

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION NO. 2605 OF 2015****Mumbai Metropolitan Region****Development Authority,**

an authority established under

the Mumbai Metropolitan

Region Development Authority

Act, 1974, and having

its administrative office at

Bandra Kurla Complex,

Bandra (East), Mumbai 400051.

.. PETITIONER

Versus

1 **The Fare Fixation Committee,**
comprising Mr.Jusice E.Padmanabhan
(Retd), Mr.T.K.Vishwanathan (Retd)
and Mr.Jayanth Kumar Banthia,
through the Ministry of Urban
Development, Union of India

2 **Union of India,** through the
Ministry of Urban Development,
Nirman Bhavan Maulana Azad Road
New Delhi 110001

3 **State of Maharashtra,** through
the Department of Urban
Development, Mantralaya
Madam Cama Road,
Mumbai 400032.

4 Mumbai Metro One Private Limited
a Private Company incorporated
under the provisions of the Companies
Act, 1956 and having its registered
Office at E-4(i) 3rd flor, MIDC area,
Marol, Andheri (East)
Mumbai 400093.

.. RESPONDENTS

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Mr.Aspi Chinoy, Sr. Advocate with Dr.Birendra Saraf, Mr.Ayush Agarwala, Ms.Akriti Sarkar, Mr.C. Nageshwaran, Aditya Thakkar i/b Khaitan & Co. for the petitioner.

Mr.Dushyant Kumar, AGP for the State.

Mr.Vijay Kantharia with Mr.D.P. Singh and Mr.Anil Yadav for Union of India.

Mr.Janak Dwarkadas, Sr. Advocate with Mr.Chirag Kamdar, Mr.D.J. Kikalia, Tushaar Kikalia i/b M/s.Mulla & Mulla for respondent no.4.

**CORAM: DR. MANJULA CHELLUR, CJ.
& M.S.SONAK, J.**

RESERVED ON: 31st OCTOBER, 2017

PRONOUNCED ON: 4th DECEMBER, 2017

JUDGMENT (Per Dr.MANJULA CHELLUR, CJ):

1 The present petition is filed challenging the recommendations and the decision made by the Fare Fixation Committee (hereinafter referred to as 'FFC') for increase in the Mumbai Metro Fare from Rs.9 – Rs.13 in the year 2014-15 which came to be increased to Rs.10 – Rs.110 from January 2015.

2 The petitioner before us is Mumbai Metropolitan Region Development Authority (hereinafter referred to as 'MMRDA'). It is an authority established under Mumbai Metropolitan Region Development Authority Act, 1974 which is mainly concerned with the Planning, Co-ordination and Supervision of proper, orderly and rapid development of areas in the Metropolitan Region of Mumbai. It is also under an obligation to execute the plans, projects and schemes for such development as well as matter connected therewith. The petitioner – MMRDA is also the authority for implementing Metro project i.e. Versova-Andheri-Ghatkopar Corridor Mass Rapid Transit System (Metro project). This came to be

planned by the State Government in order to absolve chaotic conditions faced by users of public transport i.e. BEST buses and local trains.

3 The respondent no.1 is the Fare Fixation Committee constituted by second respondent – Union of India in terms of Section 34 of the Metro Railway (Operation and Maintenance) Act of 2002 {for short known as 'Metro Act'}. The first respondent was constituted by an order dated 7th April 2015 to determine the fares for Metro project. Respondent no.3 is the State of Maharashtra which has constituted/designated the petitioner as Project Implementation Agency for Metro project. Respondent no.4 - Mumbai Metro One Pvt.Ltd (for short known as MMOPL) is a private company jointly incorporated by M/s.Reliance Ltd, Veolia Transport S.A. and the MMRDA and are holding 69%, 5% and 26% shareholding respectively. The MMOPL is a Special Purpose Vehicle (SPV) to undertake the business of designing, building, operating and maintaining the Metro project on Build, Own, Operate and Transfer (BOOT) basis,

subject to and in accordance with the terms of the Concession Agreement which came to be entered into between MMRDA and MMOPL.

4 It is not in dispute that MMRDA as Implementing Agency for Metro project came out with a Detailed Project Report (DPR) providing for actual commencement of operations in 2011, and stipulated that the Metro fares should be fixed at 1.5 times the ordinary (Non Air-conditioned) BEST bus fares. This corresponds to fare ranging between Rs.6 to 10 in 2011 to be revised by 11% every four years. The DPR also estimated Ridership figures ranging from 5.66 lakhs per day in 2011 to 12.06 lakhs passengers per day in 2041. An international competitive bidding/global tenders came to be invited by the MMRDA on 21st August 2004 by a notice. This was an invitation for proposal of Metro Project on BOOT basis subject to terms and conditions specified in the request for proposals. The project was to be implemented on Private/Public Partnership (PPP) basis. Some of the salient features in the proposals were mentioned as under :

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- (a) The Concession Agreement was to be for 35 years, including the construction period of five years.
- (b) The Metro was to operate on an East-West corridor of 11.50 kms along 12 stations.
- (c) The estimated Ridership was 5.66 lakhs per day opening at the beginning in the year 2011 and this was to enhance upto 12.06 lakhs per day at the end of 30 years term in 2041 from 2011.
- (d) The Bidders were, however, required to make their own estimates of Ridership, financial and other details.
- (e) The initial fare was fixed between Rs.6 – 8 – 10 for the year 2003-04 and was subject to upward revision by 11% at every four years.
- (f) Each of the bidder was required to submit a Detail Business Plan indicating arrangement of finances, operation and maintenance plan, sources and usage of the funds, projected annual income statement, cash flow statement etc.

5 The project/concession was to be awarded to the qualified Bidder whose tender complied with the required minimum capital contribution, funding – Viability Gap Funding (VGF) subject to above fare terms.

6 Apparently, amongst the other bidders, the fourth respondent consortium comprising Reliance Energy Ltd and Veolia Transport S.A on 10th January 2006 submitted its complete business plan along with the bid. It is relevant to mention that subject to all technical and commercial considerations being fulfilled, the bidder who ever seeks minimum finance contribution from MMRDA and the State, in the form of Viability Gap Funding was to be considered for the award of Concession Agreement. The Consortium bid sought Rs.1251 crores which after several negotiations was reduced to Rs.650 crores.

7 After evaluation of all the bids based on the recommendations made by MMRDA, the State by resolution dated 14th June 2006 awarded the concession to the Consortium. A Letter of Intent dated 20th June 2006 was accordingly, issued to the Consortium.

8 On 7th March 2007, Reliance Comex was declared as the successful bidder and MMRDA executed a Concession

Agreement with their SPV – MMOPL for implementation for Metro project on BOOT basis. By virtue of this Concession Agreement, MMOPL was contractually required to levy and collect fare from the users of Metro project only in accordance with the Schedule - L i.e. Rs.6 – 8 – 11 for the year 2011 to be enhanced by 11% every fourth year. It is not in dispute that a provision was made for upward revision of the fare beyond the stipulation in Schedule-L in the event of “any unanticipated rise in the operating costs of the Metro project”.

9 The said Metro Project which was to be made operational in the year 2011, was actually made operational only in the year 2014 – 15. Apparently, a dispute between the parties is pending for adjudication in arbitration between the parties as to which of them is liable for delay and who should bear the escalation in the project costs from estimate of Rs.2356 crores as contemplated in the bid raised to Rs.4321 crores alleged to have been costed for completion of the work. The independent consultant one Louis Burger Consulting Pvt. Ltd in its independent final report dated 25th

September 2014 attributed various causes for the delay, as claimed by MMOPL to the acts on omission and commission on the part of MMOPL itself. However, the MMOPL disagrees with the report and blames MMRDA for the delay.

10 A fare order determining the maximum fare which could be charged from the rider using Metro system came to be issued by the State on 3rd September 2013. In terms of this order, as reflected in the Fare Schedule-L to the Concession Agreement at Rs.6 – 8 – 10 for the year 2011 which has to be enhanced by 11% every fourth year. Union of India by order dated 18th November 2013 extended the application of the Metro Act to the project which includes, *inter alia*, the Constitution of a Fare Fixation Committee for the purpose of recommending fare for carriage of passengers by Metro Railway. In terms of Metro Act, MMOPL claims to have become “Metro Railway Administration” as defined under the Metro Act. MMOPL also assumes the right to determine the initial fares under the Metro Act. A Meeting of Board of Directors came to be held on 29th May 2014 wherein MMOPL

sought to unilaterally revise or increase the initial fares stipulated in the Concession Agreement from Rs.9 – 13 for the year 2014-15 to Rs.10 – Rs.40/-. The Directors who were nominated by MMRDA opposed and voted against the said resolution.

11 As stated above, the commercial operation of the Metro project commenced on 8th June 2014, and MMOPL charged an introductory fare at Rs.10/- and achieved a Ridership of 3.58 lakhs per day.

12 When unilateral enhancement in the initial fare came to be made by MMOPL, a dispute arose between MMRDA and MMOPL which came to be submitted to arbitration. MMDRDA also initiated Arbitration Petition in 1096 of 2014 under the Arbitration and Conciliation Act, 1996, seeking interim relief restraining the implementations of the resolution of the Board dated 29th May 2014, revision of fares were unilaterally done.

13 This petition came to be dismissed by learned Single Judge on 24th June 2014. In the Appeal before the Division Bench, MMOPL made a statement that it would charge fare between Rs.10 to Rs.20 as an interim measure. The Division Bench also ordered that the Union of India should be impleaded, so also the State so as to direct the expeditious constitution of FFC in terms of Section 34 of the Metro Act. Ultimately, by an order dated 8th January 2015, the Appeal came to be dismissed by the Division Bench.

14 SLP No.7034 of 2014 came to be filed wherein a direction was given on 16th March 2015 for Constitution of FFC for determination of fares by end of April 2015. This period again came to be extended upto July 2015. However, as an interim measure, MMOPL was given liberty to charge increased fare, subject to condition that 50% of the differential amount be deposited with the Registry of this Court on weekly basis. This condition came to be modified subsequently by order dated 7th August 2015. Since January 2015, MMOPL has been charging fares between Rs.10 to

Rs.40. By a notification dated 7th April 2015, Union of India constituted Fair Fixation Committee comprising of Mr.Justice E. Padmanabhan (Retired), Mr.Justice P.K Vishwanathan (Retired) and Mr.Jayanth Kumar Banthia (Ex. Chief Secretary) in terms of Section 34 of the Metro Act to recommend fare for Metro project. Apparently, in terms of Section 37 of the Metro Act, recommendations made by FFC is binding on the Metro Administration.

15 The FFC by order dated 30th April 2015, appointed three experts bodies/committees i.e. Mr.G. Raghuram,. Ramakrishna T.S, Prashanath Udayakumar of IIM, Ahmedabad. The Welingkar Institute of Management and Development and Research and thirdly Sanjeev Kumar Lohiya, IRSE to assist FFC to arrive at the fares to be recommended.

16 On 24th April 2015, MMOPL made an application seeking revision of fares. MMRDA also made application/responses on 7th May 2015 followed by 22nd May 2015 and

10th June 2016. The above said three Committees submitted their reports. In addition to the three reports of three different experts, a report from Price Water House, Cooper Pvt.Ltd was also placed on record. After analyzing these reports, the FFC came out with the impugned order dated 8th July 2015.

17 In the impugned order, the majority members comprises of Mr. Justice E.Padmanabhan (Retd.) and T.K. Vishwanathan (Retd) have recommended fare revision from Rs.9 to Rs.13 (as in the year 2014-15) to Rs.10 – Rs.110 from the said year onwards. The minority member of the Committee Mr. Jayanth Kumar Banthia has recommended fare revision of Rs.18 – Rs.26. Aggrieved by the same, MMRDA has filed the present Writ Petition challenging the impugned decision of the FFC dated 8th July 2015.

18 Mr.Aspi Chinoy, learned Senior Counsel arguing for the petitioner – MMRDA by referring to provisions of Section 33 and Section 103 of Metro Act, contends that FFC

has totally misinterpreted those provisions, and further argues that, at the most, those provisions empowered FFC to recommend the Metro fares. According to him, while recommending Metro fares, FFC has to necessarily apply the terms and conditions of Concession Agreement dated 7th March 2007 i.e. the rates and the formula for such revision. According to him, FFC totally ignoring the terms and conditions of Concession Agreement dated 7th March 2007, and misconstruing the provisions of Metro Act, has arrived at the impugned fare, and this amounts to excluding vital and relevant considerations.

19 In the alternate, he submits that even though the Concession Agreement may not be *per se* binding on the FFC, nevertheless, the terms and conditions of Concession Agreement which consists of vital and important relevant material, ought to have been taken into consideration by the FFC. To substantiate his contention, he brings to our notice the DPR, RFP, and the Business Plan submitted by consortium for the purpose of bidding process. Therefore, his main

impetus is that FFC has unjustifiably excluded the terms and conditions of Concession Agreement. According to Mr.Chinoy, learned Senior Counsel for the petitioner, by excluding the relevant material, as stated above, FFC has completely destabilized the integrity of the tender process, by which the consortium was awarded the contract for the Metro project. He submits that only on the basis of the Business Plan, consortium could secure the tender in their favour, especially having considered the financial and technical issues mentioned in the Business Plan. Therefore, the impugned decision of the FFC would impact the terms and conditions of the Concession Agreement and it amounts to totally ignoring the binding effect of Concession Agreement, including the term that during the tenure of the project, the tenderer will charge from the commuters the fare at a specified rate, including the revision of the fares as per the specified formulae in the agreement.

20 In terms of DPR and tender documents, the fares were fixed and only the ridership would vary. In other words,

the bidder along with the private partner was to earn profits by maintaining the fixed fares, but only through increased ridership. Mr.Chinoy submits that this was the precise manner in which the Metro project was conceived as a Mass Rapid Transit System. The impugned decision, by which, fares have been increased is by many folds compared to the fares agreed between the parties. Therefore, this would virtually deprive the public from the benefits of the Metro project. According to him, if the impugned decision is allowed, it would change the character of the project thereby frustrating the very purpose of Metro project under which several benefits in the form of VGF, public properties and construction rights over the public properties came to be granted to the project proponent. Mr.Chinoy submits that the fares were to correspond to 1.5 times of ordinary, non-air conditioned bus fares, but the recommended fares by the FFC is 10 times more than such fares agreed under the terms of Concession. Therefore, he contends that it deserves to be set aside.

