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

Reserved on: 23rd December, 2020

Pronounced on: 5th January, 2021

+ O.M.P. (I) (COMM.) 409/2020 & I.A. 11600/2020, I.A. 11601/2020, I.A. 12643/2020

DELHI INTERNATIONAL AIRPORT LIMITED.... Petitioner
Through: Dr.A.M.Singhvi with
Mr.Manoj K. Singh, Mr.Vijay K
Singh, Mr. Ssahel Sood, Mr.Raghav
Shelchar, Mr.Rahul Chopra, Advs.

versus

AIRPORT AUTHORITY OF INDIA & ANR. Respondents
Through: Mr.Tushar Mehta,
Solicitor General with Mr. Raghav
Shankar, Mr.Karan Lahiri,
Ms.Arshiya Sharda, Mr.Prateek Arora,
Mr.Sailender Reddy, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER

% **5th January, 2021**
(Video-Conferencing)

1. Though I had mooted a suggestion that the present petition, having been heard *in extenso* through eminent learned Senior Counsel, including the learned Solicitor General of India, could be finally disposed of, there was no consensus *ad idem* between the parties on my suggestion. Accordingly, this order is restricted to the issue of grant of *ad interim* relief.

2. This order, accordingly, adjudicates prayer (vii) in the present petition, which seeks issuance of ad interim orders in terms of prayers (i) to (vi). Notice is, accordingly, separately being issued in the OMP.

3. Dr. Singhvi, learned Senior Counsel for the petitioner-Delhi International Airport Limited (hereinafter referred to as “DIAL”), submits that the issue in controversy is squarely covered by my earlier judgment in *Mumbai International Airport Limited v. Airport Authority of India*¹ (hereinafter referred to as “MIAL”) and that, therefore, the petitioner is clearly entitled to interim relief.

4. Mr. Tushar Mehta, learned Solicitor General appearing for the Airport Authority of India (hereinafter referred to as “AAI”), submits, *per contra*, that there are clear factors which distinguish the present case from *MIAL*¹.

5. A brief recital of facts would suffice, as I am concerned with the aspect of *ad interim* relief.

6. On 4th April, 2006, DIAL and AAI entered into an Operation Management and Development Agreement (hereinafter referred to as “OMDA”) for development and management of the Indira Gandhi International Airport, Delhi (hereinafter referred to as “IGI Airport”), of which the following features may be noted:

¹ MANU/DE/2148/2020

(i) Chapter III of the OMDA set out the conditions precedent, to be fulfilled by DIAL and AAI.

(ii) Clause (iii) of Article 3.1.1 and 3.1.2 of the OMDA required the AAI and DIAL to execute an Escrow Agreement, with one of the banks named in Schedule 13 to the OMDA.

(iii) Chapter XI of the OMDA, required DIAL to pay, to AAI, an Annual Fee (hereinafter referred to as “AF”), during the currency of the OMDA, and set out the quantum thereof. Clause 11.1.2.2, thereunder, read thus:

“**11.1.2.2** The AF shall be payable in twelve equal monthly instalments, each instalment (hereinafter referred to as “Monthly AF” or “MAF”) to be paid on the first day of each calendar month. The JVC shall from time to time cause the Escrow Bank to make payment of the MAF to AAI in advance on or prior to the 7th day of each month by cheque drawn in favour of AAI. If AAI does not receive the payment of MAF due hereunder by the due date provided herein, the amount owed shall bear interest for the period starting on and including the due date for payment and ending on but excluding the date when payment is made calculated at State Bank of India Prime Lending Rate + 10% p.a. Notwithstanding anything contained herein, the JVC shall at all times be liable to pay the MAF in advance on or prior to the 7th day of each month”

(iv) “Revenue” was defined, in the OMDA, thus:

“ “Revenue” means all pre-tax gross revenue of JVC, excluding the following: (a) payments made by JVC, if any, for the activities undertaken by Relevant Authorities or payments received by JVC for provision of electricity, water, sewerage, or analogous

utilities to the extent of amounts paid for such utilities to third party service providers; (b) insurance proceeds except insurance indemnification for loss of revenue; (c) any amount that accrues to JVC from sale of any capital assets or items; (d) payments and/or moneys collected by JVC for and on behalf of of any governmental authorities under Applicable Law (e) any bad debts written off provided these pertain to past revenues on which annual fee has been paid to AAI. It is clarified that annual fee payable to AAI pursuant to Article 11 and Operational Support Cost payable to AAI shall not be deducted from Revenue.”

