

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

+ **O.M.P. (COMM) 32/2019 & IA 978/2019**

Reserved on: 22.01.2019
Date of decision : 15.02.2019

AIRPORT AUTHORITY OF INDIA Petitioner

Through **Mr.Tushar Mehta, Solicitor
General with Mr.Raghavender
Shankar, Mr.Karan Lahiri,
Ms.Kanu Agarwal and Mr.Adit
Khorana, Advs.**

versus

MUMBAI INTERNATIONAL AIRPORT LTD. Respondent

Through **Mr.P.Chidambaram Sr.Adv. with
Mr.Ankur Chawla, Ms.Kanika
Singh, Mr.R.K. Mohit Gupta,
Ms.Pallavi Langar and Ms.Palak
Vashist, Advs.**

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 23.09.2018 passed unanimously by a three member Arbitral Tribunal.

2. The dispute between the parties, though required reference of the Arbitral Tribunal and of this Court to various documents exchanged between the parties and meetings held by them for a period ranging almost 10 years, lies in a very narrow compass. The dispute is whether

land ad measuring 16860 sq. mtrs. (approx. 4.17 acres) being the ‘F’ Block of the NAD Colony located near New Engineering Complex (NEC) Gate, Bamanwada Village, Taluka Andheri, Mumbai Suburban District (hereinafter referred to as the ‘disputed land’) was the ‘Demised Premises’ in terms of Schedule 25 of the Operation, Management and Development Agreement dated 04.04.2006 (hereinafter referred to as ‘OMDA’) executed between the parties or was a ‘Carved Out Assets’.

3. Chapter I (Definitions and Interpretation) of OMDA defines ‘Carved Out Assets’ to mean the assets set out in Schedule 27 thereof. Schedule 27 of OMDA reads as under:

**“SCHEDULE 27
CARVED OUT ASSETS**

Details of the Carved out Assets

Mumbai Airport

<i>S.No.</i>	<i>Assets / Leases</i>	<i>Area of Land (Sq. Metres)</i>
<i>1.</i>	<i>New ATC Tower</i>	<i>12,045.50</i>
<i>2.</i>	<i>The NAD staff colony of AAI</i>	<i>2,02,919.44</i>
<i>3.</i>	<i>Lease of land to Hotel Leela Venture</i>	<i>27,000.00</i>
<i>4.</i>	<i>All retail fuel outlets which are outside the airport operational boundary</i>	<i>2,032.61</i>
<i>5.</i>	<i>Convention Centre</i>	<i>64,749.60</i>

4. Schedule 25 annexed a map demarcating the 'Demised Premises'. The map also identified the 'Carved Out Assets'. It is undisputed that the disputed land was not shown in the map as a 'Carved Out Assets'.

5. On 26.04.2006, the parties entered into a Lease Deed to effectuate and in accordance with the OMDA. Clause 2.1.1 of the Lease Deed excludes the 'Carved Out Assets' from the 'Demised Premises' and reads as under:

*“2.1.1 In consideration of the Lease Rental, OMDA and the covenants and warranties on the part of the Lessee therein and herein, the Lessor, in accordance with the AAI Act and the terms and conditions set forth herein, hereby, demise to the Lessee, commencing from the Effective Date, all the land (along with any buildings, constructions or immovable assets, if any, thereon) which is described, delineated and shown in the Schedule 1 hereto, other than (i) any lands (along with any buildings, constructions or immovable assets, if any, thereon) granted to any third party under any Existing Lease(s) constituting the Airport on the date hereof; and (ii) any and all of the Carved Out Assets and the underlying land together with any buildings, constructions or immovable assets thereon, on an "as is where basis" together with all Encumbrances thereto, (hereinafter "**Demised Premises**") to hold the said Demised Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Demised Premises, hereditaments or premises or any part thereof belonging to or in anyway appurtenant thereto or enjoyed therewith, for the duration of the Term for the sole purpose of the Project, and for such other purposes as are permitted under this Lease Deed.”*

(Emphasis Supplied)

6. Schedule 1 referred to in the above Clause was in form of a map, which now showed the disputed land as a 'Carved Out Assets'.

