2023:DHC:4531

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

Pronounced on: 28.06.2023

\+ **W.P.(C) 2194/2020**

NORTH DELHI METRO MALL PVT. LTD. ..... Petitioner

Through: Mr. Amit Sibal and Mr. Jayant Mehta, Sr. Advocates with Mr. Hardeep Sachdeva, Mr. Kamal Shankar, Mr. Abhishek Awasthi, Mr. Pradyumna Sharma, Mr. Darpan Sachdeva, Advocates.

versus

DELHI METRO RAIL CORPORATION LTD. AND ORS.

..... Respondents

Through: Mr. Tarun Johri, Advocate for R-1.

Mr. Sandeep Sethi, Sr. Advocate with Mr. Rahul Malhotra and Mr. Deeptanshu Jain, Advocate for R-2.

Mr. Anupam Srivastava, ASC GNCTD with Mr. Ujjwal Malhotra, Advocate.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

W.P.(C) 2194/2020, CM APPL. 7702/2020, 11757/2020, 11762/2020, 18492/2021, 32753/2022, 34216/2022, 54694/2022 & 1544/2023

1. The petitioner says that it was incorporated pursuant to a

Concession Agreement dated 25.07.2003 ('the Agreement') between Delhi Metro Rail Corporation Ltd. ('DMRC/ R-1') and MGF Developments Ltd. ('MGF'), for development of a shopping mall, multiplex theatre, food court and other entertainment facilities on a plot of land in North Delhi at Khyber Pass, Civil Lines.

2. The land was licensed to the petitioner by DMRC and indeed, DMRC itself is a licensee of L&DO. The allotted land in north Delhi abuts Mall Road, Magazine Road and Timarpur Road. The petitioner's land of 5 hectares is in two parts. The northern part – Site B, is referred to as 'Island Plot' and is located to the north of the Metro Deck abutting Timarpur Road. The petitioner contends that it has enjoyed access from Timarpur Road for Site B/Island Plot since 2005 but is now being illegally, arbitrarily and unreasonably deprived of access from Timarpur Road by a gate put up by R-2.

3. The petition seeks the following reliefs:

> *"…a. Issue a writ of mandamus, or any other appropriate writ, order or direction, directing the Respondents to ensure access from Timarpur Road to the Petitioner's site located in Khyber Pass as described in the Concession Agreement between the Petitioner and Respondent No. 1 dated 25.07.2003;*
>
> *b. Issue a writ of mandamus, or any other appropriate writ, order or direction, directing the Respondents to demolish the gate…"*

I. Issue of Maintainability

4. At the outset, R-2/ Parsvnath Developers Limited challenges the maintainability of the writ petition. It contends that: i) disputed questions of fact are best adjudicated in suits or proceedings for specific performance and not in writ petition; ii) the prayers sought cannot be granted because the relief sought is pivoted on the petitioner's claim of a right to access from Timarpur Road to the Island Plot which the petitioner claims has been granted to it in an agreement with DMRC; and iii) since the petition seeks adjudication of rights between the parties, which will entail leading of evidence, interpretation of clauses of the agreement, this would be best done in such proceedings of specific performance of the agreement between the petitioner and the DMRC, therefore the writ proceedings is not the correct process.

5. Refuting the said contention, the petitioner relies on the dicta of the Supreme Court in *M.P. Power Management Co. Ltd. v. Sky Power Southeast Solar India (P) Ltd.,* (2023) 2 SCC 703, which has held, *inter alia*, as under:

> *"81. We have already concluded that PPA is not a statutory contract. However, that would not be the end of enquiry. Dr A.M. Singhvi, learned Senior Counsel, would point out that the contract, not being a statutory contract, assumes relevance only for the purpose of deciding as to whether the Court should relegate the writ applicant, to alternate remedies. In other words, while the Court would retain its discretion to entertain*

the petition or decline to do so, in the facts of each case, there is no absolute taboo against the Court granting relief, even if the challenge to the termination of a contract is made in the case of a contract, which is not statutory in nature, when the offending party is the State. In other words, the contention is that the law in this field has witnessed an evolution and, what is more, a revolution of sorts and a transformatory change with a growing realisation of the true ambit of Article 14 of the Constitution of India. The State, he points out, cannot play the Dr Jekyll and Hyde game anymore. Its nature is cast in stone. Its character is inflexible. This is irrespective of the activity it indulges in. It will continue to be haunted by the mandate of Article 14 to act fairly. There has been a stunning expansion of the frontiers of the Court's jurisdiction to strike at State action in matters arising out of contract, based, undoubtedly, on the facts of each case. It remains open to the Court to refuse to reject a case, involving State action, on the basis that the action is, per se, arbitrary.

82. We may cull out our conclusions in regard to the points, which we have framed:

82.3. The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent State in a case by itself to ward off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/inaction is, per se, arbitrary.

82.9. The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a writ petition, when actually the *resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.*

82.10. The reach of Article 14 enables a writ court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State.

82.12. In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible (see in this regard Shrilekha Vidyarthi v. State of U.P. [Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212 : 1991 SCC (L&S) 742]). However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved in the case must be action/inaction, which must be palpably unreasonable *or absolutely irrational and bereft of any principle. An action, which is completely mala fide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases.*

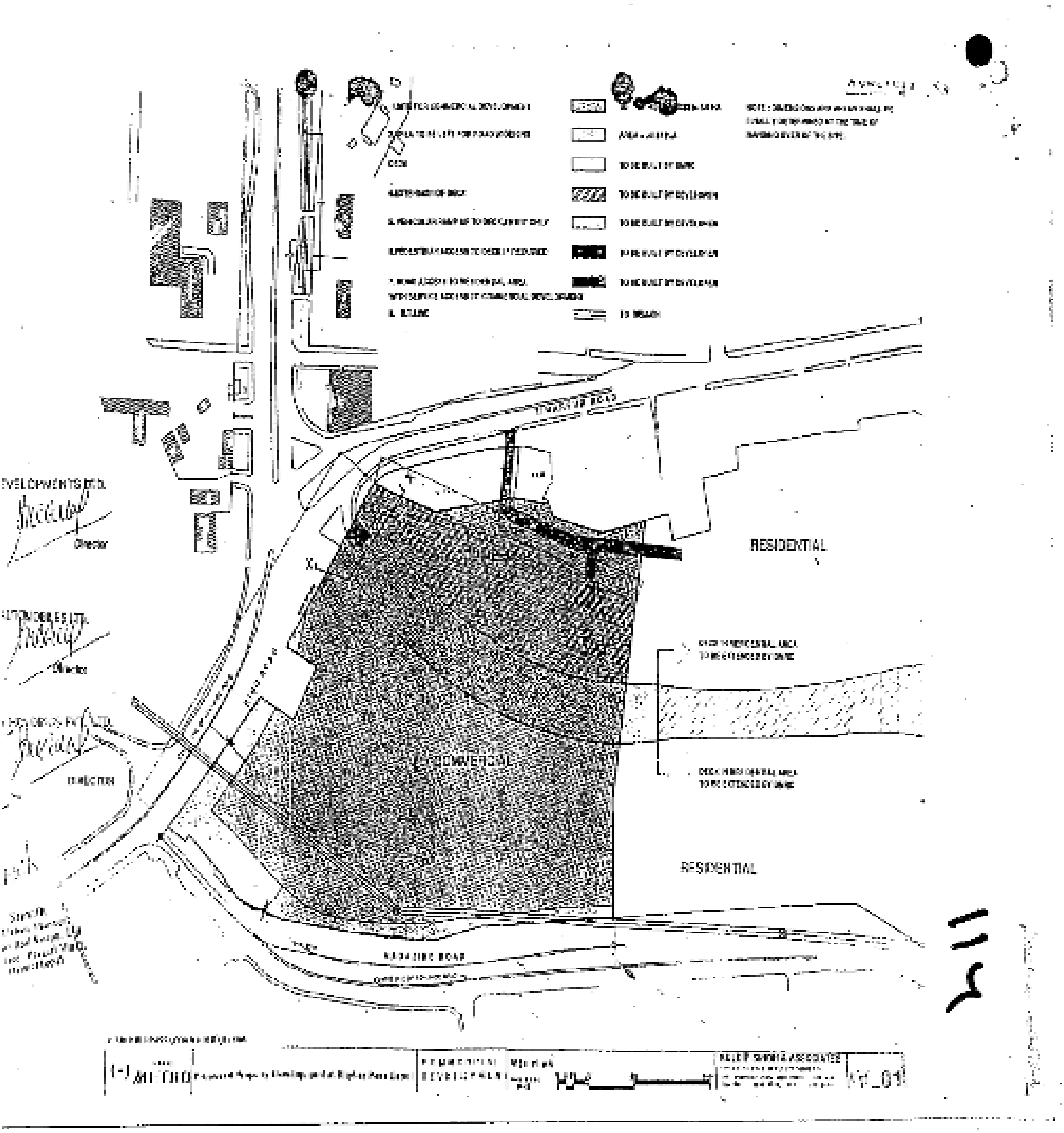
6. The law as discussed above is that: (i) there can be a wide variety of circumstances, be it breach or termination of a contract that may provide a cause of action to a party to a contract with the State, to seek relief by way of a writ petition; (ii) the courts would not shy away from the writ jurisdiction merely because the facts are *ex facie* complex and require interpretation of clauses of the contract and (iii) availability of an alternate remedy would be no bar to a writ proceedings, if the state action/inaction is palpably unreasonable or absolutely irrational. The petitioner claims that its rights to access its Site B/Island Plot from Timarpur Road, has been granted and assured to it in the contract with DMRC, which was much prior in time than the DMRC contract with R-2.