- (v) Chapter XVI of the OMDA provided for “*force majeure*”. Articles 16.1.1 and 16.1.2, thereunder, read thus:

“16.1 Force Majeure

16.1.1 The JVC, or AAI, as the case may be, shall be entitled to suspend or excuse performance of its respective obligations under this Agreement to the extent that AAI or JVC, as the case may be, is unable to render such performance by an event of Force Majeure (a “**Force Majeure**”).

16.1.2 In this Agreement, “Force Majeure” means any event or circumstance or a combination of events and circumstances, which satisfies all the following conditions: (a) materially and adversely affects the performance of an obligation; (b) are beyond the reasonable control of the affected Party; (c) such Party could not have prevented or reasonably overcome with the exercise of Good Industry Practice or reasonable skill and care; (d) do not result from the negligence or misconduct of such Party or the failure of such Party to perform its obligations hereunder; and (e) (or any consequence of which), have an effect described in Article 16.1.1.”

As has been observed by me in *MIAL*¹, the present COVID-2019 pandemic clearly constitutes “*force majeure*” within the

meaning of Chapter (xvi) of the OMDA. Though, as noted in case of MIAL, the learned Solicitor General has not disputed this fact, he contends that, unlike the situation which obtained in MIAL, the COVID-2019 pandemic cannot be said to have made it unable for DIAL to discharge its obligations under the OMDA. Schedule 13 to the OMDA sets out the draft of the Escrow Agreement, to be executed between AAI and DIAL.

7. As required by the OMDA, an Escrow Agreement, dated 28th April, 2006, was executed between DIAL, AAI and the ICICI Bank Limited (as the Escrow Bank). The salient features thereof may be enumerated as under:

(i) Clause 2.1 of the Escrow Agreement read thus:

“2.1 Establishment of the Accounts

The Company and the Escrow Bank confirm that the Escrow Bank has established, in the name of the Company at the Escrow Bank's New Delhi branch, an account titled the "**Escrow Account**". The Escrow Account shall have the following sub accounts, maintained, controlled and operated by the Escrow Bank for the purposes of this Agreement, namely:

(a) a sub account maintained, controlled and operated by the Escrow Bank, titled the "**Receivables Account**";

(b) a sub account maintained, controlled and operated by the Escrow Bank, titled the "**Proceeds Account**" which shall have the following sub accounts:

(i) a sub-account maintained, controlled and operated by the Escrow

Bank, titled the "**Statutory Dues Account**;

(ii) a sub-account maintained, controlled and operated by the Escrow Bank, titled the "**AAI Fee Account**; and

(iii) a sub-account maintained, controlled and operated by the Escrow Bank, titled the "**Surplus Account**".

(ii) Article 3 of the Escrow Agreement sets out the manner in which the Escrow Account was to be operated. According to the covenants thereof,

(a) all receivables were to be deposited, by DIAL, into the Receivables Account, immediately, on receipt thereof,

(b) immediately on deposit of monies in the Receivables Account, the Escrow Bank was to transfer the monies from the Receivables Account to the Proceeds Account,

(c) in operating the Proceeds Account, the Escrow Bank would act thus, in the following manner and priority:

(i) transfer, to the Statutory Dues Account, by the last day of any month, statutory dues payable for the succeeding month,

(ii) transfer to the AAI Fee Account, by the last day of every month, the monthly AAI Fee payable for the succeeding month,

(iii) remit, to AAI, any amount other than AAI Fee, payable by DAIL to AAI under the OMDA,

and notified in writing by AAI to the Escrow Bank,
and

(iv) transfer any or all balance amount into the
Surplus Account.

(iii) Articles 3.3 and 3.4 of the OMDA required the Escrow Bank to withdraw, from the Statutory Dues Account and the AAI Fee Account, the amounts required to be paid by the DIAL towards statutory dues as per applicable law and the amounts required by the AAI.

(iv) Article 3.5 required the Escrow Bank to pay, from time to time, to DIAL, within three days of receipt of directions from DIAL to the said effect, the said amounts, from the Surplus Account, as DIAL may direct.

8. A reading of the opening paragraph of my judgment in *MIAL¹*, which sets out the covenants of the OMDA and the Escrow Agreement between MIAL and AAI, juxtaposed with the OMDA executed between DIAL and AAI, and the Escrow Agreement executed among DIAL, AAI and the ICICI Bank Limited, would reveal that the covenants of the OMDA and Escrow Agreement in *MIAL¹* were identical to the OMDA and the Escrow Agreement in the present case. The contractual dispensation governing the relationship between DIAL and AAI was, therefore, the same as the contractual dispensation between MIAL and AAI.

