shall also include the dispute between the plaintiff vis-a-vis defendant No. 2 and vice versa. Thus, the finding that the defendant No.2 as a foreign company continues to remain a party to the maintenance agreement is crucial in nature and leads to the irresistible conclusion that the nature of the arbitration proceedings does not get altered from international commercial arbitration to domestic or local arbitration.

39. Let me test the prima facie view arrived by me from the reading of the clauses of the agreements that the defendant No. 2 continues to remain participant under the agreement in order to see if the same is legally permissible and what shall be effect of the same on the plaintiff's plea that the assignment agreement is in the nature of novation as contended in paragraph 9 of the plaint.

40. The principle relating to novation of the contract is statutorily engrafted under the provisions of Section 62 of the Indian Contract Act, 1872 which reads as under:

> "62. Effect of novation, rescission, and alteration of contract- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

41. From the plain reading of the Section 62 of Indian Contract Act, 1872 it can be seen that if the parties to a contract agree to substitute a new contract for it or to rescind or to alter it, the original contract need not be performed. The provision has certain essential ingredients and in the presence of which only, the same gets attracted. The said ingredients are:

a) If the parties to the contract agrees to substitute new contract for it.

b) Or to rescind it.

c) Or to alter it.

Then the original contract need not be performed.

The question as to whether the parties to contract agrees to substitute new contract or signed another contract in continuation to the previous one is a question of fact as per the well settled principle of law and has to be determined after the reading the clauses of the agreement and deducing the intention of the parties after reading the clauses of the agreement.

In the instant case, if we apply the said principle to the facts of the present case, I have already done analysis in the preceding paragraphs of my discussion that the reading of Article 2.2 and 2.3 alongside the recitals of the assignment agreement dated 17th May, 2010 would make it explicitly clear that the parties have intended to execute the assignment agreement in order to pave the way towards the implementation of the maintenance agreement as it is contractually permissible under the maintenance agreement to assign or subcontract the obligations by CAF to the wholly owned subsidiary which are defendant No. 2 to defendant No.1 respectfully. There is clearly a contrary intention appearing on behalf of the parties where they have agreed not to substitute the assignment agreement in place of the maintenance agreement but has entered into assignment agreement in order to effectuate the maintenance agreement.

42. Furthermore, article 2.3 as a non obstante clause further makes it plain that the responsibility and liability of the defendant No.2 shall continue to remain under the maintenance agreement which means that the parties never intended to substitute the assignment agreement in place of the maintenance agreement and on the contrary intended to the continue with the maintenance agreement by introducing another participant which is CAF India/defendant No.1 herein in addition to the parties to the existing maintenance agreement. In view of the same, the first ingredient of Section 62 of Indian Contract Act does not get satisfied as the parties never intended to substitute the new contract in place of the old one and on the contrary intended to retain the old one with

certain additional obligations casted on the new participant.

43. So far as the second ingredient is concerned, there is no recession of the maintenance agreement and thus the question of recession does not arise. Lastly, the alteration has also not been done in the maintenance agreement as I have already indicated that it was term of the maintenance contract in the form of Article 8 that CAF can assign or subcontract the obligations to its wholly owned subsidiary without the consent of the project company. Even if one goes strictly by the terms of the contract, then the consent of the plaintiff was not even essential for subcontracting or assignment to defendant No.1 but the assignment agreement was entered into in order to make the terms explicit and clear. In that case, it cannot be said that the assignment agreement alters the maintenance agreement which leads to novation. Further, the existence of the retention of the performance of the defendant No.2 in the form of article 2.3 is also clear indicator that the parties never intended to alter the performance of the defendant No. 2 in the maintenance contract by entering into assignment agreement.

44. In view of the same, the provisions of Section 62 of the Indian Contract Act are prima facie not applicable to the facts of the present case and it cannot be said that the assignment agreement novated the maintenance agreement or in any way discharge the obligations of the defendant No. 2 under the maintenance agreement in view of clear and unambiguous non obstante clause provided in Article 2.3 of the assignment agreement.