7. The present writ petition has arisen out of a contractual matter by a public authority/State, the impact of which would be felt in the public domain. There will be a violation of Article 14 if the State/DMRC does not act fairly, non-arbitrarily in terms of the representation made to the petitioner and as per their mutual agreement. Therefore, the writ petition is maintainable.

II. Right to Access

(i) Unlimited access

8. R-1/DMRC had invited proposals for selection of Concessionaire through its Tender Notice dated 15-12-2002. The bid of the Consortium of MGF was accepted. A Letter of Acceptance No.DMRC/PD/C2/Tend21 dated 11-07-03 ('LOA') was issued including the terms and conditions negotiated and finalized with the Consortium. According to the petitioner, in terms of the advertisement issued by DMRC, a service lane access/a loop, coming down from Timarpur Road showed access first to Site B/Island Plot, which then continued eastwards to the residential land allotted to R-2, a subsequent licensee. R-2 has partially built a housing complex in the land allotted to it whereas the petitioner is to develop the allotted land into a commercial complex. The site plan mentioned in the agreement showing access to the petitioner is as under:



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Signature Not Verified
Digitally Signed By:KAMLESH KUMAR
Signing Date:05.07.2023 19:53:21

9. What is noted from the above is that the black line-the road, coming down from Timarpur Road shows access to the 'Island Plot.' It also provides access to the residential part. R-2 became a licensee subsequent to the petitioner. The latter submits that its right to access the land is assured in terms of what was represented to them in the advertisement and in terms of the agreement itself. The Agreement enjoins upon DMRC to enable access to the site as under:

> *"4.3.1 ...DMRC agrees to observe, comply and perform the following:*
> *(i) Provide physical possession of the Site, free from encumbrances, attachments, encroachments, charges, liens, through this agreement, within 60 (sixty) days of signing of this agreement, unless prevented by a condition of Charge in Law or Force Majeure as per Article 7 of this Agreement.*
> *(ii) Enable unlimited access to the Site, and permit its peaceful use by the Concessionaire in accordance with the provisions of this Agreement without any let or hindrance from DMRC or persons claiming through or under it..."*

10. The Service Road coming down from Timarpur Road was at one time barricaded by R-2 so as to secure exclusive access to the residential land, to the exclusion of the petitioner from using the loop road. The moment this was brought to the notice of DMRC, it issued letters and directives to R-2 to remove the said barriers, barricades and walls. The relevant letter of DMRC is reproduced hereunder:

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ANNEXURE – R-11

दिल्ली मेट्रो रेल कार्पोरेशन लि०
DELHI METRO RAIL CORPORATION LIMITED
(भारत सरकार एवं दिल्ली सरकार का एक संयुक्त उपक्रम)
(A JOINT VENTURE OF GOVT. OF INDIA & GOVT. OF DELHI)
CIN: U74899 DL 1995 GOI 068150
Phones: 23348324 Telefax: 23165791

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SURYA PRAKASH, IRSE
Executive Director / Property Development

No. DMRC/PD/C2/L2/KHP/212/6/2014

Date:31.07.2017

1. M/s Parsvnath Developers Ltd.
   Parsvnath Metro Tower,
   Near Shahdra Metro Station,
   Shahdra, Delhi – 110032
   Fax: 43050473

2. M/s North Delhi Metro Mall Pvt. Ltd.,
   MGF House, 4/17 B, Asaf Ali Road
   New Delhi-110002
   Fax: 23275453

Sub : Property Development at Khyber Pass Depot Plot.
Ref : (1)ED/S&T(P) note No.DMRC/S&T/Tele/Ph-III/CS15A dated 21.07.2017
(2) M/s North Delhi Metro Mall Pvt Ltd. letter dated 25.07.2017
(3) Joint site inspection by PD Civil, M/s PLDPL and M/s North Delhi Metro Mall representative on 27.07.2017.
Reg. Blocking of access to the site of M/s MGF and DMRC S&T Contractor site office by M/s Parsvnath.

With reference to above, it is informed that the access to Project site of M/s Parsvnath (PLDPL) ,M/s MGF (North Delhi Metro Mall) and DMRC Site Office at MTNL Building has been examined by management as per the tender document, possession papers and sanctioned building plans of upcoming Residential and Commercial Project. The following conclusion is made as per the records:

1. The access road from Timarpur Road should be kept free for Project related vehicle movement for all concerned Project and DMRC Contractor office at MTNL Building.

2. The boundary wall constructed by M/s Parsvnath (PLDPL) on 22 & 23rd July, 2017 should be demolished by M/s Parsvnath (PLDPL) because it has blocked the only Right of Way of one portion of leased area to M/s MGF (North Delhi Metro Mall).

3. M/s Parsvnath (PLDPL) should remove the gates placed on Timarpur Road entry of Fire Access Road. However, for proper security arrangement, a security guard office with boom barrier can be installed and related expenditure may be shared equally by M/s Parsvnath (PLDPL) and M/s MGF (North Delhi Metro Mall). An immediate action should be taken by M/s Parsvnath (PLDPL).

4. Earlier letter of DMRC issued vide No. DMRC/PD/C2/L2/KHP/212/6/2014 dated 20.07.2017 has been withdrawn. Earlier letter was issued to M/s MGF with a copy to M/s Parsvnath with a intension to remove any encroachment in the common access road by security guard hut etc. however, a boundary wall was constructed by M/s Parsvnath which blocked the only access to M/s MGF from Timarpur Road entry.

25, अशोका रोड, नई दिल्ली–110001
25, ASHOKA ROAD, NEW DELHI-110001

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5. The access through Timarpur road is not a main entry of either M/s MGF (North Delhi Metro Mall) or M/s Parsvnath (PLDPL) Projects and it is basically a fire access road which is also indicated in M/s Parsvnath (PLDPL) sanctioned building plan dated 13.02.2009. However, access through Timarpur Road is the only Right of Way available to M/s MGF (North Delhi Metro Mall) to access island plot which is separated from other part of M/s MGF plot by Deck of Underground Metro Line to Depot. The building plan of M/s MGF(North Delhi Metro Mall), which was sanctioned on 22.05.2013 is also showing the access to Timarpur Road through same fire access road.