9. Till beginning of 2020, the OMDA and the Escrow Agreement were operated, without any hiccups, in the manner stipulated and contemplated therein.

10. A radical change in the situation, however, occurred as a result of the COVID-2019 pandemic, which has been a global scourge starting February 2020. As a matter of common knowledge, various travel advisories were issued by the Central Government and State governments, initially restraining and, thereafter, completely prohibiting airline operations at airports. Specific reference has been made by DIAL – as was made by MIAL in the earlier case – to the travel and other advisories issued by the Central Government and by the Ministry of Health and Family Welfare on 5th February, 2020, 19th February, 2020, 26th February, 2020, 2nd March, 2020, 5th March, 2020, 18th March, 2020, 19th March, 2020 and 23rd March, 2020, the invocation of the Epidemic Diseases Act, 1897 and the notification, by the Government of NCT of Delhi, of the Delhi Epidemic Diseases (COVID-2019) Regulations on 12th March, 2020 and the imposition of *janta curfew* on 22nd March, 2020, followed by a nationwide lockdown on 24th March, 2020, which was, much after it was imposed, relaxed only in phases. As a result, operations at the IGI Airport were seriously and adversely affected and, over a time, practically came to a halt.

11. DIAL, in the circumstances, addressed communications to the AAI, on 19th March, 2020, 27th March, 2020 and 31st March, 2020, invoking the *force majeure* clause as contained in the OMDA and

requesting for exemption from having to pay Monthly Annual Fee (hereinafter referred to as “MAF”), thereunder, during the currency of the *force majeure* situation.

12. Similar communications were made by MIAL to AAI, to which detailed allusion is to be found in *MIAL*¹.

13. At this *ad interim* stage, I do not deem it necessary to make exhaustive reference to all these communications. However, it is necessary to refer to the response, dated 4th April, 2020, from AAI, to the representation of DIAL. In the said letter, AAI, after specifically referring to Article 11.1.2, 16.1.1 and 16.1.5(d) of the OMDA, went on to observe, in paras 8, 9, 11, 12 and 13, as under:

“8. AAI is cognizant of the extraordinary nature of the events that have transpired in the past weeks. Keeping these in view, AAI is willing to grant consideration to deferral, as requested, for a period of three (3) months of DIAL's obligation under Article 11.1.2.2 to make Monthly Annual Fee payments against its Annual Fee obligation. In short, AAI accepts DIAL's proposal for deferral of its obligation to pay MAF, on the stated ground that it "would not be in a situation to discharge its obligation to pay Monthly Annual Fee to AAI during the next three months upto June, 2020". AAI is doing so in these extraordinary circumstances on a without prejudice basis and notwithstanding DIAL's failure to produce any supporting documentation on its available cash flows, debt obligations or evidence of DIAL's temporary inability to pay MAF. However, as stated below, AAI's acceptance is conditional upon the Board of DIAL passing a Resolution on this matter, and such Resolution being duly communicated to AAI.

9. Reference in this regard may be had to Clause 16.1.5(c), which stipulates that "the time for performance by

the affected Party of any obligation or compliance by the affected Party with any time limit affected by Force Majeure, and for the exercise of any right affected thereby, shall be extended by the period during which such Force Majeure continues and by such additional period thereafter as is necessary to enable the affected party to achieve the level of activity prevailing before the event of Force Majeure". AAI is willing to have recourse to Clause 16.1.5(c) to extend the time for payment of MAF for the months of April, May and June 2020 till 15.07.2020. Such extension of time in respect of MAF payment is of course without prejudice to AAI's rights under the OMDA and cannot be construed as a waiver, modification or alteration of any of the said rights, including AAI's right to be paid Annual Fee computed at 45.99% of pre-tax Gross Revenue under the OMDA. It is also clarified that such extension of time is in the nature of a dispensation limited to the present facts and circumstances and cannot be construed as creating any precedent in this regard inter se the parties to the OMDA.

11. In view of the above, till such time DIAL submits the Board resolution, AAI shall issue instructions to the Escrow Bank to transfer funds equivalent to 45.99% of the Gross revenue projected by DIAL in the spreadsheet included as an attachment to DIAL's email dated 03.04.2020 for the three months (i.e. April, May and June 2020) from the Proceeds Account to the AAI Fee account and thereafter to AAI's bank account by the 7th of the month. This would, as you are aware, be considerably less than monthly payment of Rs.148.33 Cr. MAF as per the last Business Plan, which would (as per past practice) have determined the MAF payable until the new Business Plan for FY 2020-21 is approved by DIAL's Board of Directors.