21 To substantiate his contentions, Mr.Aspi Chinoy, learned Senior Counsel brings out several facts, which according to him, are irrelevant material taken into consideration by FFC. In other words, according to him, it appears that FFC was carried away and impressed by the contentions brought before FFC by MMOPL that the fares stipulated in the Concession Agreement were on the basis of the fact that VGF would be Rs.1,251 crores, and the estimated costs of the construction of the Metro project would be at Rs.2356 crores. Mr.Chinoy submits that upon mutual negotiation, the consortium reduced the VGF from Rs.1252 crores to Rs.650 crores. Since there is a serious dispute by both the parties with regard to the fact who are responsible for such delay and the quantum of costs overruns, as well as reasons for such cost being overrun, the dispute between the parties is pending adjudication in arbitration proceedings. In the mean while, there was no justification for FFC to take into consideration the facts and figures submitted by MMOPL. In other words, according to learned Senior Counsel, there is no admission of figures projected by the Project proponent

holding MMRDA as responsible for the cost overruns. Learned Senior Counsel Mr.Cninoy submits that this is nothing but putting the cart before the horse, which would cause immense detriment to the interest of the commuter public.

22 Learned Senior Counsel also contends that the impugned decision of the FFC is vitiated by non-application of mind, failure to take into account relevant considerations, but taking irrelevant considerations, therefore, it has led to perversity in the order. Learned Senior Counsel brought to our notice the details with reference to the opinion of the experts in their reports with regard to the fares *vis-a-vis* ridership, and contends that even such reports have been misconstrued by FFC, and therefore, there are errors apparent on the face of record. According to learned Senior Counsel, FFC failed to notice that for the first eight years of the operation of the Metro, MMOPL was not even expected to make any profit or offer any returns to the stakeholders. The impugned decision rather recommends exclusive and

disproportionate fares which will change the very complexion of the Metro project which is meant to be a Mass Rapid Transit System.

23 Mr.Chinoy, learned Senior Counsel submits that the FFC proceeds on the misdirection that the Metro project was an ordinary Greenfield Commercial Project, and therefore, its fare was required to cover all operational costs, repayment of loan, depreciation, return of share holding etc. right from the first year of its operation. He further submits that because of FFC misdirecting itself to consider and realize the above fact, and prompted the impugned decision in arriving at the enhanced fare of Rs.9 to Rs.19 and Rs.10 to Rs.110. According to Mr.Chinoy, most of the contentions raised and most of the materials produced by MMRDA, in its letter dated 7th May 2015 and 10th June 2015 are totally ignored by FFC rather has proceeded to make its recommendation based on irrelevant considerations like the reduced offer of VGF and the cost overruns.

24 According to learned Senior Counsel, the impugned decision suffers from serious perversity since the majority, while stating that lower average fare was being recommended, has in fact, recommended a substantially higher fare. Even in the brief reasoning, there are serious contradictions that can be seen from the report of the majority, is the stand of the learned Senior Counsel. According to him, virtually the FFC ignored the contributions made by the State and the MMRDA. Therefore, for all these reasons, the impugned decision deserves to be set aside on the grounds of perversity based on unreasonable considerations. Mr. Chinoy further submits that the decision has virtually offered a bonanza to MMOPL to charge exorbitant fares, that too, on irrelevant considerations. He pointed out that the fares are so exorbitant that even the MMOPL in its pleadings has referred to them as “Tariff shock”, and resolved not to implement the same to the extent recommended by the FFC. According to him, if it is left to MMOPL to charge the fares from commuters at the recommended rate, then the very public interest will be a

causality since there might be no restraint upon MMOPL to increase the fare upto the recommended rate at any time.

25 To substantiate his contention, that FFC is neither an expert body, nor can its functions be regarded as legislative in character, proceeds to rely on several decisions which are referred to below, opining that FFC was dealing only with a particular situation and a particular entity. He relied upon

- (1) ***Union of India Vs. Cynamide India Ltd. & Anr.***
(1987) 2 SCC 720.
- (2) ***Shri Sitaram Sugar Company Limited vs. Union of India &***
(1990) 3 SCC 223
- (3) ***Rohtas Industries vs. S.D. Agarwal***
1969(1) SCC 325
- (4) ***C.I.T. vs. Mahindra and Mahindra Limited***
(1983) 4 SCC 392.

26 Mr.Chinoy submits that the principle of ***Wednesbury unreasonableness***, will have to be invoked in the present situation, and the impugned decision has to be interfered with.

27 According to Learned Senior Counsel, Mr.Chinoy that even if the impugned decision is regarded as legislative or quasi legislative, judicial review applying the touchstone of ***Wednesbury unreasonableness***, is not ruled out. According to him, since the impugned decision is vitiated by illegality and irrationality and even procedural impropriety, it is a fit case where the relevant considerations have been ignored by taking into irrelevant considerations, therefore, ***Wednesbury unreasonableness*** principle have to be applied.

28 According to him, the impugned decision is nothing, but a decision without acquiring any authority, but based on incorrect facts, rather than correct facts. Therefore, according to him, if only correct principles could have been applied, FFC would have arrived at a right conclusion. The impugned decision, according to him, is manifestly unreasonable and suffers from perversity. Therefore, on all these grounds, judicial review is possible and permissible. Therefore, it ought to be an exercise by interfering with the impugned decision. Mr. Chinoy, after making his submission

has also filed notes of arguments, re-iterating the above contention and has sought the impugned decision to be quashed and set aside.

29 Per contra, learned Senior Counsel Mr.Dwarkadas arguing for MMOPL, at the outset, questions the *locus standi* of MMRDA to maintain the present petition on the ground that MMRDA being a joint venture partner in MMOPL having stakes of 26% equity shares, and therefore, contends that as a shareholder, MMRDA has no right whatsoever, in law to challenge the actions of MMOPL, unless such challenge is based on the provisions of Companies Act of 1956. According to him, a shareholder can speak only through the Company as its member. It is further contended that once Metro Act came into existence, MMRDA ceases to be an implementation agency. Therefore, for want of *locus standi*, petition deserves to be dismissed, is the stand of MMOPL. Reliance is placed on *Daman Singh Vs. State of Punjab* ¹ to substantiate the above contention.

¹ (1985) 2 SCC 670

30 It is argued that under the RFP, it was accepted that project of this magnitude requires joint efforts by all the persons concerned. Minimum assistance from the MMRDA by way of financial contribution if required during the period of construction of the Metro project is envisaged. This was for the purpose of assessment of type of assistance. Form 29 prescribed the financial proposal. The financial proposal in Format 29 is entirely different from the business plan referred to by the MMRDA, therefore, according to the learned Senior Counsel Mr.Dwarkadas, Business Plan was not at all required and relevant for the purpose of evaluation of the bids or determining the award of contract.

31 The contract was to be awarded solely on the basis of the quantum of financial assistance required by the bidder or the VGF expected by the bidder from the MMRDA or the State. According to learned counsel, from reading of clause 27(3) of the RFP, this is clear. Therefore, Mr. Dwarkadas contends that repeated reference made by

learned Senior Counsel Mr.Chinoy to the Business Plan is nothing but misplaced argument since the business plan or the projections therein are totally irrelevant, so far as not only with regard to bid evaluation process, but also the fare determination made by FFC.

32 Learned Senior Counsel Mr.Dwarkadas further submits that in fact, the consortium had sought for VGF of Rs.1251 crores as against the estimation of the cost of the project at Rs.2356 crores. However, for reasons which are entirely attributable to the MMRDA, the construction of project was delayed thereby the cost of the construction also rose to Rs.4260 crores.

33 Learned Senior counsel further points out that the consortium upon negotiation reduced the VGF demand to Rs.650 crores from Rs.1251 crores. This was agreed because of the assurances given by the MMRDA that it would support a very aggressive construction schedule, high traffic forecast and aggressive financing work. He further contends that

there was strong assurance of timely handing over of the site, grant of all statutory clearances in a time bound manner. To substantiate his contention, Mr.Dwarkadas refers to communication dated 10th May 2006 addressed by consortium indicating several conditions which were to be adhered to by the MMRDA and the reasons for increase in the construction cost rising upto Rs.4026 crores. According to him, none of these conditions were complied with by MMRDA. According to Mr.Dwarkadas, mere extension of time for completion of the construction and the fact of not choosing to opt for cancellation of the contract or imposition of any penalties would suggest that MMRDA is well aware of the delay in completion of the project was attributable to deficits on the part of MMRDA and not the consortium. He refutes the contention raised by petitioners that there is an obligation to abide by Business Plan submitted by the consortium at the time of the bid and the same to be taken into consideration by FFC.

34 According to learned Senior Counsel Mr.Dwarkadas taking into consideration the changed circumstances as detailed above, it was neither fair, nor proper to restrict MMOPL to the schedule of the fares set out in the Concession Agreement dated 7th May 2007. According to him, by extension of the Metro Act, the fares stipulated in the Concession Agreement lapses,. and the same are completely irrelevant so far as determination of fares by FFC.

35 According to him, even assuming that the RFP, the Business Plan and the Concession Agreement have some relevancy to the issue of fare determination by the FFC (which, according to him are not applicable because of extension of Metro Act), he contends that MMRDA is bent upon misleading and misconstruing the scope and ambit of the documents. According to him, there is nothing binding in the Business Plan which suggest that Metro project was to run at a loss for the first 8 years since its operation. According to him, the Business Plan always envisaged that there would be enough cash surplus at the end of each financial year and

that is the reason why the project was regarded as bankable and viable one. He submits that such a cash surplus is absolutely necessary to cover the operating cost part, repayment of the principle loan amount borrowed, interest and other such matters.

36 Mr.Dwarkadas, by referring to certain passengers from the book *“Public-Private Partnership Projects in Infrastructure – An Essential Guide for Policy Makers”* by Jeffrey Delmon, a Senior Infrastructure Specialist at the World Bank in Washington D.C. submits that government support is key to commercial viability in PPP Project. Mr.Dwarkadas also contends that unbankable or unviable project is contrary to the very concept of PPP Project. Therefore, according to him, for all these reasons, the MMRDA cannot bank upon the DPR, RFP, Business Plan or the Concession Agreement. He relies upon Section 103 of the Metro Act to contend that said provision would render all such instruments/agreements inapplicable since they are irrelevant to the issue of the fixation of fare to be determined

by the FFC. He strenuously contends that several clauses in the Concession Agreement cannot be relied upon since the position has undergone a sea-change for act of omissions and commission solely attributable to MMRDA.

37 According to Mr.Dwarkadas, there is overwhelming material on record in the form of balance-sheet and other material establishing that estimated cost of the construction of Rs.2356 escalated to Rs.4026 crores. The balance-sheets have been approved by Board of Directors of MMOPL which includes atleast three nominee Directors of MMRDA, is the stand of Mr.Dwarkadas. The balance-sheet of MMOPL is said to have been audited by one of the reputed four accounting firms i.e. M/s.Deloitte Haskins & Sells LLP. Therefore, according to Mr.Dwarkadas, the fares have to be determined on the basis that MMOPL incurred additional cost of construction, or at escalated cost, for which they are required to be suitably compensated if the Metro Project is to remain bankable or viable.

38 It is also contended that there is ample material on record which establishes that the escalation of cost of construction was primarily attributable to the MMRDA on account of various breaches committed by MMRDA so far as terms of Concession Agreement such as delay in handing over the site, delay in providing right of way, failure to provide agreed area of land for putting up the construction yard, etc. Mr.Dwarkadas further points out that MMOPL has also made a claim for Rs.1939 crores against MMRDA, and the said claim is pending for consideration before the arbitrators.

39 Mr.Dwarkadas, learned Senior Counsel further points out that though the MMRDA supports dissenting report of one Jayant Kumar Banthia, both majority as well as minority reports accepts and proceed on the basis that the construction costs have escalated to Rs.4000 crores. Even the experts appointed by the FFC have verified the same and have opined indeed that the cost of construction was escalated to Rs.4000 crores or so. Therefore, according to Mr.Dwarkadas, the FFC was entirely justified in determining

the fares based on the escalated costs of construction from Rs.2356 crores to Rs.4000 crores. Therefore, according to him, the moment said escalation is accepted, fundamental assumptions and presumptions set out in the Concession Agreement cannot apply, and under no circumstances MMOPL can be tied down to the fares stipulated in the Concession Agreement.

40 Mr.Dwarkadas further submits that it is nothing but a misconception to connect the rate of fares to the ridership. According to him, there is no material either to support or sustain the nexus between the fares and the ridership. He submits that even though the impugned decision permits fares ranging between Rs.10 to Rs.110, the MMOPL has made it clear that it does not intend to give any shock so far as tariff is concerned to the commuters/riders and therefore, for the time being, it desires to increase the fares from the present rate of Rs.10:20:30:40 to Rs.10:20:25:35:45. He refers to paragraph no.19 of MMOPL's affidavit in reply at page 1773 of the paper book for this

purpose. According to learned Senior Counsel, the admission of nexus between the fares and the higher ridership contended by the petitioner is totally a misplaced concept, since low fares would result in higher losses and higher cash deficit, even assuming that the ridership would be double from the existing position. According to him, the experts did consider all these aspects while proposing the enhanced fares. The FFC, according to him, preferred the rates which will cause minimum prejudice to the commuters so that there is no tariff shock. Mr.Dwarkadas further contends that there is no unreasonableness or perversity so far as the impugned decision of the committee while fixing the fares.

41 According to him, the contention of MMRDA that the Metro is not operating as a Mass Rapid Transit System, is totally incorrect. He refers to the meaning of the word “Mass” from the dictionary to mean a large volume of commuters. According to learned senior counsel, the material on record establishes that on an average week day ridership from August 2016 is about 3.5 lakh per day. To run the

project as a Mass Rapid Transit System, this quantity of ridership is more than sufficient. Therefore, there is neither any intention nor any possibility of the project ceasing to operate as a Mass Rapid Transit System. Mr.Dwarkadas further contends that MMRDA is misinterpreting the impugned decision as well as the reports of the experts. Because of such misinterpretation, the MMRDA is arriving at an argument of perversity. On the other hand, according to Mr.Dwarkadas, upon proper construction of the impugned decision and the reports of the expert, it is apparent that neither there is perversity, whatsoever involved in the impugned decision nor absurdity. Mr.Dwarkadas, referring to the four reports submitted before the FFC attempts to explain the correct interpretation of the reports of the said note.