Yours faithfully,

31/3/17

(Surya Prakash)
Executive Director/Property Development

11.Pursuant to the aforesaid letters from DMRC, the barricading of the service road was removed so as to provide access to the petitioner as well from Timarpur Road side. DMRC has specifically intimated R-2 that the petitioner's only access to the 'Island Plot' was from Timarpur Road which is separated from the other part of the petitioner's plot by Deck of underlying Metro Line to the Depot; that the Building Plan has been sanctioned and development has to be carried out in terms thereof; the said approved Building Plan shows access from Timarpur Road. This letter was never the subject matter of any challenge by R-2 before any authority. This letter was followed by two more communications by DMRC to the petitioner on

14.03.2018 and 06.07.2018. Another letter was issued to R-2 by DMRC on 22.06.2018 specifically calling upon R-2 to demolish the boundary wall constructed by it so that the earlier access available to M/s North Delhi Metro Mall Private Limited – petitioner was restored. The said letter reiterated that all vehicles be cleared before entering Timarpur Road. In other words, the DMRC has all along represented to all parties that North Delhi Metro Mall Private Limited will have access to the 'Island Plot' from Timarpur Road. In the letter dated 06.07.2018, the DMRC has communicated to R-2 as under:

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ANNEXURE – R-16

दिल्ली मेट्रो रेल कॉर्पोरेशन लि०
DELHI METRO RAIL CORPORATION LIMITED
(भारत सरकार एवं दिल्ली सरकार का एक संयुक्त उपक्रम)
(A JOINT VENTURE OF GOVT. OF INDIA & GOVT. OF DELHI)
CIN: U74899 DL 1995 GOI 068150
Phones: 23348324 Telefax: 23362791

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SURYA PRAKASH, IRSE
Executive Director / Property Development

PD/C2/L2/KHP/212/6/2014

Date: 06.07.2018

1. M/s Parsvnath Developers Ltd.
Parsvnath Metro Tower,
Near Shahdra Metro Station,
Shahdra, Delhi – 110032

2. M/s North Delhi Metro Mall Pvt. Ltd.,
MGF House, 4/17 B, Asaf Ali Road
New Delhi-110002
Fax: 23275483

Sub: Property Development at Khyber Pass Depot plot.
Ref: (1) Your Letter No DMRC/KP/2018-19/358, Dated 26.06.2018.
(2) DMRC letter . No.DMRC/PD/C2/L2/KHP/212/6/2014 dated 22.06.2018.

Sir,

Kindly refer the site plan of the tender document (page no.45 of Agreement) wherein it is prudent that the common access from Timarpur Road was to facilitate both the Commercial and Residential Project at Khyber Pass Depot plot (copy enclosed) and independent access to both projects from Megazine Road. Earlier, this common access area measuring approx. 1323 Sqm was under possession of M/s MGF (North Delhi Metro Mall) which was subsequently handed over to M/s Parsvnath Developers to complete the tendered area of 6.8 Hec.

It may be noted that the sanctioned plans of both the Residential and Commercial projects which clearly indicates that the common access from Timarpur Road is serving as fire access road to both the Projects (copy of plans enclosed). Hence, this arrangement should be honored by both the Concessionaire and the adequate protective measures as well as the responsibility to protect the leased site should also be shared jointly by M/s Parsvnath and M/s MGF (NDMM) to restrain the trespassing in the leased plot.

You have provided us copy of the sanctioned plans of residential and commercial development at the leased site. The validity of both the residential development by M/s Parsvnath Developers and M/s MGF (NDMM) has been expired. Therefore, you are requested to submit the valid plans of the respective projects having the provision of common access from Timarpur Road to both the plots as conceived in the site plan of the tender document.

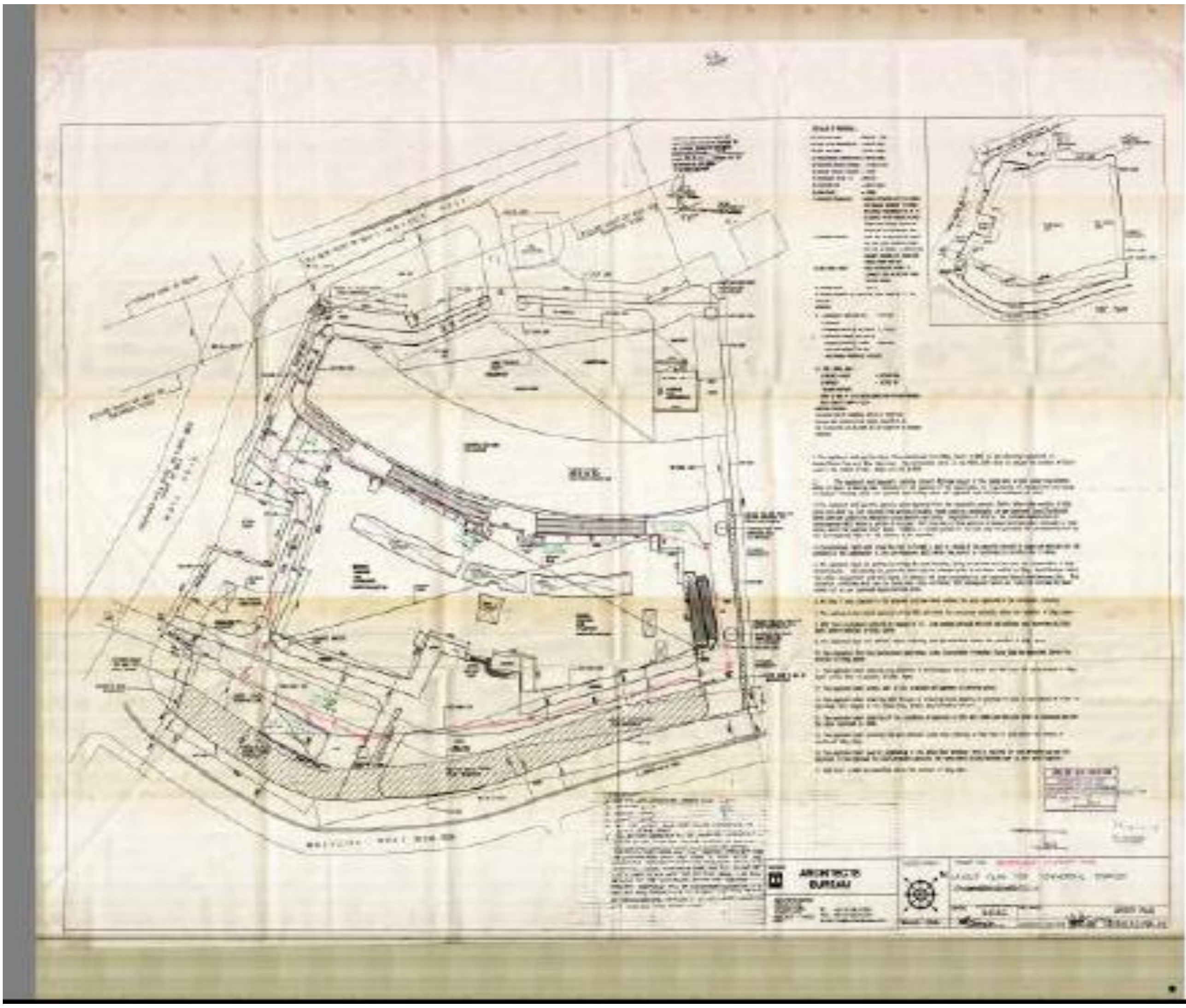
Yours faithfully,

(Surya Prakash)
Executive Director/PD

2 5, अशोक रोड, नई दिल्ली–110001
25, ASHOKA ROAD, NEW DELHI-110001

True Copy

12. In effect, both concessionaires i.e. the petitioner and R-2 would have access to their respective plots of land from Timarpur Road through the common access road, as shown in the map. A building plan was sanctioned by the Municipal Corporation of Delhi and the same has been annexed to the petition showing petitioner's access to the 'Island Plot' from Timarpur Road. It is reproduced hereunder:



13. The Building Plan was sanctioned by MCD, was drawn up as per the understanding and/or logical interpretation of the agreement. The offending boundary wall constructed by R-2 to impede access and passage to the petitioner from Timarpur Road, was in apparent breach of the understanding and terms of agreement. The wall/obstacle was demolished by DMRC. This demolition is testimony of and acceptance by R-2 that its endeavour to create, treat or represent the common access loop road as its own exclusive access was not in consonance with the scheme/ project under which both the concessionaires had been granted license rights in their respective plots of land. There was no challenge by R-2 to the said demolition by DMRC of wall built by R-2 sometime in November, 2018.