12. In the event that DIAL is able to submit the Board Resolution within the three months (i.e. April, May and June 2020, and prior to 06.06.2020), then AAI would instruct the Escrow bank to not transfer funds from the Proceeds Account to the AAI Fee Account, for the remaining time within the said three month period and, instead, transfer such amounts directly to the Surplus account up to 06.06.2020. After 06.06.2020, the normal procedure would be followed in

respect of transfer of funds from the Proceeds Account to AAI Fee Account as per Business Plan to be submitted by DIAL.

13. At the end of this three-month period, the cumulative Annual Fee amount for the months of April, May and June, 2020, (computed on actuals) shall be paid to AAI by 15.07.2020. No interest under Article 11.1.2.2 would be levied for this three-month period (i.e. 1st Quarter FY 2020-21).”

14. The communication, dated 30th March, 2020, from AAI to MIAL, which constituted the main plank of MIAL’s case before this Court, in *MIAL*¹, was, to all intents and purposes, identical to the aforesaid communication dated 4th April, 2020, from AAI to DIAL. As in the case of the communication dated 30th March, 2020 from AAI to MIAL, the communication dated 4th April, 2020 from AAI to DIAL also specifically (i) notes (in para 4) the invocation, by DIAL, of the *force majeure* provisions contained in Chapter XVI of the OMDA, and (ii) given the circumstances consequent to the COVID-2019 pandemic and the restrictions imposed as a consequence thereof, expresses (in para 6), unequivocally, the willingness of AAI to defer the obligations of DIAL to pay MAF up till 30th June, 2020.

15. There is, therefore, effectively no distinction, whatsoever, between the present case and MIAL, insofar as acknowledgement, by AAI, of (i) the existence of *force majeure*, (ii) the fact that the ability of DIAL, to perform its obligations under the OMDA had been prejudicially affected by the *force majeure*, and (iii) the consequent decision, of AAI, to grant deferral, to DIAL, of the requirement of paying MAF, in accordance with the OMDA, were concerned. As in the case of *MIAL*¹, the AAI granted deferral, to DIAL, of its

obligations under the OMDA, for the months of April, May and June, 2020, and not thereafter.

16. It is important to note this fact, at least at this *ad interim* stage, as it answers the factual distinction which the learned Solicitor General had sought to draw, between the present case and *MIAL*¹.

17. The learned Solicitor General had also sought to submit that, unlike the position that obtained in the case of *MIAL*¹, the *force majeure* situation that had emerged consequent to the COVID-2019 pandemic had not rendered DIAL unable to perform its obligations under the OMDA. In this context, the learned Solicitor General asserted that the financial position of DIAL was far superior to that of MIAL. He also invited my attention, in this context, to the balance-sheet of DIAL, which contained, according to the learned Solicitor General, huge reserves (in the region of ₹1800 crores), which could be exploited by DIAL for payment of MAF and compliance with other obligations under the OMDA.

18. The learned Solicitor General emphasised that Article 16.1.1 of the OMDA did not excuse or suspend the obligation of the JV – whether MIAL or DIAL – merely because a situation of *force majeure* existed. He pointed out that it was also necessary for the JV to establish that, as a consequence of such *force majeure*, it had been rendered unable to perform its obligations under OMDA. MIAL, he submits, had been able to make out such a case, whereas DIAL had not.

19. To this, Dr. Singhvi had sought to respond that a mere reading of the balance-sheet of DIAL was not accurately reflective of its financial wherewithal to perform its obligations under the OMDA. He sought to submit that the “huge reserves” reflected in the balance-sheet were specifically required to be used for the new terminal of the IGI Airport, which was being developed and were not available, therefore, to DIAL, for its utilisation towards payment of MAF under the OMDA. Dr. Singhvi submitted that the financial position of DIAL, as reflected by the averments contained in the petition, was true, correct and accurate, and that the submissions of learned Solicitor General, to the contrary, were not correct on facts.

20. The learned Solicitor General objected to this line of argument, stating that these were facts which were required to be pleaded on affidavit, and did not form any part of the pleadings in the present case.

21. To my mind, at least at this *ad interim* stage, it is not necessary to enter into the fine niceties of the financial position of DIAL, *vis-a-vis* that of MIAL, or to hyper-distinguish one from the other.

22. That the intervention of the COVID-2019 pandemic, and the restrictions imposed as a consequence thereof, had, even in the case of DIAL, made out a case for deferral of its obligations under the OMDA, stands specifically acknowledged by AAI in its communication dated 4th April, 2020 to DIAL, just as had been

acknowledged by the AAI in its communication dated 30th March, 2020 to MIAL. Moreover, the deferral from performance of its obligations under the OMDA, as extended by AAI to DIAL, is exactly the same as that extended by AAI to MIAL, i.e., deferral till 30th June, 2020, and no further.