45. I have already arrived at the prima facie finding that there exists no novation and the nature of the transaction between the parties remains the same which is in the nature of international commercial arbitration. Still, even it is assumed for the sake of argument that some performance in the agreement has been altered and assigned to the defendant No. 1 which is an Indian entity, the arbitration clause which is a dispute resolution clause as per the well settled principle of law is a collateral term in the contract and cannot perish on account of the change or alteration in the performance as per the well settled principle of law. (See National Agricultural Co-op. Marketing Federation India Ltd. v. Gains Trading Ltd, (2007) 5 SCC 692 and also P.Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corporation and Ors, (2009) 2 SCC 494). I would immediately say that I am conscious of the fact that the argument in the instant case is not simply that the arbitration clause is perished on account of performance coming to an end but it is also that the nature of the arbitration has itself changed on account of assignment agreement. However, the present case is not of such nature but even in case it is so, still if there is a dispute resolution clause, which would include the disputes of diverse nature including the claims arising out of the obligations and breaches prior to the termination and post termination of the agreements between the parties and the matters incidental thereto and more importantly the dispute as to whether there exists a novation of the agreement or not which in the prima facie view of this court, it is not, the arbitration clause in such a case cannot be said to be come to an end or for that matter altered merely because there is exchange of the performances or obligations from one hand to another which in the instant case is defendant No. 2 to defendant No. 1 and simultaneously retaining the obligations of the defendant No. 2 in the maintenance contract. At this stage, holding that an arbitration clause has come to an end believing the stand of the plaintiff by finding novation at prima facie stage which is itself a disputed question between the parties and more so when the plain

reading of the provisions of the agreement speak otherwise would be going against the express terms of the contract and would also be legally impermissible. To this extent, the principle that the arbitration clause is independent to that of the performances under the main contract and is not dependent upon the validity of the performances is equally apposite in the instant case. This finding of mine is independent to the one that there is no novation of the agreement at the first place which is plain from the reading of the provisions of the agreement.

46. The only question remains to be examined is the legal effect of the introduction of the defendant No. 1 as a participant having obligations to perform under the assignment agreement and simultaneously retaining the responsibility of the defendant No. 2 under the maintenance agreement. I find that the legal effect of the same is that both the defendant No. 1 and defendant No. 2 are co- promissors qua their obligations to be performed under the maintenance agreement and assignment agreement respectively. Though in the present case the assignment of rights and obligations of CAF has been done to CAF India/ defendant No. 1 but certain responsibility and liability of CAF/ defendant No.2 herein is still retained qua the maintenance agreement which means that both CAF and CAF India have collective promises and/or obligations to be performed under the maintenance agreement and assignment agreement respectively.

47. Section 43 of the Indian Contract Act, 1872 clearly recognises the principle that there can exist joint promissors towards the performance of the single promise or obligation under the contract. The said Section 43 reads as under:

> "43. Any one of joint promisors may be compelled to perform.-
>
> When two or more persons make a joint promise, the promise may, in the absence of express agreements to the contrary, compel any one or more of such joint promisors to perform the whole promise.
>
> Each promisor may compel contribution: Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.
>
> Sharing of loss by default in contribution: If any one of two or more joint promisors make default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.
>
> Explanation: Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal."

48. From the reading of Section 43 of the Indian Contract Act, 1872 it can be seen that legally it is permissible that there can be two or more persons who make a joint promise and in the absence of the any express agreement to the contrary, the promisee can be compelled any of the joint

promissors to perform the said promise. Thus, the liability of the joint promisors under the law in the absence of the express agreement is joint and several as per the provisions of the Section 43.