14. The petitioner's Concession Agreement with DMRC dated 25.07.2003 was never amended. In any case, it could not have been altered unilaterally as both parties would be required to agree to any amendment in terms of Clause 11.5 thereof. Their respective rights got crystallized in terms of the same. The subsequent Concession Agreement between DMRC and R-2 was executed on 30.03.2004, i.e. 9 months after the petitioner's agreement. This subsequent agreement could not unilaterally override, obliterate or subjugate the rights of the petitioner, which stood created and secured in terms of the earlier agreement. Therefore, if something has been purported to be granted to R-2 by the subsequent agreement, it would be subject to the rights already created in favour of the petitioner.

Therefore, since the petitioner has been granted right of access from Timarpur Road, the same could not be taken away unilaterally and no exclusive right could purportedly be conferred upon R-2. Subsequent rights will be subject to the rights earlier created. DMRC will need to so ensure. The learned Senior Advocate for the petitioner relies upon the dicta in *S.Kumar versus S.Ramalingam* (2020) 16 SCC 553, which *inter alia* reads as under:

> *"14. Section 48 of the Transfer of Property Act, 1882, relied upon by the learned counsel for the appellants, reads thus:*
>
> > *"48. Priority of rights created by transfer.—Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."*
>
> *The said provision contemplates that where a person i.e. Rajasekaran has created different rights in or over the same property i.e. 16 ft wide strip of land and such rights cannot be exercised to their full extent together, then each later created right shall be subject to the rights previously created. The exception is if special contract or reservation binding the earlier transferee is executed. It will mean that the exclusive right conferred on the plaintiff in the sale deed dated 31-5-1988 will not be legal till such time the earlier transferee i.e. Defendant 2 has a special contract or*

reservation which binds her. Since the right of access to Defendant 2 was reserved in the sale deed dated 1-4-1976, therefore, the vendor could not confer exclusive right to the plaintiff vide sale deed dated 31-5-1988.

15. The plaintiff has to maintain the 16 ft wide passage in any case in terms of the recital in his sale deed dated 31-5-1988. Therefore, if Defendant 2 or her transferees use the passage, then such use of passage by Defendant 2 or her transferees cannot be said to be causing any prejudice to the plaintiff."

15. The learned counsel for DMRC submits that in two agreements with both the licensees, common service access is shown to both parties from the loop road coming down from Timarpur Road. For the petitioner, the access is limited to service access i.e. fire access, medical services, municipal utilities, as may be.

16. In terms of Serial no. 7 of the legend to the Site Map annexed with the petitioners' Concession Agreement dated 25.07.2003, common access to the petitioner is shown from the same loop-road from Timarpur Road, both to residential area with service access to commercial area.

17. However, for the sake of convenience and to ensure that the rights of R-2 are unhindered, an access of equivalent width of 9 mtrs. has been arranged and a road has been laid for exclusive use of R-2 from Timarpur Road. This new access is immediately to the left side of the current access. The latter portion will be an exclusive access to the petitioner. This will

not create any hindrance or prejudice to either of the parties.

18. It is only upon approval by the DMRC, of the building plan proposed by the petitioner, that it was submitted to the Municipal Corporation of Delhi and was sanctioned. DMRC was aware that the first proposed building plan which showed a 6 mtrs. wide road around the Metro Deck was not a feasible option because a study carried out at the instance of DMRC apropos the load-bearing capacity of the proposed road, had opined the road to be unviable for use. In other words, even light weight motor vehicles would not be able to access the 'Island Plot' from the southern side, i.e. from the Magazine Road. In the communications to R-2, the petitioner and other authorities, DMRC has consistently maintained that the petitioner had a right of way/access to the 'Island Plot' from Timarpur Road.

19. Referring to the Building Plan sanctioned by the MCD on 10.01.2008, R-2 contends that the access to 'Island Plot' is from Magazine Road by a 6mt wide road, which goes around the concrete Metro Deck; cars entering into the petitioner's commercial complex are to travel from the Magazine Road towards the 'Island Plot' for parking of cars in the three basements to be constructed in the 'Island Plot'; the exit gate shown by the petitioner in its Building Plan is a misnomer and a misrepresentation by the petitioner to the Corporation; this exit gate is not in terms of the agreement; it has been placed at the end of the petitioner's land and it opens into the loop road going

towards Timarpur Road; that the petitioner is seeking access to Timarpur Road from this exit gate, through these proceedings. R-2 submits that the Building Plan was revised in 2013, and modified in 2019, albeit with the permission and approval of DMRC for further construction, above the 3-tire underground parking.

20. The learned Senior Advocate for R-2 asserts that the petitioner would have to first show a right of access from Timarpur Road. In terms of clause 4.3.1 of the contract between the petitioner and the DMRC, there is unlimited access to the licensed land. It does not specify as to whether the unlimited access could include access from Timarpur Road. In additional affidavit, the DMRC reiterated its stand with respect to access as under:

> "*..6. It is submitted that in the aforesaid letters the Respondent No. 1 DMRC, had placed mistaken interpretation on the words, "Service Access" appearing in the plans attached with the Agreement of DMRC with the Petitioner, so as to include, "Construction Access" and thereby DMRC wrote the said letters stating that the Petitioner, will be given access for construction from the said road. DMRC has never assured the Petitioner in Agreement executed with it, that the construction access would be given to the Petitioner from Timarpur Road side.*"

21. Mr. Amit Sibal, the learned Senior Advocate for the petitioner refutes the aforesaid contentions apropos DMRC's affidavit. He says that DMRC's own position as recorded in the order dated 09.06.2020 refutes the aforestated contentions. It reads *inter-alia* as under:-

"2. Mr. Nayyar, the learned Senior Advocate for the petitioner, has drawn the Court's attention to the Counter Affidavit filed by DMRC dated 01.06.2020 to the writ petition. It verifies that it is true on the basis of records maintained in the office of the DMRC.

3. In the said affidavit, the DMRC states that the petitioner has no right of access from Timarpur Road. However, DMRC's own letter dated 31.07.2017 addressed to the petitioner and respondent no.2 records as under:

Sub : Property Development at Khyber Pass Depot Plot.
Ref: (1)ED/S&T(P) note No.DMRC/S&T/Tele/Ph-III/CS15A Dated 21.07.2017
(2) M/s North Delhi Metro Mall Pvt Ltd. letter dated 25.07.2017

(3) Joint site inspection by PD Cell, M/s PLDPL and M/s North Delhi Metro Mall representative on 27.07.2017.
Reg: Blocking of access to the site of M/s MGF and DMRC S& T Contractor site office by M/s Parsvnath.
With reference to above, it Is informed that the access to Project site of M/s Parsvnath (PLDPL) ,M/s MGF (North Delhi Metro Mali) and DMRC Site Office at MTNL Building has been examined by management as per the tender document, possession papers and sanctioned building plans of upcoming Residential and Commercial Project. The following conclusion is made as per the records:

1. This access road from Timarpur Road should be kept free for Project related vehicle movement for all concerned Project and DMRC Contractor office at MTNL Building.

2. The boundary wall constructed by M/s Parsvnath (PLDPL) on 22 & 23"' July, 2017 should be demolished by M/s Parsvnath (PLDPL) because it has blocked the only Right of Way of one portion of (eased area to M/s MGF (North Delhi Metro Mall).