23. At this *ad interim* stage, therefore, it would neither be possible, or, even appropriate, for me, to distinguish the facts of the present case, from those which obtained in *MIAL*¹. Consistency is one of the foremost traits of a robust justice dispensation system.

24. In the case of MIAL, the concluding paragraph of my judgment, dated 27th November, 2020, had directed as under:

“(i) 38.7% of the actual payments, received by MIAL, from the activities connected with the OMDA and the functioning of the CSI Airport, shall be deposited in the Proceeds Account in the Escrow Account maintained by SBI. Subject to the directions that follow, this direction shall operate prospectively from the date of the pronouncement of this judgement.

(ii) AAI is restrained from transferring the said amounts, lying in, or to be deposited in, the Proceeds Account to the AAI Fee Account.

(iii) MIAL would be entitled to utilise the amounts lying in the Proceeds Account, for meeting its expenses in connection with its obligations under the OMDA, pertaining to the running and maintaining of the CSI Airport and other obligations linked thereto. I do not deem it necessary, therefore, to transfer the amounts lying in the Proceeds Account to the Surplus Account. The utilisation, by MIAL, of the amounts lying in the Proceeds Account, towards maintaining the CSI Airport and fulfilling other obligations

under the OMDA – save and except such obligations, the fulfilment of which are impeded by the COVID-2019 pandemic and the restrictions imposed consequent thereupon – would be strictly accounted, and monthly account statements, in that regard, shall be provided to AAI as well as the SBI.

(iv) MIAL and AAI are both directed to appoint one arbitrator each, of their choice, within a period of ten days from the communication, by the Registry of this Court, of a copy of this order, by e-mail to learned Counsel who appeared on their behalf, or from the date of uploading of this order on the website of this Court, whichever is earlier, and to communicate the choice of arbitrator to each other. The two arbitrators, so appointed, shall appoint the Presiding Arbitrator, on or before 31st December, 2020. The learned Arbitral Tribunal would enter on the reference within two weeks of its being so constituted.

(v) The fees of the learned arbitrators would be in accordance with the Fourth Schedule of the Arbitration and Conciliation Act, 1996, subject to any other fees being fixed by the learned arbitrators after discussion with the parties.

(vi) MIAL is permitted, if it so chooses, to prefer, before the Arbitral Tribunal thus constituted, an application, under Section 17 of the Arbitration and Conciliation Act, 1996, for the continuance of the operation of this order, within two weeks of the Arbitral Tribunal entering on the reference. Default, on the part of MIAL, in doing so, would result in this order ceasing to operate on the expiry of the said period.

(vii) AAI is also permitted to move an application, under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitral Tribunal, for alteration or variation of the present order, or for a direction, to MIAL, to deposit any differential amount, remaining to be paid in accordance with the OMDA, in the Proceeds Account or the AAI Fee Account, or for any connected or cognate reliefs. Any such application, if moved, would be decided on its own merits.

(viii) In case such an application is moved by MIAL or AAI, the learned Arbitral Tribunal is requested to consider and dispose of the application as expeditiously as possible,

needless to say after affording due opportunity to the opposite party to contest the prayers. The present order would, therefore, continue to remain in operation, pending and subject to the decision of the learned Arbitral Tribunal in this regard.

(ix) The interim protection, under (i) to (iii) *supra*, would continue till, and remain subject to, the decision, of the learned Arbitral Tribunal, on the application to be preferred, before it, by MIAL under Section 17 of the Arbitration and Conciliation Act, 1996, if it so chooses to prefer any such application. Else, as already noted hereinabove, this order would cease to operate two weeks after the Arbitral Tribunal enters on the reference.”

25. *Prima facie*, I am of the view that the facts in the present case are identical to those in *MIAL*¹.

26. The learned Solicitor General also sought to take exception to the fact that, unlike MIAL, which had approached this Court at the appropriate stage, DIAL merely sought to capitalise on the judgment rendered in the case of MIAL, and had invoked Section 9 of the Arbitration & Conciliation Act, 1996 in a much belated fashion. Dr. Singhvi sought to respond to this submission by pointing out that, in its communication dated 23rd November, 2020, addressed to DIAL, AAI, even while accepting the proposal of DIAL for deferral of obligations to pay MAF till June, 2020, denied the submission, of DIAL, that it was exempted of its obligations from having to pay MAF as a consequence of *force majeure*. In view of issuance of this communication, Dr. Singhvi submitted that it could not be alleged that DIAL had approached this Court belatedly. Even otherwise, he submits, once this Court had expressed its view on an identical issue, the petitioner was well within its right in seeking the same relief, as it

was identically situated.