7. The respondent contended that the disputed land was wrongly shown as 'Carved Out Assets' in the Lease Deed.

8. In the 7th Meeting of the OMDA Implementation Oversight Committee (hereinafter referred to as the 'OIOC') held on 20.02.2008, the petitioner stated that the said issue was being examined and will be decided shortly.

9. In a meeting chaired by the Minister of Civil Aviation (MOCA) on 16.04.2008, the following decision was arrived at:

"2. AAI Matters:

(a) Carved out assets:

Pursuant to the OMDA provisions, MIAL had requested AAI for transfer of certain carved out assets for development of aeronautical services / assets. There was, in principle, agreement between AAI and MIAL that part of AND colony land and entire convention centre land shall be demised to MIAL. It was also agreed, in principle, to relocate ATC tower to Santacruz and technical block to AND colony as these facilities are coming in the way of construction block to AND colony as these facilities are coming in the way of construction of parallel taxi tract to runway 14/32. It was also discussed that AAI will construct a new building in AND colony for relocating the REDEVELOPMENT office.

On the matter of land to be transferred to MIAL by AAI, it was decided that 25 acres of the AND colony and 16, acres of the Convention Centre land would be transferred to MIAL by AAI. It was clarified that 4.53 acres of "F" block land of AND colony was not carved out asset but inadvertently included in the list of lease deed.

AAI has already agreed to relocate quarters at this block to AND colony. It was decided that as agreed earlier between AAI and MIAL, 4.53 acres of land shall be handed over by AAI to MIAL and necessary amendment to lease deed shall be carried out. AAI pointed out that in the last Board meeting it was decided to give 15 acres of AND colony and 11 acres of Convention Centre land to MIAL. Considering the future requirement of AAI for various purposes including requirements of DGCA, BCAS, MET etc.

Decision

Considering the requirements of both MIAL and AAI, it was finally decided that MIAL would provide suitable 5 acres of land to AAI in the airport premises for its future requirements of traffic flow management centre, etc. and 25 acres of AND colony and 16 acres of Convention Centre land will be leased to MIAL by AAI.

(b) Consideration for carved out assets

AAI indicated that the OMDA provides that any carved out assets given for aeronautical purpose has to be on the mutually agreed terms and accordingly, it should be higher than the terms of OMDA. However, MIAL indicated that since the land is being used only for aeronautical purpose and the cost of relocation, if any, is also being borne by them, the same terms of OMDA will be most appropriate.

Decision

It was decided that transfer of carved out lands (25 acres of AND colony land and 15 acres of Convention Centre land by MI to MIAL would be on the terms of OMDA in respect of demised premises.” (Emphasis Supplied)

Note:- There seems to be some typographical errors in the above quotation. The same has been taken from the document as filed in this Court.

10. A reading of the above Minutes would clearly show that it was agreed that the disputed land was not a 'Carved Out Assets' but was inadvertently shown as a 'Carved Out Assets' in the Lease Deed. It was further agreed that the disputed land shall be handed over by the petitioner to the respondent and necessary amendment to Lease Deed shall be carried out.

11. In spite of the above decision, the dispute persisted, with the respondent claiming exclusion of the disputed land from the 'Carved Out Assets'.

12. On 03.11.2009, the MOCA conveyed its approval for leasing of the disputed land for 'aeronautical purpose' as part of 'Demised Premises' on payment of *pro rata* upfront money. In turn, the petitioner by its letter dated 16/24.11.2009, conveyed to the respondent the approval of the competent authority for leasing of the disputed land for 'aeronautical purpose' as part of the 'Demised Premises' on payment of upfront money of Rs.33,36,000/- and subject to certain other conditions being fulfilled by the respondent.