42 According to Mr.Dwarkadas, in terms of *Union of India Vs. Cynamide India Ltd. (supra)* and *Shri Sitaram Sugar Company Limited vs. Union of India (supra)*, the scope of judicial review in such matters is extremely limited.

Since the impugned decision of FFC is based upon reports of experts, scope of judicial review is further limited, since the Court, in a matter of this nature should always defer to the opinion of the experts rather than interpreting the same. Mr.Dwarkadas submits that fare fixation is legislative in character and the FFC was not even obliged to give reasons in its impugned decision. In any case, since cogent reasons are backing the decision, i.e. the reports of experts, there is no scope for exercising judicial review. Learned Senior Counsel also places on record notes of arguments in support of impugned decision.

43 In order to address the controversial issue, it would be proper to know the salient features of Metro Act, and the scheme in the said Act. Originally, the Metro Act was titled as “The Delhi Metro Railway (Co-operation and Maintenance Act) Act of 2002”. This Act was enacted by Parliament for the purpose of regulating the working of the Metro Railway in the National Capital Region, apart from indicating provisions for operation and maintenance of the

same. Apart from National Capital Region, it also provided operation and maintenance of Metro Railways in Metropolitan Area for all the matters connected therewith and incidental thereto. The Act came into force with effect from 29th October 2002.

44 An Amendment came to be brought in 2009 known as “Metro Railways” (Amendment Act of 2009). The short title came to be made by referring to the same as “Metro Act of 2002”. Sub-Section (2) of Section 1 provides that the Act extends in the first instance to the National Capital Region and by way of notification, the Central Government, may, after consultation with the State Government extend the Act to such other Metropolitan area and Metropolitan city, except the Metropolitan City of Kolkatta. It further says from what date, such act comes into effect in the Metropolitan area and Metropolitan city, shall be specified in the notification and the provisions of the Act will apply to that Metropolitan area and Metropolitan city accordingly.

45 So far as Metro area of Mumbai, the Central Government, after consultation with the State Government, by Notification dated 16th October 2009 declared that the Metro Act shall extend to the Metropolitan area of Mumbai, Maharashtra with effect from date of publication of the Notification in the Official Gazette, i.e. 16th October 2009.

46 Section 2 of the Metro Act refers to definitions and Section 2(e) defines the meaning of '*fare*'. According to section 2(e), '*fare*' means the charge levied for the carriage of the passengers. Section 2(f) defines '**Government Metro Railway**' to mean Metro Railway owned by the Central Government. The term '**Non Government Metro Railway**' is defined in section 2(l) to mean a Metro Railway other than a non-government metro railway. The term '**Metro Railway**' is itself defined in section 2(i). The term '**Metro Railway Administration**' is defined in section 2(j) to mean in relation to Government Metro Railway means the General Manager of that Railway; or in relation to a 'Non Government Metro

Railway' means the person who is the owner or the lessee of that Metro Railway, or the person working at Metro Railway under an arrangement with the owner or lessee of that Metro Railway.

47 Chapter VII of the Metro Act deals with '**Fare Fixation**' issue. Section 33 provides that the Metro Administration shall, from time to time, on recommendations made by the FFC constituted under the Act can fix the fares for the carriage of passengers for travelling from one Metro Railway Station to another. Provided that the Metro Railway Administration may fix the fare under this section without the recommendation of the FFC on the initial opening of the Metro Railway. Section 34 prescribes how the Constitution of the FFC is made. Section 35 deals with the terms and conditions as well as the procedure to be followed by the FFC. Section 36 provides that the FFC shall submit its report along with its recommendations to the Metro Railway Administration within such period not exceeding three months, as may be specified by order made by the Central

Government. Section 37 provides that the recommendations made by the FFC shall be binding on the Metro Railway Administration. Section 103 of the Metro Act provides that the provisions of the Act shall have effect notwithstanding inconsistent therewith contained in any enactment other than the Metro Act, or in any instrument having effect by virtue of any enactment other than the Act.

48 With the above provisions on hand, we have to now analyze how FFC report per majority recommended the fares which led to the impugned decision. The decision is divided into two. The majority report of Mr. Justice E. Padmanabhan, Chairperson and T.K. Vishwanathan, Member which recommended the fares at Rs.10 to Rs.110. The minority report of Jayanth Kumar Banthia, Member recommended fare at Rs.18 – Rs.26. As stated above, in terms of Section 37 of the Metro Act, the recommendations of the FFC shall be binding on Metro Railway Administration.

49 At paragraph nos.1 and 2 of the report of the majority, it makes brief reference to the circumstances in which the FFC came to be constituted under the Metro Act. Paragraphs 3 to 8 of the majority report contains material placed on record by MMOPL and contentions of MMOPL in support of revision of Metro fares. At paragraph 9, the majority has observed that a fine balance between the affordability and the business viability needs to be carefully evolved. Paragraph 10 refers to public hearings and aspects to which such public hearings relates to. Paragraph 11 of the majority report observed that the different persons appeared before FFC, barring one or two, expressed that for services of Mumbai Metro, they are willing to pay a higher fare as it deserves. According to them, the value proposition and the reduction of traffic congestion along the corridor is appreciable and there is every justification for the Mumbai Metro to be operated on self sustainable basis, and they are agreeable for a revision of fares.

50 The majority report, again records the contention of Mumbai Metro that the payment ability of user is one of the most important factor, rather key factor, to be taken into consideration. In paragraphs thereafter, especially paragraphs 13 and 14, the majority opined as under :

13. Hence, affordability of the facility is governed by the ability to pay, willingness to pay by the commuters across the metro alignment. The commuters were interviewed by the Welingkar Institute (independent expert appointed by the Fare Fixation Committee) on several days throughout the corridor and it has been reported by the said experts that the commuters are willing for a upward revision of the Fare.

14. In other words the commuters belong to a particular section of the society living along those who travel from the adjacent railways suburban systems operated by Western and Central Railways. They enjoy various conveniences while traveling by Mumbai Metro, such as air-conditioning, lifts, escalators, hygiene, cleanliness, toilets, etc being maintained at top model as against pitiable conditions prevailing in suburban railways. Being a prime service, the commuters who belong to a special class among the common public have a level of affordability and are willing to pay fares which is commensurate with the efficiency of service, security, punctuality, on time availability, cleanliness, etc. which they get by operations of Mumbai Metro. The other transport facilities along the corridor are rather inaccessible and costlier

also. Ac bus operation is a rarity along the corridor but only ordinary Non-AC BEST buses are being operated apart from auto rickshaws and taxis. The prevailing fare of AC buses in Mumbai, Autorickshaws and Taxis is as under:

Sl.	Mode of Transport	Fares (Rs)	
1.	AC BEST Buses	Rs.30 to Rs.100	Along the corridor
2.	Autorickshaws	Rs.18 to Rs.201	Along the corridor
3.	Taxi (Non Ac)	Rs 22 to Rs.245	Along the corridor

51 At paragraphs 16 and 17 of the majority report, they briefly make a comparison between the fares of BEST Buses and fares charged by Delhi Metro Railway Corporation (DMRC). The distinction drawn is that the BEST fares are gross subsidized and financing, and scale of operation at DMRC are entirely on a different footing.

52 Paragraphs 17 and 18 of the report refers to appointment of three experts (agencies) as well as the report submitted by Price Water House Corporation Private Limited

(PWC). In paragraph 19, it states that after the reports were placed on record by the experts, the FFC Members discussed and analyzed the same amongst themselves. In this paragraph, FFC specifically mentions that whilst assessing the requirement for fare revision, they took into consideration the following:

- (1) Entire spectrum of Project cost;
- (2) Equity, return on investments
- (3) Servicing of debts ;
- (4) operation costs, etc.;
- (5) Present traffic and collection of the fare for the past few months.

53 In paragraph 21, there is a general observation that in any public utility transport project, it is very difficult to satisfy every sector, and there is bound to be certain amount of hue and cry from various sectors, including press and political parties.

54 In paragraph 22 of the report, certain measures are suggested to improve the Metro Project including increase in non-fare box revenue, and provision of operational subsidy from the Government. However, the majority report, in terms admits that any recommendation as to such measures “will not fall within the purview of Fare Fixation Committee”.

55 At paragraph 23 of the report of the majority, they expressed inability to accept the fare revision formula suggested by MMOPL “as it requires a thorough study of the formula, and more so, in the absence of any guidelines laid down under the Metro Railway (Operation and Maintenance) Act, 2002 for fare fixation.”

56 The only reasoning or discussion, if at all, set out it is mentioned in paragraphs 24, 25 and 26 of the majority report which reads as follows:

“24. We have considered the reports submitted by the four expert committees. In terms of reports we find that they have suggested higher average Fare.

However, we are fixing the fare hereunder, which works out to be a lower average Fare than the average Fare suggested by the four expert committees. Even after this revision, as set out below, Mumbai Metro will not be able to break-even and they will sustain loss on a day to day basis, which would have a far reaching effect on its finances and operations in due course. In our considered view, the Mumbai Metro One should at least be sustainable for the time being not to speak of return on equity which on a long term basis be able to earn 17% (post-tax Equity IRR) and it should be in a position to absorb the shock of loss for some more time till traffic increases considerably. If the Mumbai metro turns the corner and makes a profit, it is definitely open to the Mumbai Metro One Private Limited to pay dividends to the investors depending upon the income at that stage and not immediately. The Mumbai travelling public/commuters expecting convenience, facilities, punctuality and top ranking operations, should be ready to sacrifice and should not mind paying revised fares, otherwise they will have to lose the Mumbai Metro One facility and convenience of Mumbai Metro once and for all.

25. There are twelve stations in Mumbai Metro one with ten intermediate stations placed equidistance approximately. We fix the Fare at Rs.10 for commuting from one station to the next station and the said rate of Rs.10 is to be multiplied by number of stations one commuters in either direction and such fare shall be applicable for either direction.

26. In our considered view and an analysis of the entire materials placed before us including the report of three expert agencies and the details/statistics etc placed before the fare fixation committee we have no

hesitation to fix the above Fare. We are also conscious of the fact any sharp upward revision will have a far reaching effect on the operations of the Mumbai Metro as well as the commuters who travel.

57 Paragraphs 27 to 30 of the majority report records that Mr.Jayant Kumar Banthia has taken a different view, MMOPL is at liberty to fix different rates for peak hours and non-peak hours; MMOPL may consider even giving concession to the differently abled persons, school going children etc.. Finally, in paragraph 30, the FFC makes notes that under section 33 of the Metro Act, there is no necessity for prescribing guidelines indicating the factors to be taken into consideration by FFC, so that this will facilitate the task of the FFC in future. By way of illustration, the majority report makes reference to factors like rate of return to investment, affordability to the public etc. The conclusion is recorded in paragraph 31, which reads as follows:

“31. Conclusion: In terms of the majority members of the Fare Fixation Committee, the Fare is fixed as under:

“Fare is fixed at Rs. 10 for commuting from one station to the next station and the said rate of Rs.10 is to be multiplied by number of stations one commutes in either direction and such fare shall be applicable for either direction. “

58 The dissenting report submitted by Mr. Jayant Kumar Banthia, Retired Chief Secretary of Government of Maharashtra is appended to the report of the majority of the FFC. As stated above, the dissenting report of the minority recommended the fares from Rs.18 to 26.

59 The next question which would fall for our consideration is what is the scope of judicial review in the present situation ? Learned Senior Counsel on both the sides raises several contentions on the scope of judicial review so far as Fare Fixation order. For this, one has to evaluate the rival contentions. According to Mr.Chinoy, learned Senior Counsel, the impugned decision is *quasi-judicial* or, at the most, it can come under the category of *quasi-legislative*. For

this proposition, he placed reliance in *Associated Provincial Picture Houses Limited vs. Wednesbury Corporation*¹.

60 Per contra, Mr.Dwarkadas, another Senior Counsel arguing for respondent no.4 (MMOPL) submits that exercise of Fare Fixation is purely legislative so far as its nature, and therefore, the scope of judicial review is extremely limited. He further submits that the impugned decision is backed by the reports of experts, and therefore, the Court must defer to the opinion of the experts in a matter of this nature. As already stated above, for this proposition, he placed reliance in the case of *Cynamide (supra)*, so also *Sitaram Sugar (supra)*.

61 Since both learned counsel placed reliance on *Cynamide (supra)* and *Sitaram Sugar (supra)*, it would be just and proper to extract certain passages which are relevant for the present case, and for the purpose of convenience, relevant paragraphs are referred herein :

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62 In Cynamide (supra), reliance was placed on certain passages in paragraphs, 4, 5, 7 and 27.

“4. We start with the observation, ‘Price fixation is neither the function nor the forte of the court’. We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price. For example, if the legislature has decreed the pricing policy and prescribed the factors which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go no further. We will not deluge ourselves with more facts and figures. The assembling of the raw materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not re-evaluate the considerations even if the prices are demonstrably injurious to some manufacturers or producers. The court will, of course, examine if there is any hostile discrimination. That is a different ‘cup of tea’ altogether.

5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing – there are several

instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate – in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity.

7. The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is “difficult in theory and impossible in practice”. Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as “one between the general and the particular”. “A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a

specific direction or the application of a general rule to a particular case in accordance with the requirements of policy". "Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases." It has also been said: "Rule-making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts. A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interests of the general consumer public. The right of the citizen to obtain

essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the State to fix prices and the obligation of the producer to charge no more than the price fixed. Viewed from whatever angle, the angle of general application, the prospectiveness of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity. Price fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the Government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price may acquire a quasi-judicial character. Otherwise, price fixation is generally a legislative activity. We also wish to clear a misapprehension which appears to prevail in certain circles that price fixation affects the manufacturer or producer primarily and therefore fairness requires that he be given an opportunity and that fair opportunity to the manufacturer or producer must be read into the procedure for price fixation. We do not agree with the basic premise that price fixation primarily affects manufacturers and producers. Those who are most vitally affected are the consumer public. It is for their protection that price fixation is resorted to and any increase in price affects them as seriously as any decrease does a manufacturer; if not more.