27. At this *ad interim* stage, given the similarity and near identity, on facts, between *MIAL*¹ and the present case, I do not intend to enter into this aspect, leaving it open for consideration when the present OMP is finally heard, or by the Arbitral Tribunal which may come to be constituted, as the case may be.

28. There is, however, one important factual distinction between the present case and that of *MIAL*.

29. As there was some confusion regarding the exact status of the monies contained in the Proceeds Account, the AAI Fee Account and the Surplus Accounts, in the present case, I had, *vide* my order dated 9th December, 2020, issued the following directions to AAI:

“The AAI is, accordingly, directed to place a short note, not exceeding two pages, under cover of an appropriate index, setting out this position, in order to clarify to this Court as the Court desires to know the date when the aforesaid amounts of ₹ 399.20 and ₹ 51 crores were

(i) deposited in the Proceeds Account,

(ii) transferred, from the Proceeds Account, to the AAI Fee Account,

(iii) further transferred from the AAI Fee Account, if at all, and

(iv) the account in which these amounts are present today.”

30. In compliance with the aforesaid directions, AAI has filed an affidavit, along with which the table, appended to this order, has been

annexed².

31. The position, as reflected in the tabular statement, filed by AAI – which is not disputed by Dr. Singhvi – is that between April, 2020 & November, 2020, out of ₹ 1426.67 crores, transferred from the Receivables Account into the Proceeds Account, ₹384.73 crores had already been transferred into the AAI Fee Account and therefrom to the AAI Bank Account which was outside the Escrow Account. Further, by 9th December, 2020, a further amount of ₹ 51.94 crores, out of a total amount of ₹ 129.97 crores which had been transferred from the Receivables Account into the Proceeds Account also stood transferred into the AAI Fee Account and therefrom to the AAI Bank Account. DIAL has sought refund of this amount into the Proceeds Account, such a prayer cannot be considered at an ad-interim stage. As such, the aspect of refund of ₹ 384.73 crores & ₹ 51.94 crores which had travelled outside the Escrow A/c back into Escrow Account is an aspect which will have to be examined when the present OMP is finally heard. At an ad-interim stage, it is not possible for this Court to restore the *status quo ante*.

32. Dr. Singhvi has taken specific exception to the withdrawal, by AAI, of ₹ 51.94 crores, from the AAI Fee Account immediately on it being transferred to the said account, prior to 9th December, 2020, after the present petition had been filed and was listed before this Court.

² Ref. Annexure to this order.

33. A reading of the OMDA read with the Escrow Agreement makes it clear that the AAI was entitled to transfer, from the Proceeds account to the AAI Fee Account, 45.99% of the amounts deposited in the Proceeds Account every month. No exception could be taken to the transfer of ₹ 51.94 crores from the Proceeds Account to the AAI Fee Account, *per se*.

34. Having said that, in my judgment in *MIAL*¹, I had directed *status quo* to be maintained with respect to the AAI Fee Account. In other words, I had restrained AAI from withdrawing any amount from the AAI Fee Account.

35. Tested on that anvil, it may be arguable whether AAI is required to transfer back, into the AAI Fee Account, the aforesaid amount of ₹ 51.94 crores, which was withdrawn by it from the AAI Fee account, immediately on deposit of the amount therein.

36. This, however, is also not a direction which I can legitimately issue at an *ad interim* stage.

37. As such, the issue of whether the amounts withdrawn by AAI, from the AAI Fee Account, on or before 9th December, 2020 (as reflected in the afore-extracted table² filed by AAI itself), is required to be deposited back in the Escrow Account, is left open for decision at the stage of final hearing of the present OMP.

38. Dr. Singhvi, however, submits that, even in December, 2020,

apart from the aforesaid amount of ₹ 51.94 crores, an additional amount of ₹ 77 crores was transferred from the Proceeds Account to the AAI Fee Account, *after* 9th December, 2020.

39. Inasmuch as the right of the AAI to transfer, to the AAI Fee Account, 45.99% of the amount deposited in the Proceeds Account, stood exhausted with the transfer of ₹ 51.94 crores till 9th December, 2020, Dr. Singhvi submits, with emphasis, that the further transfer of ₹ 77 crores from the Proceeds Account to the AAI Fee Accounts, which had taken place after 9th December, 2020, is completely without authority of law and is contrary to the provisions contained in the OMDA and the Escrow Agreement. He submits that this amounts to an “advance appropriation”, by AAI, of the amounts transferable probably for the month of January, 2021, which, according to him, is not permissible either under the OMDA or under the Escrow Agreement.