13. On the other hand, the respondent by its letter dated 24.11.2009, while enclosing a cheque of Rs.30,02,400/- towards upfront charge, represented as under:

"We notice there is restriction of end use on the assumption that the carved out asset is being demised to MIAL while in this case asset was wrongly carved out while registering the lease deed and this is only a correction. Even Upfront Fee payable against the same has already been paid as it was not carved out asset as per OMDA. We are taking

up the matter of end use separately, and in the meantime, we request AAI for execution of Supplementary Lease Deed at the earliest.”

14. Even before the exchange of above letters, on 20.11.2009, in the meeting of OIOC, the following decision had been taken:

“3.8 Other issues and decisions taken

a) Carved out assets

It was brought to the notice of the Committee that AAI has issued approval for demising of 4. 17 acres of land of AND Colony ("F" Block) from the carved out assets with end use restriction for aeronautical purposes. Since this approval is only a correction to the earlier wrongly carved out land, MIAL requested for removal of the condition relating to land use restriction. Chairman, AAI agreed for considering the same.” (Emphasis Supplied)

15. A reading of the above clearly shows that the Chairman of the petitioner had agreed to consider the request of the respondent for removal of the condition relating to land use restriction as the disputed land had wrongly been shown as a ‘Carved Out Assets’.

16. The parties thereafter, executed the Second Supplemental Lease Deed on 15.04.2010 with respect to the disputed land. Some of the terms of this Lease Deed have been referred by the learned Solicitor General as also by the learned Senior Counsel for the respondent and are therefore, reproduced hereinunder:

“WHEREAS

xxxxxx

B. Pursuant to the OMDA, by and under a Lease Deed dated 26th April, 2000 executed between the Lessor and Lessee herein and registered with the Sub-Registrar of Assurances at Mumbai under serial no. BDR/9601/2006 (hereinafter referred to as '**the Lease Deed**'), the Lessor has demised, granted and assured unto the Lessee all those piece and parcel of land described, delineated and shown in Schedule I of the Lease Deed, other than the Existing Leases (which term will not include licenses/leases that have expired in accordance with the terms of the relevant license/lease documents, notwithstanding their inclusion in Schedule 28 of the OMDA) and Carved Out Assets as described therein and in the OMDA, along with buildings or construction or immovable assets thereon, if any, to hold the same together with all the singular rights, liberties, privileges, easements and appurtenances thereto hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the term and purposes as set out under the OMDA;

C. Pursuant to clause 2.6.3 of the OMDA and clause 2.1.3 of the Lease Deed, the Parties have negotiated in good faith the terms and conditions on which the Lessor shall lease to the Lessee and the Lessee shall take on lease from the Lessor, the land underlying the Carved Out Asset;

D. The Lessee has requested the Lessor to grant to the Lessee a lease of certain additional land admeasuring 4.17 acres ('F' Block) and more particularly described in the Schedule I hereunder (**hereinafter the "additional land"**) which compromises a part of the Carved Out Assets for a term co-terminus with the term of the Lease Deed and upon the same terms and conditions, subject to the same covenants and without any increase in the rent as contained in the Lease Deed to the intent that the additional land should henceforth be regarded as a portion of and as included in the demise by the Lease Deed created which the Lessor has agreed to do."