27. We are unable to agree with the submissions of the learned counsel for the respondents either with regard to the applicability of the principles of natural justice or with regard to the nature and the scope of the enquiry and review contemplated by Paras 3 and 27. While making our preliminary observations, we pointed out that price fixation is essentially a legislative activity though in rare circumstances, as in the case of a compulsory sale to the Government or its nominee, it may assume the character of an administrative or quasi-judicial activity. Nothing in the scheme of the Drugs (Prices Control) Order induces us to hold that price fixation under the Drugs (Prices Control) Order is not a legislative activity, but a quasi-judicial activity which would attract the observance of the principles of natural justice.....”

63 In the case of Cynamide, the issue was with price fixation under the Drugs (Prices) Control Order of 1979. This order is relatable to the Essential Commodities Act of 1955. The Supreme Court, after opining that the price fixation is neither the function nor the forte of the Court proceeds to say that the Courts do not totally deny themselves jurisdiction to enquire into question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations are kept out of the determination of the price. The

Supreme Court has also cleared the misconception prevalent in certain circles that price fixation affects a manufacturer or producer primarily, and therefore, fairness requires affording opportunity to such manufacturer or producer. The Supreme Court has further held that those who are most vitally affected in such matters are the consumer public. It is their protection that price fixation is resorted to, and any increase in price would affect them as seriously as any decrease would affect a manufacturer. It is important to note that most of the observations in *Cynamide (supra)* were made in the context of insistence on the part of manufacturers or producers of drugs that price fixation of drugs without the compliance with principles of natural justice and fair play was *ultra vires*, arbitrary and unconstitutional. The said contention was rejected by the Apex Court on the above basis. The observations made in *Cynamide (surpa)*, by the Apex Court at paragraph 7 are very relevant. It proceeds to explain in what circumstances price fixation is regarded as legislative in character, and under what circumstances, it can assume the character of administrative or *quasi judicial*. The Apex Court

further observed that price fixation measure does not concern with the interests of the individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is in the nature of a general character, not directed under any particular situation. The intention is very clear that it has to operate in the future. It is conceived in the interest of the general consumer public. The right of the citizen to obtain essential articles at fair prices, and the duty of the State to so provide them are transformed into the power of the State to fix prices, and the obligation of the producer to charge no more than the price fixed. The Supreme Court then further observes that price fixation may occasionally assume the character of administrative or quasi-judicial especially when it relates to acquisition or requisition of goods or property from individuals, and it becomes necessary to fix the price separately in relation to such individuals.

64 Such situations may arise when the owner of property or goods is compelled to sell his property or goods to

the Government or its nominee and the price to be paid is directed by the legislature to be determined in accordance with the statutory guidelines laid down by it. In such situations, the determination of price may acquire the nature of quasi-judicial character. Otherwise, price fixation is generally a legislative activity. The Supreme Court, in this paragraph itself, opines that the contention that price fixation primarily affects the manufacturer or producer, is not correct. Those who are most vitally affected are the consumer public. It is for their protection that price fixation is resorted to, and any increase in price affects them as seriously as any decrease does a manufacturer, if not more.

65 So far as Sitaram *Sitaram Sugar (supra)*, reliance was placed on certain passages in paragraphs 44, 45, 48, 49, 50, 51, 52, 56, 57 and 58, which read as follows :

“44. The individual orders, calculating the “amounts” payable to the individual producers, being administrative orders founded on the mechanics of price fixation, they must be left to the better instructed judgment of the executive,

and in regard to them the principle of *audi alteram partem* is not applicable. All that is required is reasonableness and fair play which are in essence emanations from the doctrine of natural justice as explained by this Court in *A.K. Kraipak vs. Union of India*. See also the observation of Mukharji, J. as he then was, in *Renusagar*: (at SCC p.105).

“45. Price fixation is in the nature of a legislative action even when it is based on objective criteria founded on relevant material. No rule of natural justice is applicable to any such order. It is nevertheless imperative that the action of the authority should be inspired by reason: Saraswati Industrial Syndicate Ltd. [at SCR pp. 961, 962; SCC p. 636, para 13]. The government cannot fix any arbitrary price. It cannot fix prices on extraneous considerations: Renusagar.

48. The doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated and he does not abuse his power. He must act reasonably and in good faith. It is not only sufficient that an instrument is intra vires the parent Act, but it must also be consistent with the constitutional principles: Maneka Gandhi v. Union of India (SCC pp. 314-15).

49. Where a question of law is at issue, the court may determine the rightness of the impugned decision on its own independent judgment. If the decision of the authority does not agree with that which the court considers to be the right one, the finding of law by the authority is liable to be upset. Where it is a finding of fact, the court examines only the reasonableness of the finding. When that finding is found to be rational and

reasonably based on evidence, in the sense that all relevant material has been taken into account and no irrelevant material has influenced the decision, and the decision is one which any reasonably minded person, acting on such evidence, would have come to, then judicial review is exhausted even though the finding may not necessarily be what the court would have come to as a trier of fact. Whether an order is characterized as legislative or administrative or quasi-judicial, or, whether it is a determination of law or fact, the judgment of the expert body, entrusted with power, is generally treated as final and the judicial function is exhausted when it is found to have "warrant in the record" and a rational basis in law: See Rochester Tel. Corp. v. United States. See also Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation.

50. As stated by Lord Hailsham of St. Marylebone L.C. (HL) in *Chief Constable of the North Wales Police v. Evans*:

"The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.... The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court".

In the same case Lord Brightman says:

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

51. *A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. See Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation. In the words of Lord Macnaghten in Mayor & C. Westminster Corporation v. London and North Western Railway.*

“...It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first.”

In Barium Chemicals Ltd. v. Company Law Board, this Court states: (SCR pp. 359-60, per Shelat, J.)

“... Even if (the statutory order) is passed in good faith and with the best of intention to further the purpose of the legislation which confers the power; since the authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly

form its opinion or that in forming it, it did not apply its mind to the relevant facts.”

In Renusagar, Mukharji, J., as he then was, states: (SCC p. 104, para 86)

“The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated”.

52. The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.

56. The court has neither the means nor the knowledge to re-evaluate the factual basis of the impugned orders. The court, in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence. In the words of Justice Frankfurter of the U.S. Supreme Court in Railroad Commission of Texas v. Rowan & Nichols Oil Company:

“Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen State authorities.... When we consider the limiting conditions of litigation – the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers – it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses”.

This observation is of even greater significance in the absence of a Due Process Clause.

*57. Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the “feel of the expert” by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in *Gupta Sugar Works*: (SCC p. 479, para 4)*

“... the court does not act like a chartered

accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination.”

58. Price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in Mississippi Valley Barge Line Company v. United States of America:

“The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form.... It is not the province of a court to absorb this function to itself.... The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.”

66 In *Sitaram Sugar (supra)*, the Supreme Court was concerned with the price fixation under the Essential Commodities Act 1955. After holding that such price fixation was in the nature of legislative action, and no rule of natural justice was applicable, the Supreme Court added that it is nevertheless imperative that the action of the authority

should be inspired by reason. To arrive at this opinion, Supreme Court placed reliance on its earlier decision in ***Saraswati Industrial Syndicate Ltd. & Ors. vs. Union of India (1974) 2 SCC 630***. The Apex Court further held that the Government cannot fix any arbitrary price, or fix any prices on extraneous considerations. The doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated, and it does not abuse its power. He must act reasonably, and in good faith. It is not only sufficient that an instrument is *intra vires*, the parent Act, but it must also be consistent with the constitutional principles in ***Maneka Gandhi vs. Union of India [1978]2 SCR 621***. ***Sitaram Sugar*** (supra) is relevant for yet another principle of judicial review which is set out in paragraph 49 as mentioned above. In this paragraph, the Supreme Court has emphasized that where a question of law is at issue, the Court may determine the rightness of the impugned decision on its own independent judgment. If the decision of the authority does not agree with that which the Court considers to be the right one, the finding of law by the authority is liable to be

upset. This is the same principle established by the House of Lords in *Council of Civil Service Union vs. Minister of Civil Service - (1984) 3 ALL ER 935 (HL)*. Therein, Lord Diplock summarised the principles of judicial review by conveniently classifying under three heads, i.e., “illegality, irrationality and procedural impropriety”. Illegality was explained to mean that the decision maker must correctly understand the law that regulates its decision making power and give effect to it. Whether he has or not is a justifiable question to be decided, in the event of dispute, by a court exercising powers of judicial review.

67 The *Wednesbury principle* of unreasonableness was discussed at paragraphs 44, 45, 48, 49, 51 and 52 of *Sitaram Sugar (supra)*, and says that it can be invoked to judicially review price fixation, subject ofcourse, to the limitations, discussed in the said passages. For example, if judicial review relates to a finding of fact, then, the Court, will only examine the reasonableness of the finding. When that finding is found to be rational and reasonably based on

evidence, in the sense that all relevant material has been taken into account, and no irrelevant material had influenced the decision, and the decision is one which any reasonably minded person, acting on such evidence, would have come to, then judicial review is exhausted even though the finding may not necessarily be what the court would have come to if it was called upon to determine facts, in the first place.

68 In para 51 of *Sitaram Sugar* (supra), the Supreme Court after referring to Justice Mukharji, in ***State of U.P. vs. Renusagar Power Co. (1988) 4 SCC 59***, states that the exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of such power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to a relevant factor, the exercise of power will be regarded as manifestly erroneous. If a power, whether legislative or administrative is exercised on the basis of facts which do not even exist, and

which are patently erroneous, such exercise of power will stand vitiated.

69 The principles of judicial review, as discussed in Sitaram Sugar (supra) or Renusagar (supra) is essentially, the **Wednesbury** unreasonableness principle. Therefore, even proceeding on the basis that the impugned decision is legislative in character, limited judicial review as explained in Cynamide (supra), Sitaram Sugar (supra), Renusgar (supra) is available and is required to be exercised, if the situation so warrants.

70 From reading of the above decisions, as discussed above, certain well defined principles of judicial review, have emerged so far as price fixation. To begin with, the Court which is required to exercise judicial review, cannot be equated or will not assume appellate jurisdiction or review merits, unless a case of unreasonability or absurdity is made out. The Court will always keep in mind that the exercise of fare fixation is ordinarily a legislative exercise in nature. It

may assume the nature of administrative or *quasi* judicial when it concerns/affects the interests of an individual manufacturer or producer, or is directed against a particular circumstance. Even where the exercise of price fixation is legislative in nature, the Court will not deny itself jurisdiction to enquire into whether relevant considerations have gone in, and irrelevant considerations are kept out at the time of determination of price. In matters of price fixation, the interests of those who are most vitally affected, i.e., the consumer public cannot be ignored.

71 In exercise of judicial review, the question as to whether the decision maker has arrived at the conclusion by acting arbitrarily or unreasonably, can be looked into. Where a question of law is at issue, the Court may determine the validity of the impugned decision on its own independent judgment and upset the decision, if the decision of the authority does not agree with that which the Court considers to be the right one. However, where the question of finding of fact is involved, judicial review is only concerned with the

issue of perversity or unreasonableness. Thus, where a finding of fact is found to be rational and reasonably based on evidence, in the sense that all relevant material has been gone into/taken into account; no irrelevant material has influenced the decision; and the decision is one which any reasonably minded person acting on such material would have come to such conclusion, then judicial review is exhausted even though the finding may not necessarily correspond to what the Court would have come to, if it was called upon to determine the facts, in the first instance. If power, legislative or administrative, has been exercised on basis of facts which do not exist or are patently erroneous, such exercise of power will stand vitiated.

72 Even though price fixation may be a legislative action, it is imperative that the action should be inspired by reason, and not arbitrary or extraneous consideration. The legislative action, therefore, must be consistent with constitutional principle. When the judgment is entrusted to an expert body, the same is generally treated as final and

judicial function. It is exhausted when it is found to have warrant in the record and rational basis in law; the Court is not supposed to supplant the feel of the experts by its own views. However, even a legislative action will be set aside, if there is any manifest error in exercise of power or the exercise of power is manifestly arbitrary. Similarly, if power, whether legislative or administrative has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous.

73 The circumstances, in the present case, differ from the circumstances in *Cynamide (supra)* or *Sitaram Sugar (supra)* on certain issues or crucial aspects. In the present case, the price fixation measure is directed against a particular situation. The price fixation measure concerns a particular agency, i.e., MMOPL. At least that is the manner in which the FFC has approached the issue. Therefore, we see some substance in the contention of Mr. Chinoy, learned

Senior Counsel that the impugned decision partakes a *quasi judicial* nature. However, we propose to exercise judicial review on the basis that the impugned decision is legislative or *quasi legislative* in nature. As stated above, even a legislative or *quasi legislative* exercise of price fixation is not immune from judicial review, though the grounds of judicial review may be quite restricted/limited.

74 According to respondent no.4 - Project Proponent, the petitioner has no *locus standi* to file the present petition since the petitioner is a joint venture partner along with respondent no.4 holding 26% equity stake. The balance 74% is held by consortium of Reliance Energy Ltd and Veolia Transport S.A. They also rely upon judgment in *Daman Singh Vs. State of Punjab* (supra). In order to consider the *locus standi*, we have to analyze the background in which the consortium in question came to be formed. Apparently, MMRDA has not instituted the present petition either in its capacity in a MMOPL or to question any action of MMOPL or its other shareholders.

75 Apparently, there is no dispute that MMRDA was appointed as Project Implementation Agency to complete the Metro Project, and it was appointed at the behest of the State of Maharashtra. The petition is instituted by MMRDA as the Project Implementation Agency. Rather, in this character, MMRDA certainly has sufficient interest to contend that the impugned decision, if, permitted to prevail, will be contrary to the interest of the riders or contrary to public interest. It is the case of MMRDA that if the fare determined as per the impugned decision is permitted to be corrected, then the very character of the Metro Project as a 'Rapid Mass Transit System' will be destroyed.

