

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Reserved on: 13.08.2024

Pronounced on: 13.09.2024

AERA APPEAL/4/2023

Mumbai International Airport Ltd.

...Appellant

Versus

1. Airports Economic Regulatory Authority of India;

2. Airports Authority of India

...Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE DHIRUBHAI NARANBHAI PATEL (CHAIRPERSON)

HON'BLE MR. SUBODH KUMAR GUPTA (MEMBER)

FOR APPELLANT	FOR RESPONDENT(S)
<p><u>In AERA Appeal No.4/2023</u></p> <p>For <u>MIAL</u></p> <p>Mr. Sajan Poovayya, Senior Advocate, Ms. Amrita Narayan, Mr. Ashwin Rakesh, Mr. Saurobroto Dutta, Mr. Abhishek Kakkar, Mr. Madhav Sharma, Mr. Harshvardhan.</p>	<p><u>In AERA Appeal No.4/2023</u></p> <p>For <u>AERA (R-1)</u></p> <p>Mr. Ankur Sood, Dr. Anand Kumar, Mr. Neeraj Sharma, Ms. Shalini Prasad.</p> <p>For <u>AAI (R-2)</u></p> <p>Mr. Raghav Shankar, Mr. Karan Lahiri, Mr. Prateek Arora, Ms. Pallavi Mishra, Ms. Rishieka Ray, Mr. Anubhav Aireya.</p>

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JUDGEMENT

Per Justice D.N. PATEL, Chairperson

SUMMARIUM

The present appeal revolves around an issue of calculation of Development Fee along with actual cost of debt levied by financial institutions and paid by Airport Operator – Appellant – MIAL, upon securitisation of collection of Development Fee.

STATUTES, REGULATIONS & LEGAL AGREEMENTS INVOLVED

ACT/REGULATION/RULE/AGREEMENT	SECTION/RULE/CLAUSE/ANNEXURE
Airports Economic Regulatory Authority of India Act, 2008	Sec.13, Sec.18
State Support Agreement (SSA)	ANNEXURE A-3 of this AERA Appeal
Operation, Management and Development Agreement (OMDA)	ANNEXURE A-2 of this AERA Appeal
Concession Agreement	ANNEXURE A-4 (Colly) of this AERA Appeal
AERA Order No. 09/2023-24 dated 14.06.2023	Annexure A-1 of this AERA Appeal
Airports Authority of India (Major Airports) Development Fee Rules, 2011	ANNEXURE A-7 of this AERA Appeal

ABBREVIATIONS INVOLVED

Abbreviations	Expansion
AAI	Airports Authority of India
ACI	Airports Council International
ADRM	Airport Development Reference Manual
AERA Act	Airports Economic Regulatory Authority of India Act, 2008
AERA	Airports Economic Regulatory Authority of India
AF	Annual Fee
AOC	Airlines Operators Committee
APAO	Association of Private Airport Operators
ARB	Aeronautical Revenue Base
ATC	Air Traffic Control
BAC	Base Airport Charges
BBR	Bank's Base Rate

BCAS	Bureau of Civil Aviation Security
BIAL	Bangalore International Airport Limited
CAGR	Compound Annual Growth Rate
CNS/ATM	Communication, Navigation and Surveillance and Air Traffic Management Services
CSMIA	Chhatrapati Shivaji Maharaj International Airport
CSR	Corporate Social Responsibility
CWIP	Capital Work in Progress
DF	Development Fee
DIAL	Delhi International Airport Limited
ECB	External Commercial Borrowing
FDR	Fixed Deposit Receipts
FIA	Federation of Indian Airlines
Forex Losses	Foreign Exchange Losses
FRoR	Fair Rate of Return