3. M/s Parsvnath (PLDPL) should remove the gates placed on Timarpur Road entry of Fire Access Road. However, for proper security arrangement, a security guard office with boom barrier can be installed and related expenditure may be shared equally by M/s Parsvnath (PLDPL) and M/s MGF (North Delhi Metro Mall). An immediate action should be taken by M/s Parsvnath (PLDPL).

4. Earlier letter of DMRC issued vide No. DMRC/PD/C2/L2/KI-IP/212/6/2014 dated 20.07.2017 has been withdrawn. Earlier letter as issued to M/s MGF with a copy to M/s Parsvnath with a intension to remove any encroachment in the common access road by security guard hut etc. however, a boundary wall was constructed by M/s Parsvnath which blocked the only access to M/s MGF from Timarpur Road entry.

5. The access through Timarpur road is, not a main entry of either M/s MGF (North Delhi Metro Mall) or M/s Parsvnath (PLDPL) Projects and it is basically a fire access road which is also indicated in M/s Parsvnath (PLDPL) sanctioned building plan dated 19.02.2009. However, access through Timarpur Road is the only Right of Way available to M/s MGE (North Delhi Metro Mall) to access island plot which is separated from other part of M/s MGF plot by Deck of Underground Metro

Line to Depot. The building plan of M/s MGF (North Delhi Metro Mall), which was sanctioned on 22.05.2013 is also showing the access to Timarpur Road through same fire access road. ………"

4. The petitioner contends that other communications dated 14.03.2018(Annexure P9), 30.10.2018 (Annexure P19), 14.11.2018 [Annexure P21 (Colly)] and 07.02.2020 (Annexure P28), which are also in the same vein, reiterate the same position. In other words, all along the DMRC has held the view that the wall built by respondent no. 2 was illegal and it had to be broken down and that service access, i.e. access by road for vehicular movement, has to be provided to the petitioner by the DMRC from the Timarpur Roadside. The said communications have not been referred to in the counter affidavit and the said affidavit is clearly contrary to the earlier position taken by DMRC in the various letters mentioned hereinabove.

5. In view of the above, Mr. Johri, the learned counsel for DMRC, seeks time to obtain instructions and file a better affidavit, if so instructed, before the next date. Copy of the same shall be furnished to the learned counsels for the parties through e-mail and other viable electronic modes of communication…."

(ii) Service access

22. The legend in the plan annexed to the agreement between the petitioner and DMRC provides service access to the petitioner for commercial development. The term 'service access' is not described in the contract. In the law relating to municipalities, the expressions 'service passage' and 'service access' would have a specific connotation, for example 'service passage' under the Delhi Municipal Corporation Act, 1957, has been

defined as under:

> *"2(22) "house-gully" or "service passage" means a passage or strip of land constructed, set apart or utilised for the purpose of serving as or carrying a drain or affording access to a latrine, urinal, cesspool or other receptacle for filth or other polluted matter, by municipal employees or other persons employed in the cleansing thereof or in the removal of such matter therefrom;*

23. Similarly the New Delhi Municipal Council Act, 1994, defines 'house-gully' as under:

> *"2(18) house-gully" means a passage or strip of land constructed, set apart or utilized for the purpose of serving as or carrying a drain or affording access to a latrine, urinal, cesspool or other receptacle for filth or other polluted matter, by municipal employee or other person employed in the cleansing thereof or in the removal of such matter therefrom;"*

24. However, it is noted that in the latter definition the word 'service access' or 'service passage' is not used.

25. The petitioner relies on the Unified Building Bye Laws for Delhi, 2016, which defines service road as under:

> *"…4.104 Service Road: A road/lane provided at the rear or side of a plot for service purposes."*

26. Reference is also made to a notification of Ministry of Shipping, Road Transport and Highways dated 05.12.2008. However, this notification is inapplicable to the present case because it is about highways not about city or colony roads.

27. Apropos access, DMRC has maintained its proposal recorded in

the order of 18.12.2020. At the site, the proposal has been implemented in its entirety. However, R-2 has opposed the said proposal in its affidavit dated 11.01.2021.

28. The petitioner has not been able to access the island from the side because of repeated obstacles being created by R-2. Nevertheless, those obstacles were removed by DMRC. During the course of the hearing, R-2 asserted that access to the 'Island Plot' would disturb the access to the residential land because trucks and other emergency vehicles would disturb the peace or otherwise quiet access to residents of the apartment block

29. MTNL occupies land abutting the loop coming down from Timarpur Road. In an effort to find a solution to accommodate the needs of both the sub-licensee(s), i.e. the petitioner and R-2, DMRC in coordination with MTNL has shifted the latter's telephone tower and toilet block to another part of MTNL's land, so as to make available a 9m wide road for exclusive use by R-2. This new access road is contiguous to the existing access from Timarpur Road.

30. The expense of construction of a new toilet block and shifting of the MTNL tower was borne by the petitioner. The new road of 6m was also laid during these proceedings, at the expense of the petitioner, with the full knowledge and cooperation of DMRC and MTNL. Now, 15m wide access is available from Timarpur Road which could provide a 9m access to the residents of Parsvnath/R-2 from the left side as shown in the map below and the 6m wide road could well be made available

exclusively for the petitioner's island plot. There could be a clear demarcation of the two respective access points from Timarpur Road.

III. DMRC- Lessee or Licensee?

31.The petitioner contends that the L&DO is yet to lease out the property to DMRC. Therefore, the latter can at best be treated as a licensee. DMRC cannot transfer anything more to a third party, except a sub-license. R-2 insists that it had a registered lease agreement in its favour. The petitioner says, and rightfully so, that 'lease agreement' would be an incorrect nomenclature because if the DMRC is not a lessee, it cannot create a lease or transfer deed in favour of R-2. DMRC is only a licensee of L&DO. While the agreement between DMRC and R-2 may be titled as Transfer Deed, it cannot transfer any right in the property except to put R-2 and likewise the petitioner as sub-licensee and nothing more. Therefore, the nomenclature of the document called 'transfer deed' is misleading and could not be read as anything more than a License Deed.

32.The petitioner contends that the government's allotment letter dated 15.11.1999 clearly stipulates as under:

> *"...2. viii. The plot will initially be on license under an agreement and upon successful fulfilment of the terms of the contract lease will be given. The lease will, however, commence from the date of allotment..."*

33. Indeed, R-2 and DMRC themselves acknowledge the L&DO's

letter of 15.11.1999 and are deemed to have knowledge of its contents. It is recorded in their agreement dated 30.03.2004 as under:

> *"...B. DMRC has been allotted land admeasuring about 37.80 ha located at Khyber Pass, Delhi, as more specifically described in Paragraph 1 of Annexure A and marked out in the plan set out in Annexure B ('Allotted Land') by the Land and Development Officer, Ministry of Urban Development, Govt. Of India ('L&DO') vide allotment letter No.L-II-I (1252)/99/888 dated November 15, 1999 for the construction of Khyber Pass Depot. In terms of the Allotment Letter to DMRC, a lease deed is required to be executed for grant of leasehold rights in favour of DMRC and the execution of such lease deed is presently pending..."*

34. As contemplated in the letter of allotment dated 15.11.1999, two documents were to be executed, one was Memorandum of Agreement ('MOA') another was a lease deed. The former was executed on 11.07.2014. It stipulates as under:

> *"XIX. Nothing in this Agreement shall be construed as a demised in law of the said premises or any part thereof so as to give Delhi Metro Rail Corporation (DMRC) Ltd any interest therein until and unless the said Perpetual Lease shall be executed and registered but Delhi Metro Rail Corporation (DMRC) Ltd shall only have the permission of the President to enter upon and occupy the said premises for the purpose of performance of this Agreement.*
>
> *...*
>
> *XXX. It is expressly agreed and declared by Delhi Metro Rail Corporation (DMRC) Ltd that before*

execution the Perpetual Lease as required by the President, Delhi Metro Rail Corporation (DMRC) Ltd is and shall be a bare licensee in respect of the said premises. Provided that if at any time any breach of such undertaking is discovered by the president, regardless of the execution of the said Perpetual Lease, Delhi Metro Rail Corporation (DMRC) Ltd, shall be liable to pay penalty to the President by way of compensation for such contravention. The amount of terms of such penalty by way of compensation shall be fixed by the President and the same shall be binding on Delhi Metro Rail Corporation (DMRC) Ltd.