76 MMRDA was a party before the FFC. It was also allowed to urge its contention wherein MMRDA urged that there should be revision of the fare only as stipulated in the Concession Agreement dated 7th March 2007. MMRDA, apart from raising this issue, pleaded before the FFC that the fare scheduled in the Concession Agreement, was at least a very

relevant consideration required to be taken into account while fixing the fares. Though FFC has not accepted this contention of the MMRDA, quite rightly did not deny or question *locus standi* of the MMRDA when it addressed its grievance before the FFC.

77 MMRDA in its capacity as the Project Implementing Agency, is the best person to represent the interest of various stakeholders of the Metro Project, specially the interests of the commuters and members of the public. As a matter of fact, the FFC entertained the applications of MMRDA. When the contentions of MMRDA were not accepted by FFC, the MMRDA certainly has a right to seek judicial review. Therefore, its *locus standi* cannot be questioned.

78 Two commuters initiated Writ Petition No. 863/16 wherein there is specific challenge to the impugned decision dated 8th July 2015 on several grounds, including the ground that section 33 of the Metro Act is itself unconstitutional.

Similarly, another Public Interest Litigation No. 39 of 2016 initiated by NGO called '**Public Concerned for Government Trust**' (PCGT) , in which again, a challenge is made to the Notification dated 16th October 2009, in terms of which, the Metro Act was made applicable to the Metro Project. In these petitions, they have sought a restraint order against MMOPL from charging commuter fare, except in accordance with the provisions of Concession Agreement dated 7th March 2007. These petitions were to be considered along with the present writ petition. However, on account of constraint of time, it was not possible to take up these two Writ Petitions for final disposal along with the present petition. There is no serious challenge to the *locus standi* of the petitioners in the said two writ petitions. The circumstance of MMRDA holding 26% stake in MMOPL, is certainly not some statutory bar to MMRDA to question the impugned decision of the FFC, merely because majority of the shareholders of MMOPL or the MMOPL itself regards the impugned decision as favourable to them. As noted earlier, MMRDA has neither instituted this petition in its capacity as shareholder of MMOPL, nor does

the petition question any action of MMOPL or its other shareholders.

79 Now, let us consider whether the decision in *Daman Singh (supra)*, is applicable to the facts of the present case. In **Daman Singh's case**, the challenge before the Supreme Court was to the *vires* of section 13(8) of Punjab Cooperative Societies Act, which provided for the compulsory amalgamation of cooperative societies if it is in the interest of Cooperative Societies. In this context, one of the contentions was that section 13(8) did not make express provision for issue of notice to members of concerned cooperative societies, and therefore, the provision was violative of principles of natural justice. In the alternate, it was contended that principles of natural justice should be read into the provision and notice to members be regarded as imperative. It is in this context, that the Apex Court observed that once a person becomes a member of a cooperative society, he loses his individuality *qua* the society, and he has no independent right except those given to him by the Statute

and bye-laws. He must act and speak through the society or rather, the society alone can act and speak for him *qua* the rights and duties of the society as a body. The notice to the society in such a case will be deemed as notice to all its members. Although, the challenge to *vires* of section 13(8) was rejected by the Supreme Court, such rejection was on merits and not on the ground that the members of the societies proposed to be amalgamated, had no *locus standi* to challenge the same. In the light of observations of the Apex Court, in *Daman Singh's* case, we are of the opinion the decision in Daman Singh's case does not apply to the facts of the present case, and we reject the challenge raised to the *locus standi* of the petitioner to file this petition. We hold that the present petition filed by the petitioner is maintainable.

80 Now, we come to the contention of the petitioners, rather challenge made by the petitioner to the FFC report impugned in this Writ Petition. According to the petitioner, on account of irrelevant facts being taken into consideration,

by excluding relevant considerations by FFC, it has directed itself to come to wrong conclusion, and therefore, the decision of FFC is vitiated. According to them, there was no justification for FFC to exclude consideration of vital and relevant material which were placed before them in the form of DPR, RFP, Bid Documents, Business Plan and the Concession Agreement dated 7th March 2007 while determining the Metro fares. According to them, the FFC arriving at the conclusion in determination of the fares only based on the material relied upon by 4th respondent which were totally irrelevant and immaterial, is erroneous. It is further contended that FFC did not even give reasons why relevant material, as stated above, was excluded from consideration. According to them, only during the pleadings filed by MMOPL and the submissions made by them, they tried to defend the exclusion of material by FFC.

81 According to 4th respondent, the consortium at the time of the bid, sought VGF to the extent of Rs.1251 crores equivalent to 53% of the estimated project costs. However,

same was reduced to Rs.650 crores equivalent to 28% of the then estimated project cost. The total cost of the project turned out to be Rs.4026 crores and VGF actually made by MMRDA, till date, was Rs.567 crores out of Rs.650 crores, which is equal to only 14% of the actual project cost. They further contend that the petitioners have misread the Business Plan. According to 4th respondent, a close scrutiny of the Business Plan would indicate that it was always envisaged that there would be a cash surplus at the end of each financial year. It is for this reason why project became fundable. According to them, cash surplus would mean it is surplus after providing for all operating cost as well as part repayment of the principal loan amounts, and serving of interest thereof as per the financing agreements. The figures of cash surplus as per the Business Plan, would clearly indicate cash surplus in crores by 2019 as Rs.51 crores and project profit as Rs.33 crores. By reason of delay on the part of the petitioner to secure right of way and the land for construction of the project, the 4th respondent has suffered a cash loss i.e. actual profit in crores in 2015 was Rs.277 crores

and actual cash surplus was Rs.161 crores; in 2016 actual profit was Rs.287 crores and actual cash surplus was Rs.145 crores; and in 2017 (projected) actual profit was Rs.348 crores and actual cash surplus was Rs.203 crores. This was despite the fares being fixed at Rs.10-20-30-40. According to them, suffering as annual cash loss effectively meets the Metro project unviable and it becomes no longer bankable. According to them, this was specifically recognized by FFC in the following terms :

“8 (b)(ii) An affordable fare is critical for attracting ridership which in turn is key to the business viability and also to serve the commuters need.

9. It can be construed to be a fine balance between the affordability and the business viability needs to be carefully considered. It is pointed out that there is a large revenue gap at the existing fare structure and the revenue gap to be bridged aggregated to Rs.573 crores for the year 2014-15.

24. We have considered the reports submitted by the four expert committees. In terms of reports we find that they have suggested higher average Fares. However, we are fixing the fare hereunder, which works out to be a lower average Fare than the average Fare suggested by the four expert committees. Even after this revision, as set out below, Mumbai Metro will not be able to break-even and they will sustain loss on a day to day basis.

which would have a far reaching effect on its finances and operations in due course. In our considered view, the Mumbai Metro One should be at least be sustainable for the time being not speak of return on equity which on an long term basis be able to earn 17% (post tax Equiry (IRR) and it should be in a position to absorb the shock of loss for some time till traffic increases considerably. If the Mumbai Metro turns the corner and makes a profit, it is definitely open to the Mumbai Metro One Private Limited to pay dividents to the investors depending upon the income at that stage **and not immediately.** The Mumbai travelling public/commuters expecting convenience, facilities, punctuality and top ranking operations, should be ready to sacrifice and should not mind paying revised fares, otherwise they will have to lose the Mumbai Metro One facility and convenience of Metro once and for all.

They also rely upon the observations made by Professor G. Raghuram “IAM – Ahmedabad Report”.

“6.4 With all the above efforts, the issue of bridging the viability gap would remain a significant one for the Mumbai Metro, as per their own projections (Exhibit-8). **The deficit is increasing year on year, primarily due to increasing borrowings to cover the cash losses. Hence there is urgency in financial restructuring to enable viability of the metro.**

As per our analysis, the full cost fare over the next five years would stabilize at Rs.12 per km, resulting in an average passenger fare of Rs.60 with a 5 km (sic) lead. However, as already

discussed in Section 3.6, this is not a viable fare, being significantly higher than the revenue maximizing fare, which for the peak is Rs.7.25 per km and with a significant discount for the offpeak. The weighted revenue maximizing fare can at best yield an increase in revenue of 16% over what is projected by MMOPL.

For a target year like 2016-17, we are looking at a deficit of about Rs.560 cr **including a cash deficit of over Rs.180 cr. The cash deficit can be reduced at best by Rs.30 cr due to the revenue maximizing fare, and Rs.40 crore due to non fare box revenues and possibly Rs.20 cr due to improved (10% efficiency) operations and maintenance.** This would still leave a cash deficit of nearly Rs.100 cr, which will need additional financing resulting in increased cash outflows due to interest.

The cash deficit needs to be plugged at the earliest. MMOPL would require an amount subsidy of over Rs.100 cr or a one time grant of Rs.1000 cr. This can at best stop the 'bleeding'

Additional funds to cover the replacement costs and return to shareholders would be required to the tune of Rs.360 cr per annum.

82 On perusal of opinion of the FFC, we note that FFC had excluded vital and relevant material from its consideration with reference to DPR, RFP, Bid Documents, Business Plan and the Concession Agreement dated 7th March

2007. The members of FFC who submitted the majority report have ignored the above material. Even in the pleadings as well as submissions, there is not even a whisper by MMOPL that such material was taken into consideration by FFC, and they do not even say on what grounds and why they were excluding such material. On the other hand, MMOPL tries to defend by making the statement that FFC was justified in excluding such material from its consideration at the time of arriving at the fares. On the other hand, there is an attempt to contend that consideration of such material might have vitiated the very exercise because it is settled position in administrative law that reliance on irrelevancies vitiates the decision based thereon. In the pleadings as well as submissions of MMOPL, it defended the exclusion of the material by FFC broadly on the following three grounds.

- (1) That by virtue of the provisions in section 33 and 103 of the Metro Act, all such material stands obliterated and therefore, cannot even be looked into for the purposes of fare determination by FFC;

(2) The material in the form of Business Plan was not even the basis for evaluation of MMOPL bid or award of the contract of Metro Project on BOOT basis. The selection of concessionaire was totally based on the capital contribution of VGF demanded by the bidder, and this is clearly indicated at Clause 27.3 of the RFP that the bidder who required minimum capital requirement would be selected; and

(3) That there has been a sea-change in circumstances from the time of submission of Business Plan and the Concession Agreement that was entered into between the parties. At that stage, MMOPL was persuaded to reduce the demand for VGF from Rs.1251 crores to Rs.650 crores based upon certain assurances by MMRDA and the State. The assurances were never honored by the two agencies. Further, the rates in the Concession Agreement or the formula of upward revision of fares by 11 percent at every 4th year was on the basis of construction estimate of Rs. 2356 crores. In reality, for reasons entirely attributable to MMRDA, there was delay in completing the construction, and therefore, there was consequent escalation to Rs.4026 crores. In such drastically changed circumstances, according to 4th respondent, it would be neither legal nor fair to tie down MMOPL to the fares stipulated in the Concession Agreement or forcing them to stick to the Business Plan submitted at the stage of filing bids.

83 Based upon three contentions, learned Senior Counsel Mr. Dwarkadas arguing for 4th respondent strenuously contends that reasons are obvious, why the DPR, RFP, Bid Documents, Business Plan and the Concession Agreement were not considered by the FFC. According to him, they were not considered since they were irrelevant and immaterial documents. Before we proceed to examine the above three grounds alleged by Mr.Dwarkadas, it is pertinent to mention that the majority report of the FFC really makes no reference to any such grounds as justification for exclusion of the material in the form of DPR, RFP, Bid Documents, Business Plan and the Concession Agreement. Inferentially, it can be said that the FFC has excluded such material from consideration based on its interpretation of sections 33 and 103 of the Metro Act.

84 The statutory scheme of the Metro Act, is indicated above, and so also the situation in which Sections 33 and 103 of the Metro Act appear. Section 33 of the Metro

Act provides that the FFC shall recommend the fares for the carriage of passengers in a Metro Rail. Section 37 of the Metro Act provides that such recommendation shall be binding on the Metro Railway Administration. Section 103 of the Metro Act deals with the effect of the Act on any other enactments or instruments which may be inconsistent with the Metro Act.

85 Section 33 of the Metro Act and the proviso reads as follows:

“33. Fixation of Fare for carriage of passengers : The Metro railway administration shall, from time to time, on the recommendations made to it by the Fare Fixation Committee constituted under sub section (1) of section 34, fix, for the carriage of passengers, fare for travelling from one station to another of the metro railway.

Provided that the metro railway administration may fix the fare under this section without recommendations of the Fare Fixation Committee on the initial opening of the metro railway.”

Section 37 of the Metro Act reads as follows :

37 Recommendations to be binding on metro railway administration : The recommendations made by the Fare Fixation Committee shall be binding on the metro railway administration.

Section 103 of the Metro Act reads as follows :

“103. Effect of Act inconsistent with other enactments .-

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this or in any instrument having effect by virtue of any enactment other than this Act.”

86 On perusal of FFC report, in its introductory grounds, it refers to the interim orders made by this Court while disposing of an application under section 9 of the Arbitration and Conciliation Act, 1996 in the context of MMOPL asserting rights to fix the initial fare of the Metro and further since, Mr. Dwarkadas relies upon such orders, a brief reference to them will not be out of place.

87 In Arbitration Petition (L) No. 890/14 disposed of on 24th June 2014, learned Single Judge of this Court expressed *prima facie* opinion that MMOPL was entitled to fix the initial fare without being bound by the stipulation in the Concession Agreement. This *prima facie* opinion was upheld by the Division Bench of this Court in Appeal No. 621 of 2014 by an order dated 8th January 2015. The Division Bench also

expressed the *prima facie* opinion that once Metro Act was extended to Metro Line – 1, the fixation of fare could be done by MMOPL only on the recommendation of Fare Fixation Committee under the substantive part of section 33, but for fixation of initial fare, MMOPL cannot be held to be bound by the fare structure provided in the Concession Agreement without the operation of Clause 6.5.2 for upward revision. The regime of contractual obligations under the Agreement in relation to fixation of fares, cannot, therefore, be straightaway read into the proviso to section 33 for the purpose of tying down the MMOPL to the fare structure under the agreement without any scope for upward revision. The Division Bench at paragraph 22 clarified that the observations in the order are for the limited purpose of decision under Section 9 petition and the Arbitral Tribunal or the FFC shall not be influenced by the observations made in the order. The SLP, challenging these orders were also disposed of.