FTC	Fuel Throughput Charges
FICCI	Federation of Indian Chambers of Commerce
GHIAL	GMR Hyderabad International Airport Limited
HIAL	Hyderabad International Airport Limited
IDC	Interest During Construction
IGIA	Indira Gandhi International Airport
JVC	Joint Venture Company
MDF	Metro Development Fee
MIAL	Mumbai International Airport Limited
MoCA	Ministry of Civil Aviation
MYTP	Multi Year Tariff Proposal
NPV	Net Present Value
OMDA	Operation, Management and Development Agreement
PBT	Profit Before Tax
PV	Present Value

RAB	Regulatory Asset Base
ROI	Rate of Interest
RSA	Revenue Share Assets
RSD	Refundable Security Deposit
RTL	Rupee Term Loan
SGSA	State Government Support Agreement
SPV	Special Purpose Vehicle
SSA	State Support Agreement
TDSAT	Telecom Disputes Settlement and Appellate Tribunal
WACC	Weighted Average Cost of Capital

AERA APPEAL NO.4 OF 2023

1. This appeal has been preferred under **Section 18(2) of the Airports Economic Regulatory Authority of India (AERA), Act, 2008** against the order passed by Respondent - AERA bearing number 09/2023-24 dated and issued on 14.06.2023 for the levy of Development Fee (**DF**) for Project Work and Metro Connectivity Project at the Chhatrapati Shivaji Maharaj International Airport, Mumbai (**CSMIA**) (formerly known as Chhatrapati Shivaji International Airport, Mumbai).

FACTUAL MATRIX

A. Vide a notification dated 26th May, 2017 published by the Ministry of Finance, Part XIV of Chapter VI of the Finance Act, 2017 came into force. As a result, the AERAAT under the Airports Economic Regulatory Authority of India Act, 2008 came to be merged in the instant tribunal i.e. the Telecom Disputes Settlement and Appellate Tribunal (**TDSAT**).

B. Airports Authority of India (**AAI**) during 2004-2005 invited tenders for operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the CSMIA. Thereafter, GVK Consortium was declared successful for CSMIA offering 38.7% revenue share to AAI.

C. Thereafter, a special purpose vehicle namely Mumbai International Airport Private Limited (**MIAL**) was incorporated with AAI retaining 26% Equity stake and balance 74% equity stake by MIAL which comprised of GVK Airport Holding Pvt. Ltd., ACSA Global Limited and Bid Services Division (Mauritius) Ltd.

D. MIAL entered into an **OMDA** with AAI on 04.04.2006. Thereafter, MIAL entered into an **SSA** dated 26.04.2006 with Hon'ble the President of India acting through Ministry of Corporate Affairs (**MoCA**). Besides OMDA and SSA, several other agreements were also entered into by MIAL such as the **Shareholders' Agreement** dated 04.04.2006, **Lease Deed Agreement** dated 26.04.2006, **CNS/ATM Facilities and Services Agreement** dated 26.04.2006, State Government Support Agreement (**SGSA**) dated 27.04.2006 and the **Airport Operator Agreement** dated 28.04.2006.

E. On 03.05.2006, MIAL took over the operations of CSMIA, Mumbai.

F. MIAL had submitted a **Master Plan** and **Major Development Plan** for the CSMIA in October, 2006 and based on detailed discussions with AAI and MoCA, their recommendations were included in the Master Plan. Thereafter, MIAL updated Master Plan and Major Development Plan and submitted them in May, 2007 and November, 2007 respectively. This

had resulted in an increase in the project cost from what was estimated earlier.

G. To bridge the funding gap, MIAL approached MoCA in December, 2008-February, 2009 to fund the gap of **Rs. 2,350 Crores** through DF under **Section 22A** of AAI Act, 1994. MoCA vide letter dated 27.02.2009 conveyed its approval for sanction of **Rs. 1,543 Crores** as funding gap. The gap was to be bridged through DF by MIAL at the CSMIA at **Rs 100 for every domestic passenger and Rs 600 for every international passenger** w.e.f. 01.04.2009.

H. In 2008-09, AERA Act was promulgated and MoCA forwarded MIAL's request for bridging the funding gap of Rs 2,350 Crores as against the DF of Rs 1,543 Crores that was allowed by MoCA to AERA for its consideration.