XXXXXXX

"ARTICLE 1

DEFINITIONS AND INTERPRETATIONS

xxxxx

2.2 *From the date of execution hereof, the Carved Out Assets under Schedule I of the Lease Deed and Schedule 27 of the OMDA shall not include the Additional Demised Premises and the same shall be construed as a part of the Demised Premises under the Lease Deed.*

2.3 *All the covenants, conditions, restrictions, powers, indemnities and provisions contained in the Lease Deed shall be read and construed as applicable to and shall apply to the entirety of the Additional Demised Premises so demised to the Lessee as aforesaid in as full and ample a manner as if the said Additional Demised Premises hereby demised had been included in the demise by the Lease Deed created and such entirety of the said Additional Demised Premises shall henceforth remain and be liable and subject to all such covenants, conditions, powers, indemnities and provisions contained in the Lease Deed.”*

17. While the learned Solicitor General submits that the above Lease Deed was in terms of Clause 2.6.3 of the OMDA and Clause 2.1.3 of the Lease Deed dated 26.04.2006, the learned senior counsel for the respondent submits that the said Lease Deed was in fact for effecting a correction in the ‘Carved Out Assets’ in the Lease Deed dated 26.04.2006, however, the petitioner had wrongly inserted further conditions therein while making such correction.

18. Clause 2.6.3 of the OMDA is reproduced hereinunder:

“2.6.3 *With respect to land underlying the Carved Out Assets, the Parties further agree that if, at any time during the Term, the JVC requires the said land for providing any Aeronautical Services or developing and/or constructing*

any Aeronautical Assets, the Parties shall come together to negotiate in good faith the terms and conditions on which the AAI shall lease to the JVC, and the JVC shall take on lease from the AAI, the said land.”

19. Clause 2.1.3 of the Lease Deed dated 26.04.2006 is reproduced hereinunder:

“2.1.3 With respect to land underlying the Carved Out Assets, the Parties further agree that if, at any time during the Term, the Lessee requires the said land for providing any Aeronautical Services or developing and/or constructing any Aeronautical Assets, the Parties shall come together to negotiate in good faith the terms and conditions on which the Lessor shall lease to the Lessee, and the Lessee shall take on lease from the Lessor, the said land.”

20. A reading of the above two Clauses clearly shows that for the ‘Carved Out Assets’, the parties were required to negotiate the terms of a fresh lease and the said lease could only be for providing aeronautical services or for developing/constructing any Aeronautical assets. Therefore, the petitioner contends that the disputed land being a ‘Carved Out Assets’, can be leased and was infact leased for aeronautical purpose only. On the other hand, the respondent insists that the disputed land, being wrongly shown as a ‘Carved Out Assets’ in the Lease Deed dated 26.04.2006, such restriction on user could not be imposed by way of the Second Supplementary Lease Deed.

21. In the meeting of the OIOC held on 07.05.2010, the respondent raised this grievance and the following decision was taken:

“3.6.16 End use of 4.17 acres of land (F Block) in NAD Colony: the MIAL representative mentioned that 4.17 acres of land has been treated as carved out asset, whereas the same was demised premises as per OMDA. As a result, after lease of this land by AAI to MIAL, there is an end use restriction for aeronautical purposes on this land. Since this land was part of demised premises as per OMDA, end use restriction needs to be deleted. The Chairman asked AAI to look into this and if required, send the proposal to MoCA for its orders.” (Emphasis Supplied)

22. However, by the letter of 07.09.2010, the petitioner rejected respondent's request for lifting the restriction on End use without giving any reasons for the same.

23. In the meeting held on 09.09.2010 between the parties, it was decided as under:

“3.10 End Use of 4.17 acres of Land (F Block) in NAD colony: the background of the case was explained and AAI was requested to expedite resolution of this matter, as the OMDA does not include this portion of land as carved out asset. After discussion, it was proposed that MIAL may offer to AAI for using non-aeronautical land of equal area elsewhere at airport for aeronautical purpose, in lieu of this land. AAI may examine this offer and make a self contained proposal to the MoCA for lifting of end use restriction on F block land.” (Emphasis Supplied)

24. A reading of the above would show that the parties were trying to amicably resolve the dispute that have arisen due to ambiguity and apparent conflict between the OMDA and the Lease Deed.