88 The aforesaid orders were made to dispose of application under Section 9 of the Arbitration and

Conciliation Act, 1996 taken out by MMRDA to restrain MMOPL from fixing the initial Metro fares contrary to the stipulation in the Concession Agreement. It was made clear that the observations were only *prima facie* and for the limited purpose of decision under section 9 petition, and the Arbitral Tribunal or the Fare Fixation Committee shall not be influenced by the observations made in the order. Besides, all the observations state that *prima facie* MMOPL cannot be held to be bound by the fare structure or the formula of revision stipulated in the Concession Agreement. None of the orders specifically held that the Concession Agreement stands obliterated or that the fares stated in the Concession Agreement are totally irrelevant while determination of the fares by FFC.

89 As to the construction of Section 103 of the Metro Act, no doubt, the provision contains a non obstante clause. Therefore, the provisions of the Metro Act shall have effect notwithstanding anything inconsistent therewith contained, in any enactment, other than the Metro Act, or in any

instrument having effect by virtue of any enactment other than this Act.

90 In the present case, it was not even the contention of any of the parties that any enactment other than the Metro Act was in issue or was sought to be enforced even though the provisions of such other enactments were inconsistent with anything contained in the Metro Act. The contentions, though are not very clearly formulated, it was argued that the Concession Agreement is an instrument having effect by virtue of some enactment, other than the Metro Act. Again, none of the parties specified which was such enactment, by virtue of which the instrument or the concession agreement was having effect. This factor is very relevant in the light of the observations of Supreme Court in *Sharda Devi vs. State of Bihar*¹ wherein it has held that the expression '*notwithstanding anything contrary to any enactment*' cannot take away effect of any provision in law, which is an enactment.

¹ 2002 (3) SCC 705

91 The principles of statutory interpretation of non-obstante clause in a Statute are well settled by now. While construing a non-obstante clause, it is necessary to determine the purport and object for which the same was enacted. The non-obstante nature of a provision although, may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. A non-obstante clause must be given effect to, to the extent Parliament intended and not beyond the same. This is well settled by the Apex Court in the case of *ICICI Bank Ltd. Vs. SIDCO Leathers Ltd. and ors.*¹

92 In *A.G. Varadarajulu and anr. Vs. State of Tamil Nadu and ors.*² the Supreme Court has held that it is well settled that while dealing with a non-obstante clause under which the legislature wants to give overriding effect to a section, the Court must try to find out the extent to which the legislature had intended to give one provision overriding

1(2006) 10 SCC 452

2(1998) 4 SCC 231

effect over another provision. Such intention is to be gathered from the enacting part of the section.

93 In *Madhav Rao Scindia vs. Union of India*¹, the Supreme Court again observed that the non – obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same Statute or other Statute, but for that reason alone, the scope of the provision must be determined strictly. When such section containing non-obstante clause does not refer to any particular provision which it intends to override, but refers to the provisions of the Statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. A search has, therefore, to be made with a view to determine which provision answers the description and which does not.

94 Again in *Central Bank of India vs. State of Kerala and ors*,² the Supreme Court opined that non-

1(1971) 1 SCC 85

2(2009) 4 SCC 94

obstante clause is generally incorporated in the Statute to give overriding effect to a particular section or the Statute as a whole. While incorporating non-obstante clause, the Court is required to find out the extent to which the legislature intended to do so, and the context in which the non-obstante clause is used. By reference to *State of West Bengal vs. Union of India*,¹ it was held that the Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed, but to the entire Statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs.

95 In *R.S. Raghunath Vs. State of Karnataka*², the three Judge Bench of the Supreme Court, after making reference to earlier judgments in *Aswini Kumar Ghose vs. Arabinda Bose*³, *Dominion of India vs. Shrinbai A. Irani*⁴,

¹AIR (1963) SC 1241

²(1992) 1 SCC 335

³AIR 1952 SC 369,

⁴AIR 1954 SC 596,

*Union of India vs. G.M. Koil*¹, and *Chandavarkar Sita Ratna Rao vs. Ashalata S. Guaram*² observed that the non obstante clause is appended to a provision with a view to give the enacting part of the provision an overriding effect in case of a conflict. But the non-obstante clause need not necessarily and always be coextensive with the operative part so as to have the effect of cutting down the clear terms of an enactment, and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words “the non obstante clause” cannot cut down the construction and restrict the scope of its operations. In such cases, the non obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules.

96 In the light of above principles, or the law declared by the Apex Court with regard to the word non-

1(1984) Supp SCC 196

2(1986) 4 SCC 447

obstante clause in a Statute, we have to now consider the effect of such non-obstante clause in Section 103 of the Metro Act. Even if we regard the Concession Agreement as an instrument having effect by virtue of the another enactment i.e. Contract Act, Section 103 of the Metro Act, in terms provides that the provisions of the Metro Act shall have effect notwithstanding anything inconsistent therewith in any instrument having effect by virtue of any enactment other than the Metro Act. Applying the principles of statutory interpretation as discussed above, it is not possible to accept the extreme position that the concession agreement totally stands obliterated on account of non-obstante clause contained in section 103 of the Metro Act. The section itself states that the provisions of the Metro Act shall prevail over “anything inconsistent therewith” in any instrument having effect by virtue of any enactment other than the Metro Act. Therefore, it becomes relevant and necessary to determine whether there is anything inconsistent between the Concession Agreement and the provisions of the Metro Act. To the extent of inconsistency however, the provisions of Metro

Act shall prevail. This is the proper manner in which one has to construe the provisions of section 103 of the Metro Act. The extreme position that section 103 of the Metro Act completely obliterates the Concession Agreement, or even obliterates the portions of Concession Agreement not inconsistent with the provisions of Metro Act is not acceptable. The acceptance of such an extreme position might render the very authority of MMOPL to embark upon or operate the Metro project, itself vulnerable.

97 In the present case, we are not concerned with the right of MMOPL to seek fixation and Metro fares without the recommendation of FFC on the initial opening of the Metro Rail. That issue admittedly is pending consideration in an arbitration proceeding. However, in the context of the legal submissions made, there is bound to be some unavoidable overlapping. The real issue in the present petition is whether FFC, upon consideration of section 103 of the Metro Act, was entitled to virtually ignore the Concession Agreement, or treat the Concession Agreement as obliterated or completely

regard the fares and formulae in the Concession Agreement as irrelevant, extraneous and redundant to the determination of Metro fares.

98 In terms of the Concession Agreement, MMOPL is obliged to collect fares from riders at the Metro Project as per the rates set out in Schedule - L, i.e., Rs.6-8-10 with upward revision of 11% every fourth year. This corresponds to fare of Rs.9-11-13 in the year 2014. The Concession Agreement also provides for upward revision of fare beyond the stipulation in Schedule – L in case of any unanticipated rise in the operating costs of the Metro Project. The determination in this regard was left to the State Government. These provisions in the Concession Agreement may, to the extent, they provide for a fixed fare or a fixed formula for determination of the fare, be regarded as inconsistent with the scheme of determination of Metro fares in sections 33 and 37 of the Metro Act. To the extent of inconsistency, therefore, the provisions of the Metro Act will prevail and the inconsistent provisions of Concession Agreement may have to give way. The inconsistency arises if

the fare or the formula of revision stipulated in the Concession Agreement is held as binding on the parties to the Concession Agreement. The inconsistency may also arise if the fare or the formula of revision stipulated in the Concession Agreement is held as binding on the FFC in the discharge of its statutory functions under section 33 of the Metro Act. To the extent of such inconsistency, the binding nature of the stipulation as to fare or the formula of revision, will have to yield or give way.

99 There is no question of any inconsistency if the rate or formula for revision stipulated in the Concession Agreement is to be taken into consideration by the FFC as some relevant material for determining the Metro fare. The stipulation about rates may not be binding but that does not mean that the same is irrelevant when it comes to determination of the fares. On the basis of stipulation in the Concession Agreement, it may not be possible for MMRDA to insist that the FFC determines the same fares and the FFC, may not be bound to determine the same fares or apply the

same formula for revision. However, that does not mean that the FFC can refuse to look into the stipulation of fares or the formula for revision. The binding nature of the stipulation in the Concession Agreement is one thing and relevancy, is quite another. The relevancy lies in the admitted fact that the stipulation in the Concession Agreement were consensual and contractual. It is not in dispute that these stipulations were freely agreed to by the parties. There was consensus while making the agreement. This is not even a case where the parties can plead any inequality in bargaining power. This is, in our view, the harmonious manner to interpret the provisions of section 103 of the Metro Act and the stipulation in the Concession Agreement. The extreme contention that the Concession Agreement stands obliterated, might, then render the position of MMOPL as Metro Railway Administration, vulnerable.

100 By applying the principles of statutory interpretation to the construction of non – obstante clause in section 103 of the Metro Act, and adopting the principle of

harmonious construction the statutory scheme in sections 33 and 37 of the Metro Act will have to be respected. This means that FFC will have jurisdiction to recommend revision of metro fares, notwithstanding the specification of fares and the formula of revision in the Concession Agreement. There is distinctly a distinction between an instrument operating as a binding instrument and instrument affording evidence or material on some vital and relevant factor to be taken into consideration for determination of fares. The FFC, by misconstruing the provisions of section 103 of the Metro Act, appears to have lost sight of this distinction pointed out above. In determining the fares, therefore, the FFC was not justified in ignoring the fares fixed or formula for revision in the Concession Agreement. This is particularly because the fares fixed and the formula prescribed in the Concession Agreement were based upon the terms and conditions agreed between the parties i.e. MMOPL and MMRDA. If the provisions of the Metro Act were not to be extended to the Mumbai Metropolitan Area, the contractual relation between MMOPL and MMRDA would be governed by

such fares and such formula as prescribed in the Concession Agreement. The consortium, in its Business Plan, had in fact agreed to such fares and such formula. The consortium had submitted its demand for VGF on basis of such fares and such formula. Thus, although, such fares or formula prescribed in the Concession Agreement may not be binding upon the FFC, nevertheless, the same constitutes at least one of the relevant factors to be taken into consideration which the FFC could not have ignored on the basis of improper legal construction of the provisions in section 103 of the Metro Act. Since this is an error of law, judicial review will have to be exercised, as held in *Sitaram Sugar* (supra) and *Council of Civil Services* (supra).

101 By way of recapitulation, reference is necessarily to be made to *Sitaram Sugar* (supra), upon which strong reliance was placed by Mr. Dwarkadas, Senior Counsel arguing for MMOPL. At paragraph 49 of the judgment, the Supreme Court, has, in turn, held that where a question of law is at issue, the court may determine the rightness of the

impugned decision on its own independent judgment. If the judgment of the authority does not agree with that which the court considers to be the right one, the finding of law by the authority is liable to be upset.

102 Similarly, in the case of *Council of Civil Services* (supra), Lord Diplock has explicitly explained what illegality means. According to Lord Diplock, 'illegality' means that the decision maker must correctly understand the law that regulates its decision making power and give effect to it. Whether he has or not is a justifiable question to be decided, in the event of dispute, by a court exercising powers of judicial review. The other ground upon which learned Senior Counsel Mr. Dwarkadas was contending was for exclusion of material like DPR, RFP or the business plan was that such material was never the basis for selection of the bidder / Consortium. We are afraid this may not be a correct proposition. The award of the Metro Project on BOOT basis to the Consortium was upon evaluation of the bid of the Consortium which essentially included its business plan and

the VGF demanded by it. Clause 27 of the RFP specifically required the bidders to submit business plan with financial projections, projected annual income statements, cash flow statements and balance-sheets. This clause also stipulated that the Bid Evaluation Committee (BEC) will evaluate and compare only the bids to determine the eligibility in accordance with clause 27.2 of RFP. This sub clause makes specific reference to business plans and other detailed information to be submitted or provided by the bidders in the prescribed formats. Finally, clause 27.3 of RFP stipulated that the bidder who required minimum capital contribution would be selected, predicated that the bid made on evaluation under clauses 27.1 and 27.2 had been found to be compliant and acceptable.

103 From the material on record, it is apparent that even the Consortium was clear in its understanding of the terms of the RFP and tender notice. In particular, the Consortium was quite clear as to the position of the Business Plan which was required to be submitted as a part of the bid

document. The consortium, in its business plan, specifically stated that ridership forecast is the most critical parameter for evaluating the viability of the project. The ridership forecast estimated by MMRDA and provided in RFP and other documents has been validated by the “**REL LED Consortium**”. Further, the bid document accepts that the structure for fare provided in terms of Schedule L of the Concession Agreement is the base for the fare rates used in financial model. This corresponds to rate of Rs. 6 upto 3 kms.; Rs. 8 between 3 kms. and 8 kms.; and Rs.10 beyond 8 kms. The Schedule contemplates upward revision of fares at 11% every fourth year. Detailed financials were enclosed by the Consortium along with the bid as required by RFP. The Consortium specifically stated that the survey conducted at the time of ridership estimation indicates the local population is willing to use the Metro Project so long as the fare is in the range as available in public modes of transport i.e. BEST buses and local trains. All this is quite sufficient to reject the arguments of learned Senior Counsel Mr. Dwarkadas that the Business Plan was an irrelevant document to be considered in the bid

evaluation process or that the bids had to be evaluated solely on the basis of VGF demanded by the bidders.

104 The next contention urged by Mr. Dwarkadas for exclusion of material like DPR, RFP, business plan and the Concession Agreement was that there was a sea change in circumstances since such material was issued or documents were executed. This ground is more in the nature of objections to the weight to be attached to such material, and not to the very exclusion of such material from consideration. The FFC, has completely excluded such material from consideration. The aspect of any alleged sea change finds no reference or even reflection in the majority report. At the most, it can be said that there is reference to escalation of construction costs from Rs.2356 crores to Rs.4000 crores or thereabouts. The majority report, however, proceeds on the basis that it is the MMRDA which was solely responsible for delay and cost overruns. In proceeding so, the FFC does not even advert to the material placed on record by MMRDA like Louis Berger Report or the reports submitted by Lenders

Engineers (SOWIL Limited and CREEC, China) which suggest that MMRDA was not responsible for the cost overruns. Based upon such presumption, the majority report places the brunt of increased fares on the commuting public since, MMRDA is held to represent the interests of the commuting public. In our opinion, there is unreasonableness on the part of the FFC to proceed on the basis that it is the MMRDA which was solely responsible for the delay and the consequent cost overruns. The reports are said to have suggested that it is MMOPL which has padded up the expenses.