XXXI. Delhi Metro Rail Corporation (DMRC) Ltd shall not be entitled to require and title to be shown to the said piece of land to be demised as aforesaid or any proof of the right of the President to grant this bare licence or the said premises."

35. The lease deed has yet not been executed. In effect, the DMRC has till date not become the lessee of the President of India. The aforesaid clauses clearly declare that the DMRC is a bare licensee.

36. Pursuant to the aforesaid, in its communication to the petitioner, DMRC has assured the petitioner as under:

दिल्ली मेट्रो रेल कॉर्पोरेशन लि०
DELHI METRO RAIL CORPORATION LIMITED
(भारत सरकार एवं दिल्ली सरकार का एक संयुक्त उपक्रम)
(A JOINT VENTURE OF GOVT. OF INDIA & GOVT. OF DELHI)
CIN: U74899 DL 1995 GOI 068150
Phones: 23348324 Telefax: 23362791

SURYA PRAKASH, IRSE
Executive Director / Property Development

No.DMRC/PD/L2/KHP/Vol-IV

Date: 14.03.2018

Sh. Siddharth Gupta
Director,
M/s North Delhi Metro Mall Pvt. Ltd.,
MGF House, 4/17 B, Asaf Ali Road
New Delhi-110002
Fax: 23276483
E mail: info@mgf.co, siddharth.gupta@mgf.co

Sub: Property Development at Khyber Pass Depot Plot – Commercial Development at 5 Hac Plot by M/s North Delhi Metro Mall.

Ref: (i) M/s North Delhi Metro Mall (NDMM) letter dated 26.02.2018.
(ii) Minutes of Meeting of DMRC with M/s NDMM and M/s VRSA on 05.10.2017.
(iii)DMRC letter No.DMRC/PD/L2/KHP/Vol-IV dated 12.10.2017 and 16.02.2018 (enclosed)

Sir,

Vide our letter dated 16.02.2018, a reminder was issued to know the status of construction activity and also to clear the outstanding dues of 32.66 Cr. (as on 30.08.2017, without interest component). The payment of Rs. 32.66 Cr. was agreed by M/s NDMM during meeting held on 05.10.2017 wherein representatives of M/s NDMM promised for early payment dues of Rs. 32.66 Cr. and sought DMRC assurance regarding all necessary assistance / assurance and undertaking to the lender / bankers regarding the title of the land.

Vide DMRC letter dated 12.10.2017, M/s NDMM was assured about DMRC cooperation for completion of project and under reply to para no. 3 of their letter, M/s NDMM was communicated that DMRC will give issue necessary assurance / undertaking to their lender / bank about the land title. However, in reply to DMRC reminder letter dated 16.02.2018, your firm has raised the facts/issues that were already discussed and resolved during meeting held on 05.10.2017 in which you were also present. The para wise reply to your letter dated 26.02.2018 are as under:

Para.No.	M/s NDMM letter dated 26.02.2018	DMRC Reply
1	With reference to your letter dated 12.10.2017, even in the absence of title to the land which was originally promised, we are making all efforts to conclude arrangements with invester for the project and arrive at suitable agreements with such investors. We are in the process of finalizing the arrangements. In the process, due to absence of title and resulting funding issues, we are forced to induct a 49% shareholder exposing us to great disadvantageous financial position in terms of the project valuation, costing and control. The proposed investor	The issue of land title was explained to you during Meeting held on 05.10.2017 and it was informed that DMRC will execute Sub Lease deed with Concessionaire after signing of perpetual lease deed agreement with L&DO. The same will be signed by DMRC and land owning authority (L&DO) after completion of the Construction as mentioned under clause no. XVII of MOA of L&DO and DMRC dated 11 July 2011.

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	has reduced the enterprise value of the project by 50% due to lack of clear title.	Same was also communicated to you vide letter dated 12.10.2017 and there should be no dispute about title of the land. **Further, the Concessionaire has** irrevocable rights and entitlement under Concession agreement subject to fulfilment of terms & conditions of Concession Agreement. **Regarding, change in shareholding** pattern / arrangement with the proposed Investor M/s VRSA, it was suggested that prior approval of DMRC to be taken as per clause no. 4.4.1 and 6.3.1 & 6.3.2 of the Agreement. However, you are yet to submit your request for proposed shareholding pattern for DMRC approval.
2	As DMRC is well aware , the blocking one of the entry to the land by M/s Parsvnath Developers Ltd., marked for us by DMRC, has not been resolved till date. In this regard DMRC letter No. DMRC/PD/C2/KHP/212/6/2014 dated 31.07.2017 speaks for itself and, among other things it is stated therein that: *"However, access through Timarpur Road is the only Right of Way available to M/s MGF (North Delhi Metro Mall), to access island plot which is separated from other part of M/s MGF plot by Deck of Underground Metro Line to Depot. The building plan of M/s MGF (M/s* MGF (North Delhi Metro Mall), which was sanctioned on 22.05.2013 is also showing the access to Timapur Road through same fire access road.". The investor wants clarity on this issue and fear that this obligation of DMRC also may go in the same way as the promise to give title thorough execution of sub lease.	As discussed in the meeting on 05.10.2017 and also communicated vide DMRC letter dated 31.07.2017 that access through Timarpur road is not a main entry of either M/s MGF (North Delhi Metro Mall) or M/s Parsvnath (PLDPL) and it is basically a fire access road as indicated in M/s Parsvnath building plan. *The building plan of M/s MGF (M/s* MGF (North Delhi Metro Mall), which was sanctioned on 22.05.2013 is also showing the access to Timapur Road through same fire access road. DMRC has already informed that the same fire access road will be made available to you once the construction activities are undertaken by you.
3	The issue is creating much difficulty for us as admittedly "Timarpur Road is the only right of way available to M/s MGF (North Delhi Metro Mall) to access island plot which is separated from other part of m/s MGF plot by Deck of underground Metro Line to Depot". There would be a huge project cost implication, viability of the project and the proposed investors	Please refer reply above, there should be no ambiguity about DMRC commitment to provide all necessary cooperation in relation to completion of the project. However, you are raising the same issue again & again despite DMRC assurance.

	need resolution of this issue. Even though DMRC's letter dated 12.10.2017 promises "all necessary cooperation for commercial development project on the concessioned plot at Khyber Pass", nothing has been done for making available the access. There is a credibility issue and after making the investment, the investor would expect the construction activity to commence immediately. We hope that issue will be resolved by DMRC soon.	Further, no written clarification from your investor / lender regarding DMRC assurance has been received / submitted by you till date.
4	Commencement of construction can only be as soon as the above issues are resolved and Project agreements with the investor are signed and closed. Subject to the above, we are looking forward to make the payment to DMRC with in this financial year.	You are requested to expedite the process and clear the outstanding dues on priority.

In view of the above, a meeting is scheduled at 25 Ashoka Road office on **20.03.2018** at 11:30 hrs to discuss about the delay in implementation of project and clearing of outstanding dues.

37.DMRC fully supports the position of the petitioner and it has admitted that the nomenclatures in the agreement would be misleading because it is only a licensee and not a lessee. Therefore, it could not give or transfer anything to R-2 or any party other than a sub-licence. DMRC says that it has permitted the petitioner and R-2 to construct commercial and residential complexes respectively in terms of the allotment letter and MOA. However, the fact remains that in terms of the MOA, DMRC is nothing more than a licensee. Till such time that the lease deed is executed in favour of DMRC, it does not become a lessee of the President of India and cannot, therefore, issue a sub-lease or purport any document or agreement to be considered or interpreted as a lease document.