25. In a further meeting held between the parties on 05.01.2012, it was recorded as under:

“3.9 Removal of End use restriction on 4.17 acres of land in 'F' Block of NAD Colony

The representative of MIAL informed that a Supplementary Lease Deed was executed for demise of 4.17 acres of land in 'F' Block of NAD Colony since the Lease Deed dated 26th April 2006 erroneously showed this land as Carved out although Schedule 27 of OMDA did not include it as carved out. However, the end use restriction for aeronautical use on this land was not been removed by AAI despite several requests and reminders.

ED (JVC Cell), AAI confirmed that AAI had sent its comments to MoCA that in OMDA, this place of land measuring 4.17 acres of land is not a carved out Asset. Chairman, AAI was asked to send specific comment regarding end use restriction.”

26. A reading of the above Minutes would show that the petitioner had agreed that the disputed land was wrongly shown as a ‘Carved Out Asset’ in the Lease Deed dated 26.04.2006. This was again recorded in the Minutes of the Meeting of the OIOC held on 19.12.2013, relevant portion of which is reproduced as under:

“5.7 Correction of Lease Deed: MIAL brought to the notice that 4.17 acres of land which was not Carved Out but was inadvertently shown as Carved Out in Lease Deed. MIAL (requested for correction of the Lease Deed as Article 20.3.2(b) of OMDA, i.e. in case of conflict between OMDA and any other Project Agreements, OMDA shall prevail. AAI Chairman confirmed the discrepancy and mentioned that the same needs to be corrected. However, MoCA approval is required since subsequent lease was carried out with the approval of Ministry. AAI may send proposal to MoCA for rectification.”

27. However, by the letter dated 15.09.2014, addressed by the respondent to the Ministry of Civil Aviation, the respondent, while forwarding the case to the Ministry for consideration, expressed its view point as under:

“III Viewpoints/ comments of AAI on the matter:

(a) The OMDA was execute on 04.04.2006. At that time there was no exact land area earmarked to be demised to M/s MIAL in the OMDA. Only a map showing the boundaries of CSIA and the “Carved Out Assets” of AAI indicated. It was an error that the area of "F" Block, AND Colony was not marked. The Schedule 27 of OMDA states of AND Staff Colony. It was wrong on the part of MIAL to differentiate and state that AND "F" Block Colony is not a part of AND Staff Colony. The AND Staff Colony includes both main colony and "F" Block Colony of AND Staff Colony.

(b) The list of "Carved Out Assets" shown on the Map, include the AND Staff Colony of AAI.

(c) It may also be seen from the internal notings of AAI, that "F" Block formed part of AND Residential Colony at CSI Airport (Annexure 11) This aspect was noticed subsequently and in order to remove the ambiguity necessary correction was done in the list of "Carved Out Assets" shown in the MAP at the time of registration of lease deed (dated 26.04.2006) on 22.12.2006.

(d) The plea/justification of M/s MIAL that the 4.17 acres of land was in-advertently shown as "Carved Out Assets" of AAI is not correct because as per Map, stated above, AND Staff colony is/was part of “Carved Out Assets” of AAI though total land area of AND Staff Colony (including "F" Block) stated to be not correctly mentioned in the OMDA. This is because at that time there was no proper land record and no area was surveyed. Similar case also happened in

the case of land leased to M/s. Hotel Leela Venture by AAI whereby the area of lease has been wrongly shown as 27,000 sqm., whereas in actual, the land leased to M/s. HLV is 29,000 sqm. Therefore, the mistake in "Carved Out Assets" of AAI/land area (i.e. AAI land shown less than actual measurement) shown in Schedule-27 of OMDA may not be taken as justification for claiming the land as "Demised Premises".

(e) The AAI Board approved the transfer of 4.17 acres of the carved out subject to certain conditions (SH- II, Para 6). In case now it is decided that the land in question 4.17 acres is demised land (ab initio) then, MIAL cannot be asked to fulfil the conditions approved by AAI/MOCA for transfer of the land.