105 We are also unable to agree with Mr. Dwarkadas's contention that since the MMRDA extended the period for completion of the construction without terminating the contract or without even levying any penalty, it should be presumed that the MMRDA has accepted that it was solely responsible for the delay and the consequent cost overruns. The issue of the quantum of cost overruns and the responsibility for the delay is actually pending adjudication in arbitration proceedings, where, MMOPL has raised a claim for

Rs.1939 crores or thereabouts. The FFC, was therefore, not at all justified in proceeding on the basis that it is the MMRDA which was responsible for the delay and the consequent cost overruns and on this basis, proceeding to determine the fare, which, even the MMOPL chooses to style as '*tariff shock*'.

106 While MMOPL refuting the contention of MMRDA significantly, placed reliance on Louis Berger report and other material contending that since all issues are pending adjudication in the Arbitration Proceedings, the same are of no relevance to the present petition. However, the 4th respondent MMOPL, abandons this yardstick when it defends the FFC presumption that MMRDA is responsible for the delay and the consequent cost overruns. Reference to the averments in paragraphs 31 and 32 of MMOPL's affidavit-in-reply dated 3rd June 2016 is relevant in the context.

“31. I say that Respondent No.4 accordingly incurred substantial cost overruns, primarily on account of the Petitioner failing to comply with its obligations under the Concession Agreement as well as its duties at the time of accepting the re-negotiated offer dated 10th May 2006. I say that the Respondent No. 4 was, therefore, constrained to initiate arbitration proceedings against the

Petitioner seeking indemnification and compensation for these breaches by the Petitioner. I say that the said arbitration proceedings are currently going on and the issues of breaches committed by the Petitioner is sub judice therein.

32. I say that the reliance placed by the Petitioner on the report submitted by the Lenders Engineers (SOWIL Ltd. And CREEC, China) and the report submitted by the Louis Berger Consulting Pvt. Ltd., is wholly misplaced. In any event, I say that the subject matter of both reports is currently pending adjudication before the Arbitration Tribunal and, therefore, the same is of no relevance for the present matter i.e. whether or not the Impugned Report made by Respondent No.1 must be interfered with.

107 There is now a serious fallacy, both in the contentions of MMOPL and approach of FFC in virtually proceeding on the basis that it is MMRDA which was responsible for the cost overruns. In the arbitration proceedings, if ultimately it is held that MMRDA was not responsible for the delay and the consequent cost overruns, then, the prejudice to public interest, will be irreversible. At the very least, MMOPL will be unjustly enriched at the cost of commuters. Even if MMOPL succeeds in the arbitration proceedings and is awarded the claimed amount of Rs.1939 crores, even then, the issue of unjust enrichment at the cost of

commuters and tax payers will arise. This is because the MMOPL, by then, will have recovered substantial amounts by way of the enhanced fares, and will further have to be paid compensation amount. The FFC, has altogether glossed over this vital and relevant consideration, particularly as the payments to MMOPL have to come from the commuters or the tax payers. In a sense, in the present situation, the impugned decision amounts to grant of substantial interim monetary relief in the pending arbitration proceedings even before the issue of liability for delay and cost overrun is yet to be adjudicated.

108 In all probability, perhaps realizing the fallacies which would arise out of such unjust enrichment, MMOPL persistently submitted that in case its claim is upheld in the arbitration proceedings, and if there is an award for compensation, the MMOPL will pass on the benefit of such award to the commuters. Reliance was placed upon the interim orders granted by this Court in the context of fixation of initial fares by MMOPL to urge that such a course is

permissible. According to us, such reliance is misplaced because the learned Single Judge as well as the Division Bench noted that the FFC, was to determine the fares within a period of three months. Therefore, they observed that there would be no serious prejudice to the commuting public if the initial fares fixed by the MMOPL continued for a period of three months or thereafter. If ultimately, the FFC rules against the MMOPL, adjustments could always be made. Such a proposition does not operate in the present context. Besides, when the issue is of larger public interest of the commuting public, the *prima facie* observations made in the interim orders, can neither be applied out of context nor can they even otherwise support the contention of MMOPL. The contention that VGF was reduced by the Consortium from the bid amount of Rs.1251 crores to Rs.650 crores, is, at least *prima facie*, not a relevant factor. At least, no material was placed before us to suggest that such reduction was on the basis of certain assurances made by the MMRDA and the State Government. Further, there is no allegation that such alleged assurances were not complied with by the MMRDA or

the State Government. The unilateral address of letter dated 10th May 2006 by the Consortium is hardly of any evidence. The Concession Agreement was executed on 7th March 2007. There is no reference to any such alleged assurances in the said Concession Agreement. The reduction was obviously a commercial judgment or a commercial call taken by the Consortium for the reasons best known to it. This is surely not a case involving any inequality of bargaining power, and fortunately there is no such plea raised by the 4th respondent. On such ground therefore, the FFC could not have ignored the Business Plan or the Concession Agreement.

109 The FFC has completely ignored the Business Plan submitted by the MMOPL which was vital and relevant material to the exercise of fare determination. In the DPR and RFP, certain estimates as to ridership as well as financials had been made known to the prospective bidder. However, it was made clear that the bidder must undertake independent surveys or independently assess such factors before submission of their bids, which essentially included the

Business Plan. In this case, the consortium actually agreed with the estimates and then submitted its Business Plan. From the DPR and RFP, it is quite clear that the business model contemplated was of reasonable fares which would attract high ridership, which is to sustain the Metro project. One of the prime objectives of the Metro project was to reduce the burden on the existing infrastructure. The consortium, in its Business Plan submitted in the prescribed format as a part of its bid, accepted the estimates of ridership of 5.66 lakhs per day corresponding to fare and non-fare revenue of Rs.226 crores. Upon excluding the operating expenses, interest outgoings etc. in the first year of operations itself, i.e. 2011, provision has to be made for depreciation of 137 crores, a notional loss of Rs.115 crores was projected.

110 The projections so far as 2019, i.e. after 8 year of operations where the ridership assumed to be increased to 6.60 lakhs per day. The aggregate revenue was projected at Rs.420 crores. Upon exclusion of operating expenses, interest, depreciation, tax, there would be actual surplus of Rs.33

crores. The project was expected to break even from the 9th year. From the first 8 years of operations, the Business Plan submitted by the consortium did not contemplate any payment of dividend or return of equity to the promoters. For the first 5 years of operations, there was to be no repayment of loans. Finally, the Business Plan, also projected the position in the 30th year of operations, i.e. in the year 2041. By this year, the ridership was to increase to 12.11 lakhs per day and profits projected were Rs.754 crores. Over a 30 year period, the consortium, was to make profits of Rs. 8519 crores. There is ample material on record which throws light on the business model of Metro project. Since, this was to be a Mass Rapid Transit System, the emphasis was on reasonable fares and high ridership. The consortium also understood the fundamentals of business model in this manner itself, which is clear from the Business Plan submitted by it. One should not forget that it is on evaluation of such Business Plan that the consortium was selected for award of contract. The FFC, by even refusing to look to the business plan, much less, take the same into consideration, has virtually relieved the MMOPL of

the very basis on which it got the contract. There is accordingly, the issue of integrity of the tender process, which, was not an irrelevant circumstance when it comes to fare determination. If there was any indication in the DPR or the RFP that revision of fares will not be restricted to the formula of 11 percent every 4th year or revision in exceptional circumstances of unanticipated increase in costs, it is possible that other bidders might have offered more competitive terms. Though, after the extension of the Metro Act, the fares or the formula for the revision in the Concession Agreement may not be binding, it is not correct to say that the same are irrelevant, extraneous and therefore, liable for exclusion from consideration.

111 The FFC, or for that matter, at least the three experts appointed by the FFC, as directed by the FFC, have not assessed the issue of Metro fares by taking into consideration the entire spectrum of project cost, equity, return on investments, servicing of debts, operation costs, and such other parameters specifically referred to in paragraphs

17 and 18 of the majority report. It is a situation whether incorrect questions are put to, which will obviously result in securing incorrect answers. If, as per the Business Plan submitted by the consortium, there was to be no return on equity for the first 8 years, there was to be no repayment of loans for the first 5 years and host of such other factors, as reflected in the business plan, then, assessment of fares by ignoring all such relevancies, calls for judicial review. These were the matters which were relevant to the issue for fare determination. All such issues were squarely raised by MMRDA in its submissions dated 7th May 2015 and 10th June 2015. However, the impugned decision “majority report” reflects no consideration of the submissions and the issues raised by MMRDA in their submissions. The objective for the extension of the Metro Act was certainly not an act to relieve the MMOPL of the representations held out in its business plan, which was one of the considerations for the evaluation of the bid. The objective was also certainly not to merely relieve the MMOPL of the contractual obligations undertaken by it under the Concession Agreement. The objective was to

consider all price fixation mechanisms usually go into to arrive at a fair fare, which would balance the interests of the operator and the commuting public. A fare, which would retain the character of the project as a Mass Rapid Transit System, a fare which would retain the character of a PPP model.

112 The FFC, by virtue of its statutory position, can undoubtedly disregard the fare stipulated in the contract between the parties. In a given case, it may determine fares, even lesser than the stipulated contractual rates. Similarly, in a given case the fares may be higher than the stipulated contractual rates. As held in *Cynamide* (supra) a price fixation measure does not concern itself with the interest of an individual manufacturer or a producer, which in this case, will imply the operator MMOPL. It is generally in relation to a particular commodity or a class of commodities or transactions, which, in this case, will imply, the operator MMOPL. It is done in relation to a particular commodity or a class of commodities or transactions, which, in this case, will

mean the riders of the Metro Project. Most importantly, a price fixation measure is conceived in the interests of the general consumer public. The right of the citizens to obtain essential articles at fair prices and the duty of the State to provide them so are transformed into the power of the State to fix prices and the obligation of the producer to charge no more than the price fixed. Again, the Supreme Court has clarified that price fixation is not something which primarily affects only the manufactures and the producers. Those who are most vitally affected are the consumer public. It is for their protection that the price fixation is resorted to, and any increase in price affects them as seriously as any decrease does a manufacturer, if not more.

113 Even the MMOPL tacitly concedes that the fare recommended by FFC i.e. Rs. 10 to 110, if implemented, will amount to giving a '**tariff shock**' to its valued commuters. In order to avoid giving such '**tariff shock**' to its commuters, the MMOPL states that it chose to defer any fare revision till 30th November 2015, and have a dialogue with

the State of Maharashtra with an intention to find out a viable solution. The MMOPL has stated that for the present, though, in terms of the recommendation of the FFC it is entitled to increase the fares to Rs.10 – 110, proposed increase to Rs.10 – 40.

114 The averment with regard to *tariff shock* is set out in the MMOPL's affidavit dated 7th December 2015 at paragraph 18(e) which reads as follows :

“(e) The FFC had recommended a fare structure of Rs. 10 to Rs. 110 in July 2015 after detailed scrutiny of all aspects but the 4th Respondent chose to defer any fare revision till November 30, 2015 and engage with the GoM with an intent to finding a viable solution and to avoid giving any tariff shock to its valued commuters.

115 According to us, the defence raised by MMOPL that though FFC recommended fare structure of Rs.10 to 110, they did not want to implement the same immediately to avoid 'tariff shock' to commuters, may not be much assistance to them to defend the impugned decision. Once the recommendation is allowed to prevail, it will be left open to

MMOPL to implement the fare of Rs.10 to Rs.110 at anytime they want. Recommendation by FFC is nothing but an authorization to MMOPL to implement the increased fares upto maximum absolutely according to its discretion. In that case, the commuter public would be at the mercy of the MMOPL so far as the fares are concerned. It would be nothing but defeating the very purpose of 'Rapid Mass Transit System'. Further, it is not certainly the objective for prescribing price fixation measures. By adoption of this methodology, even any attempts at future fare fixation, it may be pre-empted by urging that the fare actually levied is less than the maximum recommended.

116 In terms of DPR and RFP when the project was conceived it was fixed at 1.5 times the BEST ordinary non-air conditioned bus fare, on the other hand, when MMOPL filed application for revision of fares, it pleaded that Metro fares should be priced well above BEST fares because Metro travel is time saving, reliable, comfortable and safe. It is best comparable to A.C. Bus fare for the purpose of fixing of fares.

117 In order to achieve higher ridership, it was conceived to pay the fares to 1.5 times the BEST ordinary non-air conditioned bus fare, since Metro project was conceived as Mass Rapid Transit System. There is no merit in the argument of the 4th respondent MMOPL that there is no nexus between the low fares and high ridership. Even FFC has not accepted such proposition, though the FFC may not have paid much attention to the same. Even the Welingkar Report, upon which, MMOPL relies has stated that with 20% increase in the existing fares, ridership will be decreased by 33.71%.

118 Some extracts of its application read as follows:

“3.3.1.3. Affordability of the services

As discussed above, the Affordability of the facility will be governed by the ability to pay, willingness to pay by a majority of the strata of the potential commuters across the metro alignment.

Ridership need to be optimized since very low fares will attract very high ridership but it will generate lower revenue and on the other side very high fare may take away the affordability of the facility and attract very low

ridership and thus low revenue. The strategy needs to adopt a balanced approach and since the system is dynamic it should be able to cater to different segments of the society by allowing time of the day fares wherein peak hours may invite a differentially higher fare than non-peak hour thereby allowing optimal capacity utilization and safe running of the system.

“3.3.2. Comparison with Competing Modes of Transport

In this section, we have compared the fare structure of different modes of transport in the city (metro, buses, AC buses, auto-rickshaws, and taxi) and have compared the different parameters like time, security, safety, comfort, reliability, automation for each of transportation systems.