I. Meanwhile, levy of DF allowed by MoCA was challenged before the Hon'ble Supreme Court of India in *Consumer Online Foundation & Ors vs. UOI & Ors.* (2011) 5 SCC 360 wherein the Hon'ble Supreme court quashed the letter dated 27.02.2009 stating that levy of DF has not been authorized in the manner prescribed by law. The Hon'ble Supreme Court of India held that after 01.01.2009, DF could only be levied and collected by MIAL at the rate determined by AERA.

J. Thereafter, on 02.08.2011, MoCA notified the **Airports Authority of India (Major Airports) Development Fee Rules, 2011** (“**DF Rules**”).

K. In August, 2011, the Master Plan was further revised to incorporate changes necessary for planning and development. This resulted in increase in the project cost from the earlier approved cost of **Rs 9,802 Crores** to **Rs 12,380 Crores**.

L. On 11.10.2011, MIAL filed its Multi-Year Tariff Proposal (**MYTP**) with AERA wherein MIAL indicated detailed reasons for increase in project cost. As a result, AERA requested AAI to appoint independent auditors to audit cost estimates and expenditure incurred and to submit the audit report and in pursuance of this, M/s Ved Jain and Associates and M/s Engineers India Limited were appointed.

M. On 06.01.2012, AERA issued Consultation Paper No. 33/2011-12 to consider the request of MIAL for levy and collection of DF at CSMIA in order to meet the funding requirement of Rs 9,802 Crores.

N. Thereafter, AERA passed an interim order No. 02/2012-13 dated 16.04.2012 (issued on 18.04.2012) sanctioning a total DF amount of **Rs 876.27 Crores** based on the project cost of Rs 9,802 Crores. By virtue of this order, DF to be collected at CSMIA was determined at Rs 100 per

domestic passenger and Rs 600 per international passenger w.e.f. 01.05.2012.

O. AERA issued a Consultation Paper No. 22/2012-3 dated 11.10.2012 and MIAL filed a detailed response to the said Consultation Paper. In view of this, AERA passed Order No. 29/2012-13 dated 21.12.2012 ("**DF Order**") whereby it determined the DF for the project at Rs 3,400 Crores and the rate to be Rs 100 per domestic passenger and Rs 600 per international passenger. MIAL challenged this DF Order vide **AERA Appeal No. 02 of 2013** before this Tribunal.

P. The total DF for the project as determined by AERA was **Rs 3,400 Crores** but the estimated balance DF left as on 01.01.2013 based on actual collections till 26.04.2011 and estimated collections from 01.05.2012 till 31.12.2012 was **Rs 2,515 Crores**.

Q. Subsequent to the DF Order, MIAL approached banks for loan (DF Loan) which was subsequently approved against billable DF allowed by AERA.

R. On 15.03.2013, MIAL informed AERA that **IDBI Bank** and **Axis Bank** have sanctioned an aggregate amount of **Rs 2,647.80 Crores** against securitization of DF receipts at a rate of **12.25%**.

S. On 28.01.2016, AERA vide Order No. 46/2015-16 allowed levy of Metro Development Fee (**MDF**) of **Rs 20 per domestic passenger and**

Rs 120 per international passenger towards Metro Connectivity project at CSMIA. AERA merged the levy of MDF with DF as a result of which, the **consolidated levy of DF was at Rs 120 per domestic passenger and Rs 720 per international passenger.**

T. On 16.07.2020, this Hon'ble Tribunal passed an order in MIAL DF Appeal on this issue of applicable interest rate.

U. Thereafter, between August, 2020 to November, 2022, appellant issued letters to AERA to consider the actual interest rate prevailing for the extension of DF levy rather than current/consistent rate of 11.25%.

V. Thereafter, vide the impugned order, AERA had allowed DF billable amount of Rs 488.3 Crores as on 31.01.2023 based on recommendation of AAI, but, as per the appellant, it is entitled to DF billable amount of Rs 917.4 Crores and the interest thereupon.