(f) M/s. MIAL agreed for its additional leasing on proportionate payment of upfront money and Supplementary Lease Deed executed which stipulates that the said land area is leased to M/s MIAL for maintaining/running aeronautical services in terms of OMDA. This aspect was also raised by CAG in the PPP audit and AAI has replied that the land was transferred to MIAL only for Aeronautical purposes. Any subsequent change may affect the reply of AAI or information provided to CAG.

(g) After taking over the said land on lease from AAI for a specific purpose (aeronautical use), the request/ proposal of M/s. MIAL for removal of condition of its usage from aeronautical to non-aeronautical purposes, may be out of the purview of the terms of Supplementary Lease Deed as well as approval conveyed by MoCA to M/s. MIAL state above. In this regard reference is also invited to AAI's letter NO. AAI/MC/MIAL-28/MP/2011-12/1912 dated 9th January, 2012.

(h) The request of M/s MIAL for removal of end use restriction was considered in 16th OIOC meeting held on 02.04.2013, but the same was turned down with observations of OIOC "the supplementary lease deed was

conditional that the land should be used only for aeronautical purposes. After deliberations, it was decided that, the issue may be withdrawn by M/s. MIAL (Issue closed).

Conclusion:

Therefore, after considering all the above fact and details, AAI is of the view that even though in the Map of OMDA the land area under 4.17 acres "F" Block AND Colony) was not highlighted as "Carved Out Assets" due to mistake the Carved Out Assets Schedule- 27 clearly includes AND Staff Colony (which consists of AND Main Colony and AND "F" Block Colony) though the area stated in OMDA does not tally with actual area which is located at two areas in CSI Airport. Accordingly the same was subsequently corrected in the Lease Deed as Carved out Asset at the time of registration of Lease Deed on 22.12.2006. However, the same discrepancy was not corrected in the Schedule 27 of OMDA.

MoCA may consider the above facts and figures in terms of decision taken in OIOC."

28. Finally, by the letter dated 30.06.2016, the petitioner conveyed its decision to the respondent not to remove the restriction on the usage of the disputed land, leading to a dispute between the parties.

29. The Arbitral Tribunal, after considering the above documents has held that the disputed land was a part of 'Demised Premises' and not 'Carved Out Assets and therefore, there can be no End use restriction on the said land.

30. In reaching the above conclusion, the Arbitral Tribunal has held as under:

“It has to be also noted that any Lease Deed cannot make or amount to amendment of the OMDA. The only mode available is 20.3.1 and no other mode. It is nobody's case that there has been amendment of the OMDA. The plea that there has been an internal amendment by Supplementary Lease Deeds cannot be held as amendment of OMDA in terms of Clause 20.3.1. As noted supra, even after the Lease Deed, the Respondent accepted that it was a mistake. Reference, in this context, was made to the meeting under the chairmanship of Hon'ble Minister of Civil Aviation on 16.04.2008, the relevant portion of the minutes have been quoted supra. Similarly, the letters of the Claimant dated 05.09.2008, 24.11.2009 and the minutes of the meeting dated 20.09.2009 make the position crystal clear that both Claimant and Respondent accepted the position that the disputed land was part of "Demised Premises." It was all through being canvassed and accepted by the Respondent that the restriction of end use was being put in place under the mistaken impression that the Case Asset was "Carved Out Asset" and was not demised to the Claimant. This was the continued stand of the Claimant before execution of the 2nd Lease Deed. The Resolutions adopted at the OIOC meeting, which have extensively been quoted, amply establish that the Respondent accepted the position that the disputed asset was not "Carved Out Asset" but "Demised Premises." The stand of the Respondent that the disputed land was leased out only for aeronautical purposes and the controversy was put to an end by the letter dated 30th June, 2016. It is, therefore, stated that the Claimant cannot aprobate and reprobate at the same breadth. It would be apt to refer to the opinion of the Law Department dated 30.03.2016. It has not been explained as to what was the basis for the somersault in stand taken by the Respondent. All through it maintained (before the letter dated 30th June, 2016) that there was a mistake and the disputed land has to be treated as a part of the "Demised Premises." This position was also accepted before OIOC at several meetings. In that