40. As such, this amount of ₹ 77 crores, according to Dr. Singhvi, is required to be immediately transferred back to the Proceeds Account, without a day’s delay.

41. Though Dr. Singhvi acknowledges that this averment does not find reflection in the pleadings thus far, he submits that, as this allegedly clandestine transfer of ₹ 77 crores had taken place without the knowledge of DIAL and in violation of the OMDA and the Escrow Agreement, after 9th December, 2020, he had no opportunity to place it on record. He, however, confirms, on instructions, that such transfer

has, in fact, taken place.

42. The learned Solicitor General objected to this line of argument, submitting that these were aspects which would have to be ascertained, from AAI, on instructions. He, therefore, exhorted the court not to take any notice of such submissions, till they were placed on affidavit by DIAL.

43. Though it is a fact that the submission, of Dr. Singhvi, that ₹ 77 crores had been illegally transferred from the Proceeds Account to the AAI Fee Account after 9th December, 2020, does not find reflection in the pleadings thus far, there are three reasons why it is not possible for me to ignore this submission, as the learned Solicitor General would request.

44. Firstly, a bare glance at the chart filed by AAI, regarding the position of the various amounts of the Escrow Account, as extracted hereinabove, would reveal that monies deposited in the AAI Fee Account were being immediately transferred from the AAI Fee Account to the account of the AAI outside the Escrow Agreement and, therefore, as AAI would submit, outside the Section 9 reach of this Court.

45. Secondly, there can, *prima facie*, be no gainsaying the position, emanating from the OMDA as well as the Escrow Agreement, that AAI is entitled to transfer, in any month, only 45.99% of the amount transferred to the Proceeds Account from the Receivables Account in

that month, and not more. The chart filed by the AAI indicates that, with the transfer of ₹ 51.94 crores into the AAI Fee Account, till 9th December, 2020, this permitted 45.99% entitlement of AAI, for the said month, stood exhausted. *Prima facie*, therefore, Dr. Singhvi is correct in his submission that, no amount, in excess of the aforesaid amount of ₹ 51.94 crores could have been transferred into the AAI Fee Account after 9th December, 2020.

46. Thirdly, the actual amount transferred after 9th December, 2020 hardly matters. Neither, in view of the directions that I propose to issue in that regard, does the question of whether any amount, in excess of ₹ 51.94 crores was, or was not, transferred from the Proceeds Account to the AAI Fee Account after 9th December, 2020, matter. If no such transfer has taken place, the direction would not affect AAI, as it would not apply. If any such transfer has taken place, however, I am of the clear *prima facie* view that AAI was not entitled to transfer any amount from the Proceeds Account to the AAI Fee Account in December 2020, beyond ₹ 51.94 crores which stood transferred by 9th December, 2020. Any transfer from the Proceeds Account to the AAI Fee account, which has taken place after 9th December, 2020, is, therefore, *prima facie*, contrary to the OMDA as well as to the Escrow Agreement.

47. I am, therefore, in agreement with Dr. Singhvi that any amount that has been transferred from the Proceeds Account to the AAI Fee Account, after 9th December, 2020, would be required to be transferred back into the Proceeds Account. This position would

obtain even if the said amount has been transferred out of the AAI Fee Account to the bank account of AAI.

48. At the same time, I reiterate my view that, at least at this *ad interim stage*, no direction could be issued to AAI with respect to the amount of ₹ 51.94 crores, which has travelled outside the Escrow Account, into the individual bank account of the AAI in December 2020, or with respect to the amount ₹384.73 crores, out of the amount of ₹ 1426.67 crores deposited in the Proceeds Account, which travelled outside the Escrow Account into the AAI Bank Account between April 2020 and November 2020. The prayer, of DIAL, for return of this amount into the Escrow Account, would amount to restoration of the *status quo ante*, and would have to be considered when the present OMP is finally heard.

49. In view of the aforesaid, at this *ad interim stage*, the following directions are issued:

(i) The ICICI Bank is directed to transfer back, into the Proceeds Account, any amount which may have been transferred from the Proceeds Account to the AAI Fee Account, after 9th December, 2020.

(ii) In case any part of the said amount has been transferred out of the Escrow Account, into the Bank account of AAI, after 9th December, 2020, AAI is directed to pay back, into the Proceeds Account, the said amount, within two weeks of the

passing of the this order.