3.3.2.1 Bus :

Bombay Electric Supply and Transport Undertaking (BEST) operate the bus transportation system in the city of Mumbai. The following fares are applicable for the same; however, the bus operation has been heavily subsidized with total revenue deficit of Rs.768 Crores in the year 2013-14. Further, Rs.917 Crores has been estimated as revenue deficit for year 2014-15.

Table 3 : Current BEST fares

Sl. No.	Distance	Current Fare	
		Ordinary (Bus) Rs.	AC Buses (Rs.)
1	0 to 2 km	8	30
2	2 km to 4 km	10	35
3	4 km to 6 km	14	55
4	6 km to 10 km	18	65
5	10 km to 14 km	22	80

“3.3.3. Comparison between various Parameters for different modes of transport

Various models of transport have been compared to understand the value proposition they provide and the cost of using the same :

Table - 10

Para -- meters	Metro	Best Bus	Auto	Taxis
Time Taken	-21 minutes	60 minutes – 100 minutes	50 minutes – 90minutes	50 minutes – 90minutes
Comfort	Air-conditioned	AC available and not available on metro route	No	Option available at a very high price
Last Mile connectivity	No	No	Yes	Yes
Fare Collection	Automatic	Pass facility available, manual otherwise	Manual	Manual
Reliability on travel time	High	Low	Medium	Medium
Cost	Intial fares fixed as Rs.10-40	Rs.8 – Rs.30 AC bus; Rs.30 – Rs.100	Rs.17-187	Rs.21-230
Availability	Throughout the day	Frequent	Available	Available on call
Automation	High-Limited human Intervention	Low: Human Intervention required	Low:Driver Dependent,there have been various complaints to RTO regarding non-compliance.	

Safety	High Trains to not move without door closure	Low People hanging out on the doors from the bus	Low Unbalanced	Medium
Security	Security Cameras and round the clock security presence	None	None	None
Wait time	Average 2 to 4 minutes	Average 15 to 20 mins	Average 5 to 30 mins	Average 5 to 30 mins

Hence, it is evident that :

- (a) Metro brings in a significant amount of time saving in comparison to all other modes of transportation
- (b) The reliability of certainty of journey is highest because of the dedicated right of way
- (c) Highly safe system, secured in comparison to all other modes
- (d) Comfortable mode with Air-Conditioned coaches and automated fare collection system; thus scores above all other mode of transportation systems.

Thus, air-conditioned metro should be priced well above BEST fares because of the various value proposition it provides viz. time saving, comfort, reliability, safety etc. It is best comparable to AC bus services for the purpose of fixation fares”.

119 According to us, the contention raised by MMOPL that since the Metro Project, even with the enhanced fares will be catering eventually to atleast 1 – 2 lakh riders each day, the same is sufficient for the project to retain its Mass Rapid Transit System, is not acceptable. According to them, placing reliance on the dictionary meaning of the term “Mass” is quite misplaced if the context in which it has to be appreciated, is taken into consideration. It is also noticed that the Mumbai Suburban Railway (local trains) commute 7.5 million or 75 lakh commuters each day. This is reported to be 2.5 times its capacity. The contention completely ignores the profile and the basic structure of the project which came to be reflected in the DPR, RFP and even the Business Plans.

120 The comparison made by MMOPL between the Metro and the BEST A.C buses is also quite misconceived. The percentage of such buses and the number of commuters which used such buses is nothing compared to the percentage of buses and commuters in BEST buses ordinary non-air-conditioned ones. Apparently, in order to ease out pressure

on the existing infrastructure i.e. the local trains and BEST buses, or even on the congested public roads to reduce the congestion, the Metro Project was envisaged. Because of this purpose, construction was permitted on / above public roads and public properties. Public property is leased at a nominal rent of Rs.1/- for the Metro Project. The Metro Project is expected to cater to the different class of commuters like those commuting in air-conditioned buses or air-conditioned taxis, virtually amounts to converting the character of a “Mass Rapid Transit System” to a “Class Rapid Transit System”. According to us, these are all relevant considerations which the FFC was bound to atleast take into account in determining the Metro fares.

121 We are also of the opinion that FFC, appears to have determined the fares on the basis that the Metro Project was some *Greenfield project*. It has totally ignored the circumstance why competitive bids were invited from the bidders across the globe. The bidders, in terms of requirement, under the RFP, have submitted their business

plans which are to be evaluated for the purpose of determination of the bidder. In such matters, the bidders are required to make their own commercial judgments, including commercial judgments, and then offer their own projections. On the extension of the Metro Act, it is possible that such projections may not be binding on FFC, but one cannot call them irrelevant facts.

122 The issue of bankability or viability referred to by *Jeffrey Delmon*, is no doubt a relevant consideration to a PPP Project. Apparently, the Consortium submitted its bid together with the business plan, there is no reason whatsoever to doubt that the Consortium took into consideration the issues of bankability or viability of the project. There is reason to believe that the Consortium took these vital aspects into consideration when it reduced VGF demand from Rs.1251 crores to Rs.650 crores. Now, MMOPL is raising the issues of bankability or viability on the ground of escalation of construction costs, or the alleged non-compliance of some assurances given to the Consortium

at the stage of reduction of VGF demand. As stated above, these are the issues pending for consideration/adjudication in arbitration proceedings. According to us, FFC was disentitled to proceed on the basis that it is MMRDA which was responsible for the delay in the project which led to the consequence of cost overruns. Again, viability of only the private partner cannot be the sole or relevant consideration. The viability of the project, in total, is an important and relevant consideration. This, according to us, includes reference to the payment capacity of the consumers of the project. This again, has to be with reference to basic structure of the project as a Mass Rapid Transit System. All we want to say is that these were relevant facts and valid considerations which ought to have been gone into in the process of decision making by the FFC.

123 The FFC says it has taken into consideration the reports of the the following expert/expert bodies to study the equity investments, project costs, operational costs of Mumbai Metro :

Tilak

- (1) Professor G. Raghuram, (IIM), Ahmedabad;
- (2) L. Welingkar Institute of Management Development & Research, Mumbai;
- (3) Mr. S. K. Lohia, Chief Engineer, Northern Railways & Ex-OSD (Urban Transport) Ministry of Urban Development, Govt. of India.

124 In addition to the above experts, the majority of the FFC states that the Price Water House Coopers (PWC) Report also was placed before them for consideration since FFC thought it imminently fit to evaluate various policies that are being followed in India and across the world.

125 The majority report at paragraph 20 notes that Raghuram and Lohia Reports are recommended average fare of Rs.60 and PWC has recommended increasing the fare by 3.5 times the existing fare.

126 On perusal of Raghuram Report, it is true that it recommends average fare of Rs.60 as “Revenue Maximizing Fare”. This corresponds to peak hour fare of Rs.10 – 87 and

non peak hour fare of Rs.10 – 32. At least, *prima facie*, this was an '*all inclusive fare*' in the sense it would cover not only OPEX or Service of Interest on Loan, but also include like repayment of the loan amounts, depreciation, return to shareholders and several such factors, which, in terms of the business plan, were not to be included for at least the first eight years of operations. Most pertinently, even, the Raghuram Report sounds the following caveats if the average fare of Rs.60 is recommended :

“It is important to note that the fare estimated to cover the cash outflows and the full cost does not provide for any elasticity of demand with respect to fare. At such high fares, in reality, the traffic would be driven away, reducing the fare box revenues lower than that at the revenue maximizing level”.

“From the affordability point of view, the full cost based fare (option v. elaborated in section 3.5) would be impractical, since it does not recognize elasticity of demand and the competitive fares. It would not even work from the viability perspective, since elasticity of demand from the fare would drive away the passengers.”

“Going forward, we recommend drawing on the principle of revenue maximization, subject to validation based on competitive fares. It is important to note that even under this scenario the viability of the project is not guaranteed.”

127 From the aforesaid reading, it is very clear that the Raghuram Report had very guardedly recommended the average fare of Rs.60 corresponding to the fare range of Rs.10 – 87, subject to several caveats. In fact, the report suggests that even at these rates, the riders would be driven away. On the other hand, the majority report misconstrues this recommendation as some firm or unconditional recommendation, and then proceeds to determine the fare not even in the range of Rs.10 – 87, but in the range of Rs.10 – 110.

128 The Lohia Report draws distinction between 'Technical Fare' and 'Public Fare'. The Technical fare would enable the operator to cover full cost, including reasonable return to the shareholders. This was determined at average fare of Rs.68 in the range of Rs.22 – 136. The Public fare was determined on the basis of affordability, and was stated to be Rs.60 in the range of Rs.10 – 120. Again, even this Public fare included return to the shareholders at the rate of 10%, and took into account interest payments and OPEX, much in

excess of what was projected in the Business Plan. Finally, the Lohia Report concludes that the average Public fare should be around Rs.68 per passenger, if the State or the MMRDA were willing to bridge the viability gap by making an interim payment of Rs.35 crores. The report also notes that at these rates, the ridership would fall to about 1.90 lakhs per day. As noted earlier, the Raghuram Report, in terms, has stated that even at the average fare of Rs.60 per passenger, the commuters/riders will be driven away from the Metro Project, and therefore, it was neither practical nor viable to operate the Project at such rates. This is more or less the position reflected from the pleading of Lohia Report as well. Both the reports almost black out the Business Plan and the projections submitted by the Consortium.

129 The Welingkar Report states that if there is 20% increase in the fare structure from the existing Rs.10 – 40 levels, there would be reduction in ridership by about 19.14%. Increase of 30% in the fare would reduce ridership

by 33.71%, and users of the Metro Project would switch to bus or train for their daily commuting. The report says that 66% and 80% of the commuters interviewed, were agreeable for fare hike of 20% or 30% respectively. However, the report also notes that 52% of the non metro users stated that they were deterred even the existing fares of Rs.10 – 40, which according to them, is too expensive. The Welingkar Report, after referring to the caveats in fall in ridership, ultimately, recommended fare increase by 20% to 30% i.e. in the range of Rs.12 – 48 or Rs.13 – 52. The FFC has only picked up the statement that 66% and 80% of the existing users were agreeable to fare hike, and does not refer to any other statement or details mentioned in the report.

130 The PCW Report had opined that the existing fare of Rs.10 – 40 was adequate to meet OPEX, but not interest payments. The report also states that fare of Rs.30 – 80 would be adequate to meet OPEX interest and depreciation. Again, even the figures taken into account by PCW are much in excess of the figures projected in the business plan.

131 From the aforesaid, at least one thing is quite clear i.e. none of the reports recommended fare ranging between Rs.10 – 110. Such fares may have been discussed in the reports, but were definitely not recommended. On the other hand, the FFC, in paragraph 24 of the majority report, however states as follows :

“24. We have considered the reports submitted by the four expert committees. In terms of the report we find that they have suggested the higher average fare. However we are fixing the fare hereunder, which works out to be lower average fare than the average fare suggested by the four expert committee.”

132 After stating as stated above, the majority report of the FFC proceeds to fix the fare in the range of Rs.10 – 110, which is certainly not the lower average fare than the average fare suggested by the four experts. Even otherwise, on what basis they arrive at such rates is not forthcoming.

133 Definitely, this is a case of manifest unreasonableness. The FFC, it appears, has misread and misconstrued the reports of the experts appointed by it. The

experts, by virtue of the incorrect terms of reference made to them, have in turn, ignored several relevant considerations like the projections in the business plans, and the financials submitted by MMOPL itself along with its bid documents. The experts, have naturally, not even gone into the issue of liability for delay and cost overruns. This is, therefore, not a case where we propose to supplant the feel of the experts by our own views. According to us, even applying the limited parameters of judicial review to the matter on hand, we are of the opinion interference is warranted.

134 In the light of above discussion and reasons, we are of the opinion that the impugned decision dated 8th July 2015 deserves to be set aside. Fresh assessment is required. The Union of India has to once again resort to the exercise contemplated in terms of Section 34 of the Metro Act for constitution of the Fare Fixation Committee within a period of one month from today. The FFC once constituted is to consider the issue of Metro fare determination in accordance with law. It is left open to them to seek opinion of experts if

they think it is necessary in the circumstances that exist. However, once FFC is constituted within a month, as stated above, it shall submit its report along with the recommendations as expeditiously as possible, and in any case, within a period not exceeding three months in terms of Section 36 of the Metro Act.

135 Since the fare fixation issue on the initial opening of the Metro Railway is pending in arbitration, MMRDA's plea for interim relief stands rejected, the MMOPL subject to result of the arbitration proceedings or the determination of the fares by FFC, whichever is earlier, may continue with the present fare structure of fares not exceeding Rs.10 – Rs.40/-.

136 We once again clarify that we have not examined the issue of the constitutional validity of the Metro Act or the Notifications by which said Act is made applicable to the Mumbai Metropolitan area and the Metro-I line, since these issues are pending consideration in WP No.863/2016 and PIL No.39/2016. They could not be disposed of along with this

petition on account of time constraint. Therefore, we clarify that the determination of fares by the FFC under the provisions of the Metro Act, will be ultimately subject to the orders in WP No.863/2016 and PIL 39/2016 pending for final hearing.

137 Accordingly, we dispose of the petition with the following order :

- (1) The impugned decision dated 8th July 2015 by the Fare Fixation Committee recommending increase in the fares of Metro from Rs.9 – 13 to Rs.10 – 110 effective from 2014-15 is hereby set aside ;
- (2) The Union of India is directed to proceed in terms of Section 34 of the Metro Act within a period of one month from today.
- (3) The FFC, once comes into existence, shall consider the issue of Fare Fixation in accordance with law and on its own merits in the light of our observations in this order and submit its Report along with the recommendations, as expeditiously as possible, and in any case, within a period of three months from the date of reference by the Union of India, in terms of the Metro Act;

- (4) The MMOPL, subject to result of the arbitration proceedings relating to fare fixation on the initial opening of the Metro Railway or the determination of Fares by FFC as now directed, whichever is earlier, may continue with the present fare structure i.e. fares not exceeding Rs.10 – 40.
- (5) Since the above process/exercise takes, in all, four months period, no directions are issued for deposit of excess amount of fares collected by MMOPL. However, MMOPL is directed to file a statement before the FFC in this regard.

There is no order as to costs.

(M.S. SONAK, J)

(CHIEF JUSTICE)