Arguments canvassed by counsel for the Appellant -

Mumbai International Airport Limited (MIAL)

- 1.** Learned Senior Advocate Mr. Sajan Poovayya submitted on behalf of MIAL that AERA has failed to consider the actual Rate of Interest i.e. the contractual interest for the purpose of computation of balance of **Development Fee** and therefore, AERA – respondent no.1 be

directed to compute the revised balance Development Fee billable amount and consequently, the suitable period may be extended for the levy of the Development Fee beyond the period of 31.12.2023 so as to recover the revised Development Fee billable amount.

- 2.** Counsel for the appellant has submitted that the appellant has entered into an Operation Management and Development Agreement (**OMDA**) with Airports Authority of India (**AAI**). By the said agreement, AAI has granted Mumbai International Airport Limited (**MIAL**) - Appellant, the exclusive right and authority to undertake certain functions of Chhatrapati Shivaji Maharaj International Airport (**CSMIA**). It is further submitted by the appellant that this appellant has also entered into a State Support Agreement (**SSA**) with Hon'ble the President of India.
- 3.** **OMDA** is dated 04.04.2006 (Annexure A-2) and **SSA** is dated 26.04.2006 (Annexure A-3 to the memo of this appeal).
- 4.** Appellant is a Special Purpose Vehicle (**SPV**) and initially it was Mumbai International Airport Private Limited and presently it is known as Mumbai International Airport Ltd. which was incorporated on 02.03.2006 with Airports Authority of India (**AAI**) – Respondent No.2. Equity stake of AAI is 26% and the balance 74% equity stake is acquired by members of a private consortium.

5. It is further submitted by counsel for the appellant that the appellant has prepared and submitted the Master Plan and Major Development Plan for CSMI Airport which was approved by AAI.
6. It is further submitted by counsel for the appellant that as per aforesaid two agreements namely OMDA and SSA, Target Revenue (**TR**) is to be fixed by AERA as per following formula:

$$\mathbf{TR = RB \times WACC + OM + D + T - S}$$

7. In the aforesaid formula, **TR** stands for Target Revenue, **RB** stands for Regulatory Base, **WACC** stands for Weighted Average Cost of Capital, **OM** Stands for Operation and Maintenance, **D** Stands for Depreciation, **T** stands for Corporate Taxes for earnings pertaining to Aeronautical Services, **S** stands for 30% of Gross Revenue generated by the JVC from the Revenue Share Assets.
8. It is further submitted by learned senior counsel Mr. Sajan Poovayya on behalf of appellant that AERA – Respondent No.1 passed an order determining the amount of DF, based on project cost of Rs.9802 Crore. This order is dated 16.04.2012 which is at **Annexure A-4** to the memo of this appeal. Thus, project cost initially was Rs.9802 Crore, which was subsequently increased to Rs. 12,380 Crore. The appellant being an Airport Operator has brought this amount by way

of equity and debt and to bridge the gap, the appellant approached Ministry of Civil Aviation (**MoCA**) to fund the gap of Rs.2305 Crores through DF under **Section 22A** of the **Airports Authority of India Act, 1994** (AAI Act, 1994).

- 9.** It is further submitted by learned Senior Advocate Mr. Sajan Poovayya that under **Section 13(1)(a) of the AERA Act, 2008**, AERA was required to determine the tariff for aeronautical services to be levied at the CSMI Airport, Mumbai.
- 10.** It is further submitted by the appellant that MoCA covered the approval under **Section 22A of the AAI Act** to levy DF by MIAL at CSMI Airport at Rs.100 per departing domestic passenger and at the rate of Rs.600 per departing international passenger on ad-hoc basis for the period of **48 months** with effect from 01.04.2009. Later on, Hon'ble the Supreme Court in the case of **Consumer Online Foundation & Ors. Vs. Union of India & Ors.** quashed the aforesaid DF fixed by MoCA and it was held that appropriate order is to be passed by AERA under Section 22A of AAI Act because AERA Act came into force from 2008 onwards and therefore, the Airports Authority of India (Major Airports) Development Fee Rules, 2011, were published. And thereafter, AERA passed an order determining Development Fee vide order dated 16.04.2012 at Rs.100 per