(iii) DIAL would continue to make payment into the Receivables Account, of all receivables earned by it from the activities of the airport, in accordance with the OMDA, every month. From the said receivables amount, the Escrow Bank would effect transfer, into the Proceeds Account, in accordance with the OMDA.

(iv) Transfer of moneys from the Proceeds Account to the AAI Fee Account, pending further orders, shall stand stayed.

(v) DIAL would be entitled to use the amounts contained in the Proceeds Account for running of the IGI airport and all activities connected therewith.

(vi) All receivables as a consequence of such activities, would, however, abide by the directions already issued hereinabove.

50. These *ad interim* directions would continue to remain and operate subject to the final outcome of the present OMP.

51. As there was considerable debate, regarding the financial position of DIAL, and as to whether it had been rendered unable to perform its obligations under the OMDA, as a consequence of *force majeure*, AAI is directed to file an affidavit, specifically setting out its submissions in this regard within a period of two weeks from the date

of pronouncement of this order. DIAL is directed to file its response thereto within a period of two weeks therefrom and AAI would be entitled to file its rejoinder to the response of DIAL within one week from the filing of such response. This aspect would be examined in detail when the O.M.P. is finally heard.

52. Prayer (vii) in the petition, for grant of *ad interim* relief stands disposed of, in the aforesaid directions.

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1. Issue notice, returnable on 18th February, 2021. Mr. Raghav Shankar accepts notice on behalf of the respondents.
2. Counter affidavit, if any, be filed within a period of four weeks from today with advance copy to learned Counsel for the petitioner who may file rejoinder thereto, if any, before the next date of hearing.
3. Renotify for hearing on 18th February, 2021.

JANUARY 05, 2021

dsn/kr

C. HARI SHANKAR, J.

ANNEXURE

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | |
|---|---|--------------------------------------|--------------------------------|-------------|---------------------------------|--|--|---|---------------|--|
| MONTH | Amount transferred from Receivables A/c to Proceeds a/c during month | Bill Amount in respect of MAF | Amount (in crores) | | | Date of Transfer from Receivables a/c no. 6505002690 to Proceeds Account a/c no. 6505002691 | Date of transfer from Proceeds account to AAI Fee Account a/c no.6505002693 | Date of transfer from AAI Fee account to AAI Bank a/c no.705041566 | | |
| | INR – in crores | | AAI FEE (Net after TDS) | GST | TOTAL credit in Bank a/c | 6505002691 (Proceeds a/c) | 6505002693 (AAI Fee a/c) | 705041566 (AAI Bank a/c) | | |
| Apr-20 | 89.4 | 20.74 | 18.67 | 3.73 | 22.4 | All funds received in Receivables account are transferred to Proceeds account on a daily basis | 07.04.2020 | 07.04.2020 | | |
| May-20 | 78.91 | 27.80 | 25.02 | 5 | 30.02 | | 06.05.2020 | 06.05.2020 | Note-1 | |
| Jun-20 | 130.63 | 36.95 | 33.25 | 6.65 | 39.9 | | 05.06.2020 | 05.06.2020 | | |
| Jul-20 | 189.95 | 47.32 | 42.58 | 8.52 | 51.1 | | 07.07.2020 | 07.07.2020 | | |
| Aug-20 | 172.8 | 46.71 | 43.2 | 8.4 | 51.6 | | 07.08.2020 | 07.08.2020 | | |
| Sep-20 | 225.1 | 47.01 | 30.08 | 8.46 | 39.26 | | 07.09.2020 | 07.09.2020 | | |
| Oct-20 | 269.48 | 47.01 | 43.48 | 8.46 | 51.94 | | 07.10.2020 | 07.10.2020 | | |
| Nov-20 | 270.4 | 47.01 | 43.48 | 8.46 | 51.94 | | 07.11.2020 | 07.11.2020 | | |
| S.Fall-Q1 | 0 | 46.25 | 2.63 | 8.32 | 10.95 | | | | Note-2 | |
| S.Fall-Q2 | 0 | 32.23 | 29.82 | 5.8 | 35.62 | | | 15.10.2020 | 15.10.2020 | |
| TOTAL | 1426.67 | 399.03 | 312.93 | 71.8 | 384.73 | | | | | |
| Dec.-20 | 129.97 | 47.01 | 43.48 | 8.46 | 51.94 | | | 09.12.2020 | 09.12.2020 | |
| Note-1 – In May 2020 Rs.15.60 crores transferred to AAI Bank account from Escrow Proceed account whereas Rs.14.42 crores from DIAL's another account | | | | | | | | | | |
| Note-2 – Bill Amount adjusted against credit note issued to DIAL.” | | | | | | | | | | |