38. Referring to the petitioner's rejoinder, (page 609, para 19), R-2 contends that the land handed over by the L&DO to the DMRC is in the nature of a lease because immovable structures have to be constructed thereupon for 99 years or otherwise for at least 50 years. Referring to the *paras 23,25*, 26 and 32 of the dicta of the Supreme Court in *Pradip Oil Corporation (2011) 5 SCC 270,* he submits that the lands with the parties would be construed as leased land and not as a mere licensed land.

39. R-2 further contends that once the grant has been issued in favour of DMRC, that itself is an absolute act of transferring/vesting rights in the person/entity who is the recipient of the grant; therefore whether the document is stamped or not stamped would make no difference. For the moment, accepting the argument that DMRC is the recipient of the grant, for the latter to grant any rights in favour of a subsequent entity or another entity, the same would have to be recorded through stamped documents, which has been done in the case of R-2 but not so with the petitioner. This argument is flawed because if the grant is absolute, irrespective of whether

the document is stamped or registered, then R-2's rights, as may be, would be subject to rights/granted already created by DMRC in favour of the petitioner, earlier in time on 25.07.2003**.**

IV. Public Law Element

40. The petitioner claims public law element in the project: the non-construction of the Mall is because of non-access from the Timarpur Road side, and this is resulting in a financial loss to the exchequer. The approved structure was to be constructed as soon as possible, so that the same could be monetized; the developed structure has to be returned to the DMRC after 50 years from 2009. Presently, the land has remained unutilized since 2003, i.e. for the past two decades.

41. The Agreement stipulates that the DMRC is to receive an annual fixed license fee as under:

> *"5.1.4 Concession Fee of Rs. 5,10,00,000/- (Rupees Five crores and ten lakhs only) payable per annum, after moratorium of two years from the date of signing of concession agreement, and every year thereafter till the expiry of the concession period. This Concession Fee shall be escalated at 20% every three years. The first escalation will be effective after five years from the date of signing of Concession Agreement. DMRC recognizes only the Concessionaire for making all payments in this regard. Direct payment by the sub-allottees to DMRC is not permissible under this Agreement."*

42.In addition to the above, the DMRC is to receive 5% of annual cash flow as under:

> *"5.1.3 Five percent (5%) of Annual Cash Inflows (Non-Negotiable) as per the audited annual accounts, payable every year till the expiry of concession period. The Annual Cash inflows in this case shall include all receipts from shorts & long-term lease of space, refundable & non-refundable security deposits, securitised lease rentals, all upfront payments and all forms of O&M fees charged from tenants, sub-lessees or occupants. The maintenance fees charged by the Concessionaire or any third party appointed by Concessionaire or any society promoted by Concessionaire or formed by the tenants/ sub-lessees/ occupiers of the shopping malls, if any, shall also be construed as part of the cash inflows of the Concessionaire. In case the Concessionaire collects the lease payments from his sub-lessees as lumpsum at the at the time of allotment or in installments, such payments shall be treated as part of Concessionaire's cash inflows for the year in which they are accruing to him."*

43.R-2 says that a *lis* between the petitioner and DMRC is to be referred to arbitration in terms of Article 9.2 of their agreement. He further submits that road access to the residential area is a complete access whereas the service access to the commercial area is a qualified access and this qualified access is yet to be defined. There is a private contract with DMRC, albeit related to public land, nevertheless there is no public law element in it. Therefore, writ proceeding is not appropriate.

44.R-2 refers to its Registered agreement with DMRC whereby residential land of 6.8 hectares (67903.22 sq. mts) forming part of a larger land admeasuring 37.80 hectares allotted to DMRC, was allocated to/demised by way of lease-hold right for a period of 99 years to R-2/Parsvnath, with a clear access from Timarpur Road, as shown in the plan marked as Part-B forming Annexure-1 to the agreement. R-2 says that the road is a part of grant. It does not indicate any access to the petitioner from the said access road.

45. R-2 paid a consideration of Rs.194 crores for the said allotment and expended Rs.10.67 crores on stamp duty; that corresponding concession fee or the cost of transfer is absent in the case of the petitioner; there is no Transfer Deed apropos the petitioner; the nature of the two transactions were entirely different and DMRC cannot purport to equate the two transactions, one by a registered document and the other by a non-registered document.

46. Referring to various judgments, R-2 contends that public law element is the only mitigating factor on the basis of which the writ petition could be maintained apropos a dispute involving a contract or enforcement of rights apropos the contract. Otherwise all judgements referred to have held that the remedy would be in civil proceedings.

47. The petitioner submits that in the last two decades the petitioner has paid DMRC monies in the range of about Rs 186 crores, which is almost equal to what DMRC has received from R-2 as a one-time license amount for the residential land; 5% of the

revenue inflow is payable to DMRC as per the audited accounts of the Annual Cash Inflow, payable till the expiry of every concession period; the concession fee is to increase every three years by 20% and upon expiry of the tenure, the allotted land alongwith the buildings would return to the DMRC.

48.R-2 says that it has been permitted to construct 400 apartments of which 200 have been constructed. Ordinarily each family has about 2 cars. Therefore, once 400 apartments are occupied approximately 800 cars will be there in the residential complex and the latter has provision for parking of 1000 cars.

49.Referring to paragraph 39 (10.6) of *Shapoorji Pallonji and Co. Pvt. Ltd. versus Rattan India Power Ltd. Anr 2021 SCC OnLine Del 3688*, R-2 submits that the *lis* of this nature is to be addressed only in arbitral proceedings.

50.What emerges from the preceding arguments is that on the basis of an advertisement which showed a loop of a road coming down from Timarpur Road providing access both to the commercial 'Island Plot' of the petitioner as well as to the residential plot of R-2, the petitioner had entered into the contract on the basis of the said representation, being fully confident that it would have at least service access to the island plot from Timarpur Road.

51.The correspondence between the petitioner, DMRC and R-2 shows the understanding of the petitioner and DMRC in this regard. It is upon DMRC's strict interpretation of the terms of the agreement with the petitioner, that the obstacle erected by way of construction of a wall by R-2 was removed, so as to facilitate service access to the petitioner to the 'Island Plot' from Timarpur Road. R-2's agreement with DMRC was created and registered on a much later date. The rights of the petitioner to have service access from Timarpur Road were secured much earlier in time. It could not be over-ridden or superseded by a subsequent agreement between DMRC and R-2. R-2 cannot claim exclusive right of access from Timarpur Road because service access from the common road has already been granted and assured to the petitioner. This advertisement to public at large, in particular to the parties concerned, cannot be overridden by a subsequent agreement between DMRC and R-2, much to the detriment and without notice to the petitioner.

52. As noted hereinabove, R-2 also has a main access from Magazine Road and the access from the Timarpur Road is a service access. DMRC has tried to find a fair balance by prudently carving out an exclusive contiguous access for R-2 and/or the owners of the flats developed by R-2. DMRC has coordinated with various agencies including GNCTD, MTNL, Ministry of Telecom, etc. in creating a road of equal width immediately adjacent to the current road being used by R-2 and/or residents etc. for access to R-2's area. DMRC had to shift the telephone tower as well as toilets, etc. to secure this additional access, which as per the photographs filed looks as under:

Proposal of Plot B Access through MTNL Building

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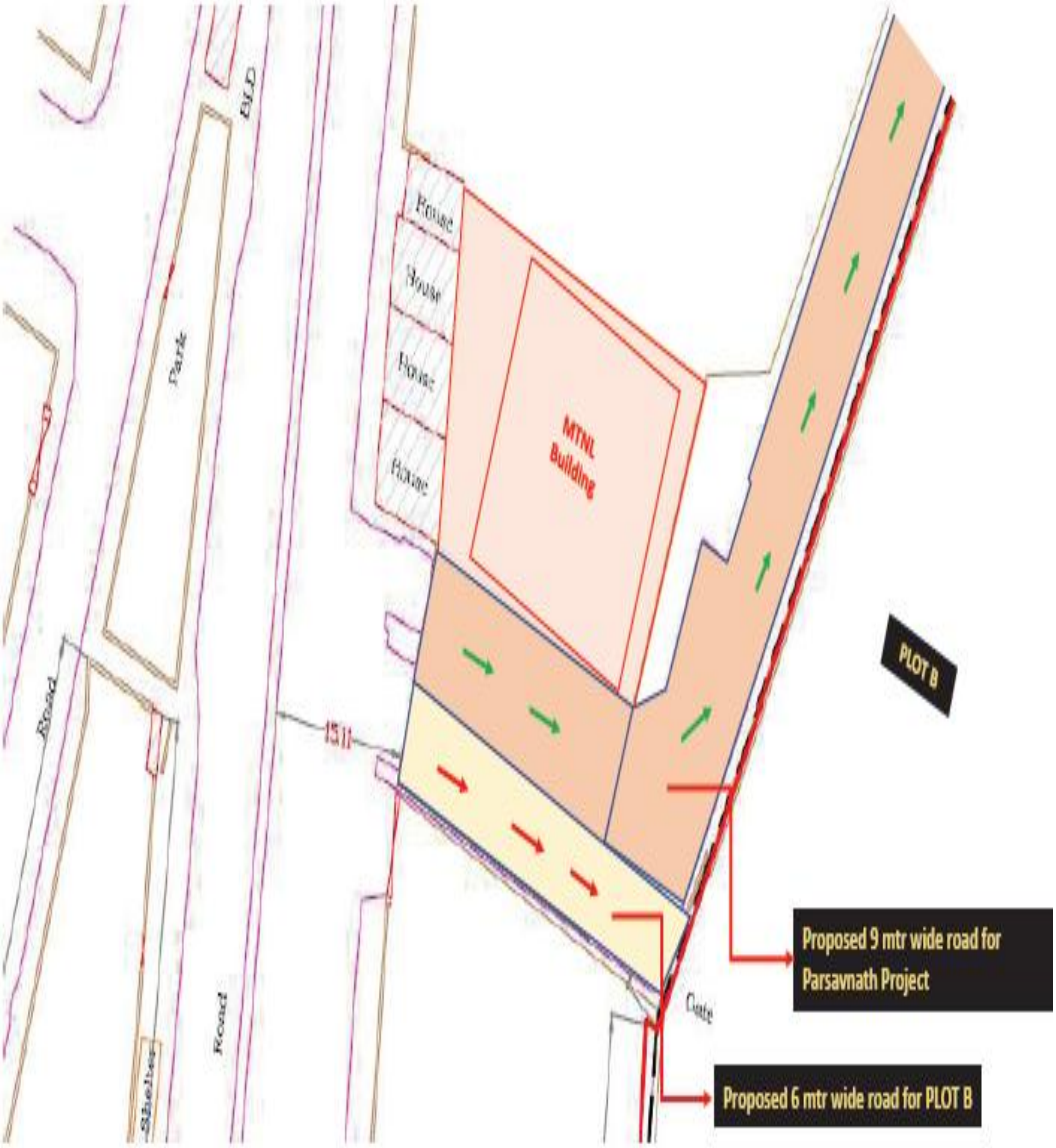
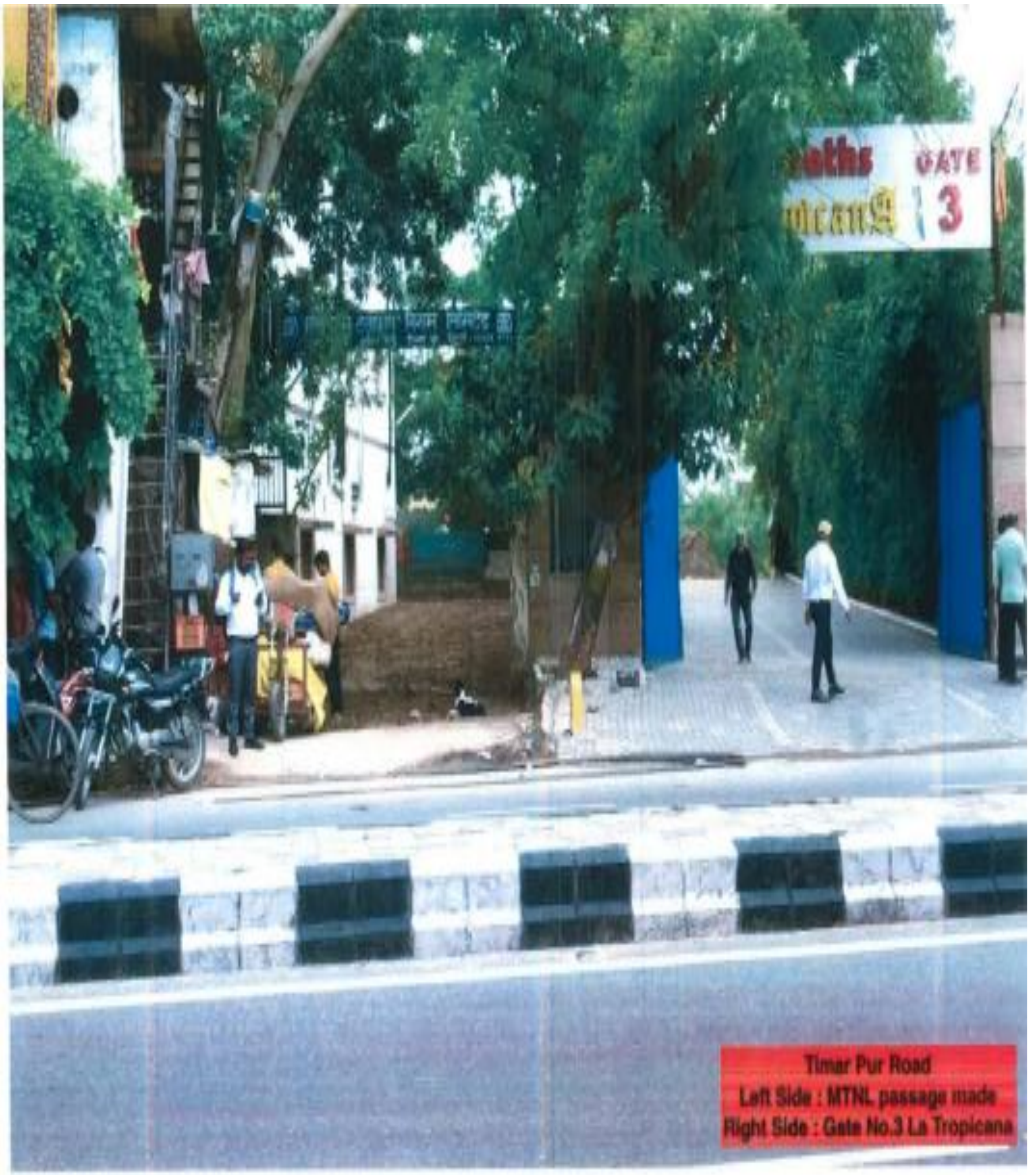
Plot B Access Post Road Swap with Parsavnath




GATE
3
Timar Pur Road
Left Side : MTNL passage made
Right Side : Gate No.3 La Tropicana


Shot on Y15
Vivo AI camera

53.DMRC is a state entity. According to the court, the arrangement by DMRC is fair and just both to R-2 as well as the petitioner. The latter's rights were created earlier in time, therefore, the petitioner's right to service access from Timarpur Road has to be secured and due arrangement for the same has been made by DMRC. In view of the above, DMRC is directed to ensure that petitioner has unhindered service access to its 'Island Plot' from Timarpur Road in terms of the service access as depicted in and represented to the petitioner in the Tender Notice dated 15-12-2002 as well as in terms of clause 4.3.1 of the Agreement. It will be open to R-2 to create and appropriate for itself an exclusive access of equal width from Timarpur Road for its residential area, as proposed by DMRC. The latter has already cleared the path and laid the road for R-2, as noted hereinabove.

54.The petition is allowed and disposed-off in terms of the above. Pending applications, if any, stand also disposed-off.

NAJMI WAZIRI, J

JUNE 28, 2023 rd/rw/ss