49. It is well settled principle of law that Section 43 of the Indian Contract Act, 1872 is a departure from the English law which is that in case of the joint promisors giving a common promise to perform to the promisee, Indian law makes the liability of the promisors joint or several. The promisee has the option to sue either one or all of the promisors in the proceedings and it is no defence in such proceedings that all the joint promissors ought to have been made party in the said proceedings. (This has been laid down in the case of Jainarain Ram Lundia v. Surajmal Sagarmal and Others, 1949 FCR 349. This view has been holding the field till date and has been followed from time to time by the courts even after independence including in the case of Union of India v. The East Bengal River Steamer Services Ltd., AIR 1964 Cal 196.

50. In case the said principles of Section 43 are applied to the facts of the case, it can be seen that there exists an express agreement as contemplated by assignment agreement wherein the obligations of both CAF India as well as CAF are explicitly preserved. Thus, not merely the finding that both the defendant No. 1 and defendant No. 2 are joint promissors is legally tenable as per the wordings of Section 43 of the Indian Contract Act, 1872 but the same is also contractually recognised whereby both the CAF and CAF India have undertaken to act as joint promissors towards their obligations under the maintenance agreement respectively to the extent their obligations overlap in the maintenance agreement. Therefore, it cannot be said that the defendant No. 2 as a joint promisor qua its respective obligation is completely discharged. If there exists any overlap in the performance of the respective performances, the liability of the defendant No. 1 and/ or defendant No.2 is joint and several. Consequently, the dispute arising out of the maintenance agreement as well as the assignment agreement qua CAF and CAF India can lead to joint claims or liabilities depending upon the circumstances in which the respective performances were allocated or in alternative if they are overlapping, then principle of joint and several liability shall be applicable.

51. In view of the same, I find that the defendant No. 2 is not discharged from the obligations arising out the maintenance agreement and continues to remain the participant in the agreement and assignment agreement was executed merely in furtherance of the maintenance agreement and not to novate or alter the same so as to discharge the obligations contained in the maintenance agreement.

52. The resultant effect of the finding that the defendant No. 2 continues to remain as joint promissor or participant in the disputes arising out the maintenance agreement and the assignment agreement is that one of the parties to the arbitral proceedings continue to be a party which is the company or body corporate incorporated under the laws of the country other than India which is Spain in the instant case and thus the proceedings are covered within the realm of Section 2 (1) (f) of the Arbitration and Conciliation Act and as such they are in the nature of international commercial arbitration and thus the parties cannot be said to have committed any fault by exclusion of the part 1 of the Arbitration and Conciliation Act as the proceedings are in the nature of international commercial arbitration only and not the domestic or local arbitration.

53. The above discussion of mine sufficiently answers the submissions advanced by the learned Senior counsel for the plaintiff and also distinguish the judgment passed by Supreme Court in the case of TDM Infrastructure (supra) and all other line of authorities supporting the said proposition being factually different as in the instant case, the arbitral proceedings continue to be in the nature of the international commercial arbitration and the parties cannot be faulted on the count of the violation of the public policy.

54. In view of the aforesaid discussion, I prima facie also express the doubts as to how the suit itself would be maintainable in view of the express wordings of the provisions of section 5 of the Arbitration and Conciliation Act and well settled principle of law laid down by the Supreme Court in the case of Chatterjee Petrochem and Anr v. Haldia Petrochemicals Ltd and Others (supra) and the judgment of this court in the case of Bhushan Steel Ltd v. Singapore International Arbitration Centre and Anr (supra). Still, as I am merely deciding an application seeking interim injunction and in the absence of any application seeking rejection of plaint barred by law, I am not dismissing the present suit as such.

55. Accordingly, IA No.10776/2014 is dismissed and it is clarified that parties may continue with the arbitral proceeding pending before the arbitral tribunal in accordance with the law and without the influence of any finding arrived at by this Court.

CS(OS) 1678/2014

56. List on 14th November, 2014.

Dasti under the signatures of Court Master.

(MANMOHAN SINGH) JUDGE AUGUST 14, 2014