view of the matter, the Committee directed steps to be taken by the Respondent to give effect to the conceded position. If there was a change in stance of the Respondent, it was but mandated that the same was to be brought to the notice of OIOC and grant of opportunity to the Claimant to project on its stand. That has not been done. Therefore, the Claimant was deprived of an opportunity of putting forth its stand which all through being consented and accepted by the Respondent.”

31. The learned Solicitor General submits that the Arbitral Tribunal has not appreciated that the Supplemental Lease Deed dated 15.04.2010 made specific reference to Clause 2.6.3 of the OMDA and Clause 2.1.3 of the Lease Deed dated 26.04.2006. These Clauses impose a restriction that the ‘Carved Out Assets’ can be used only for Aeronautical purpose. The respondent having accepted the Supplemental Lease Deed, could not, thereafter, be allowed to contend that the disputed land was not a part of the ‘Carved Out Assets’.

32. I am unable to agree with the contentions raised by the learned Solicitor General. As noted hereinabove, the respondent has been consistently contending that the disputed land was wrongly shown as a ‘Carved Out Assets’. This plea was reiterated by the respondent even in response to the letter dated 03.11.2009 of the MoCA and in the OIOC meeting dated 20.11.2009. Immediately upon the execution of the Supplemental Lease Deed also, the respondent raised the said plea in the OIOC meeting held on 07.05.2010. Therefore, the respondent cannot be said to have accepted the stand of the petitioner that the disputed land was a ‘Carved Out Assets’ nor can the execution of the Supplemental

Lease Deed dated 15.04.2010, be considered to act as an estoppel against such contention of the respondent.

33. The learned Solicitor General has further contended that the Lease Deed dated 26.04.2006 had been executed after joint measurement had been conducted by the respondent and the petitioner. He submits that in the said Lease Deed and in the map attached thereto as Schedule 1, the disputed land was shown as a 'Carved Out Assets'. He submits that the respondent did not raise any objection to the same till 2008. The contention of the respondent, in his submission, therefore, is an afterthought and is liable to be rejected.

34. I am again unable to accept the argument of the learned Solicitor General. The OMDA in Clause 20.3.2 thereof gives primacy to the OMDA over any other "Project Agreement", which includes the Lease Deed. Clause 20.3.2 of the OMD is reproduced hereinunder:

*"20.3.2 Agreement to Override Other Agreements:
Conflicts*

(a) This Agreement supersedes all previous agreements or arrangements between the Parties, including any memoranda of understanding entered into in respect of the contents hereof and represents the entire understanding between the Parties in relation thereto.

(b) In the event of a conflict between the terms of this Agreement and those of any other Project Agreement, the terms of this Agreement shall prevail".

35. Project Agreements have been defined in the OMDA as follows:

"Project Agreements" shall mean the following agreements:

- 1. This Agreement;*
- 2. The State Support Agreement;*
- 3. Shareholders Agreement;*
- 4. CNS-ATM Agreement;*
- 5. Airport Operator Agreement;*
- 6. State Government Support Agreement;*
- 7. The Lease Deed;*
- 8. Substitution Agreement; and*
- 9. Escrow Agreement.*

and Project Agreement shall mean anyone of them".

36. There is an apparent conflict between the OMDA and the Lease Deed. In such case of conflict, OMDA has to prevail and therefore, the disputed land cannot be treated as a part of 'Carved Out Assets'. Incase the petitioner wanted to make a change in the OMDA and include the disputed land as part of the 'Carved Out Assets', it could only do so by way of making an amendment to the OMDA and not through the medium of Lease Deed.

37. Clause 20.3.1 of the OMDA reads as under:

"20.3.1 Amendments

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

38. Therefore, no question of waiver, amendment or modification of the terms of OMDA can arise unless the same is in writing and signed by

the parties. The Arbitral Tribunal has also considered this issue and has held that the Lease Deed as also the Supplemental Lease Deed cannot be held to be an amendment of the OMDA in terms of Clause 20.3.1 thereof.

39. The learned Solicitor General has further submitted that Clause 20.3.2 of the OMDA shall have no application to the Supplemental Lease Deed dated 15.04.2010. He submits that the said Clause can refer only to the original Lease deed dated 26.04.2006.

40. I am unable to agree with the said submission of the learned Solicitor General. The Supplemental Lease Deed not only makes a reference to the Lease Deed dated 26.04.2006, but is clearly intended to be read alongwith the main Lease Deed. It would therefore, become a part of 'Project Agreement' as defined in OMDA, making Clause 20.3.2 of the Agreement applicable thereto.

41. In any event, the Arbitral Tribunal having interpreted the terms of the Agreement as also arrived at a conclusion upon scrutinizing various correspondences and meetings held between the parties, it will not be open for this Court to re-appreciate the same.

42. Learned Solicitor General has placed reliance on the judgment of the Supreme Court in **NABHA Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) & Anr.** (2018) 11 SCC 508, to contend that the Agreements have to be read in a commercial sense and therefore, the Supplemental Lease Deed cannot be considered as a Project Agreement.

43. I am unable to agree with the said submission of the learned Solicitor General. In **NABHA Power Limited** (supra) the Supreme Court cautioned that normally a contract should be read as it reads, as per its express terms. I may only quote paragraph 72 of the said judgment, which reads as under:

“72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any “implied term” but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.”

44. In the present case, the Supplemental Lease Deed has to be read as part of the main Lease Deed dated 26.04.2006 making Clause 20.3.2 of the OMDA applicable thereto.

45. In **Associate Builders v. DDA**, (2015) 3 SCC 49, the Supreme Court has cautioned the Court exercising power under Section 34 of the Act in the following words:

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute. (1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission*, (2003) 8 SCC 593; 2003 Supp (4) SCR 561 and *D.D.Sharma v. Union of India*.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award.”

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011)10 SCC 573: 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)

*“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachhmi Ram*, AIR 1954 SC 689, *Thawardas Pherumal v. Union of India*, AIR 1955 SC 468, *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 SC 1362, *Alopi Parshad & Sons Ltd. v. Union of India*, AIR 1960 SC 588, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*, AIR 1965 SC 214 and *Renusagar Power Co. Ltd. v. General Electric Co.* (1984) 4 SCC 679: AIR 1985 SC 1156)”*

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

*44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar*

view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

XXXX

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very

often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

46. Similarly, in **HRD Corporation v. GAIL (India)**, 2018 12 SCC 471, the Court reemphasised the caution in the following words:

“18. Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge coterminous with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] has been expressly done away with. So has the judgment in ONGC Ltd. v. Western Geco International Ltd. [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12]. Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] where “public policy” will now include only two of the three things set out therein viz. “fundamental policy of Indian law” and “justice or morality”. The ground relating to “the interest of India” no longer obtains. “Fundamental policy of Indian law” is now to be understood as laid down in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . “Justice or morality” has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Section 28(3) has also been amended to bring it in line with the judgment of

this Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

19. Thus, an award rendered in an international commercial arbitration—whether in India or abroad—is subject to the same tests qua setting aside under Section 34 or enforcement under Section 48, as the case may be. The only difference is that in an arbitral award governed by Part I, arising out of an arbitration other than an international commercial arbitration, one more ground of challenge is available viz. patent illegality appearing on the face of the award. The ground of patent illegality would not be established, if there is merely an erroneous application of the law or a reappraisal of evidence.”

47. Applying the above test, I find no merit in the present petition. The same is dismissed, with no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 15, 2019

RN/vp