departing domestic passenger and at the rate of Rs.600 per departing international passenger with effect from 01.05.2012 for the period of 48 months with effect from 01.04.2009 to bridge the funding gap of Rs.876.27 Crore. This amount is based on the project cost of Rs.9802 Crores for CSMI Airport, Mumbai.

11. It is further submitted by learned senior counsel Mr. Sajan Poovayya that AERA issued Consultation Paper in respect of determination of aeronautical tariff and DF for **First Control Period** (01.04.2009 - 31.03.2014). This Consultation Paper was issued on 11.10.2012 (Annexure A-10). MIAL along with other stakeholders filed a detailed response to Consultation Paper as well as the comments of the stakeholders and thereafter, AERA passed an **Order No. 29/2012-2013 (DF order) on 21.12.2012** (Annexure A-12). Counsel for the appellant has placed reliance upon Order No. 29/2012-13 of AERA dated 21.12.2012 (Annexure A-12) which reads as under:

"5.136 To summarise, therefore, the Authority would calculate the amount of Rs. 2515.00 Crores on NPV basis with an interest rate of 11.25% and taking the traffic projections as assumed by it in its Consultation Paper-22/2012-13 dated 11.10.2012. The total period for which the DF billing would be allowed to cover the amount of Rs. 2515.00 Crores on NPV basis as of 01.01.2013

extends up to **April 2021**. According to the above calculations, the total amount of DF billing allowed is therefore estimated at **Rs. 3845.50 crores** of which **Rs. 2515.00 will represent the balance DF as on 01.01.2013, the remaining amount of Rs. 1330.50 Crores representing the interest component** (vide Table 14). It is also clarified that the interest calculations in this table are based on monthly interest rate at **0.89%**. The total amount of interest to be paid to the lenders on the securitization of the **DF would however be limited to the actual interest** paid by MIAL based on the factors like periodicity of paying interest (Quarterly or half-yearly interest)."

[Emphasis Supplied]

12. It is further submitted that the aforesaid order was challenged before this Tribunal and this Hon'ble Tribunal passed an order dated 16.07.2020 in AERA Appeal No. 2 of 2013.

13. Learned senior counsel Mr. Sajan Poovayya for the appellant has placed reliance upon **Paragraph Nos. 6 and 9 of the order** passed by this Tribunal dated **16.07.2020** which is at Annexure A-18 to the memo of this appeal. On the basis of the aforesaid decision especially Paragraph Nos. 6 and 9, it is further submitted by learned senior counsel Mr. Sajan Poovayya that the Regulator- Respondent No.1 has sufficient powers to take care of the impact of some changes either way in the rate of interest in future, if the impact is significant and requires consideration.

- 14.** It is submitted by Learned senior counsel Mr. Sajan Poovayya for the appellant that the Rate of Interest (ROI) upon the DF for which securitisation was done by this appellant ought to have been considered by AERA on the basis of actual Rate of Interest and AERA cannot put a cap upon Rate of Interest @ 11.25% p.a.
- 15.** It is further submitted by learned senior counsel Mr. Sajan Poovayya for the appellant that **DF was to be recovered in future years** whereas expenditure was to be done and, therefore, the DF which was to be recovered in future years was **securitised** by this appellant and the amount was obtained by the appellant for the development of CSMI Airport. The amount is to be returned to the bank by way of instalments along with **actual Rate of Interest** (ROI) and, therefore, actual ROI should have been considered by AERA while computing DF to be recovered by this appellant from the embarking domestic and international passengers.
- 16.** It is further submitted by learned senior counsel Mr. Sajan Poovayya that the respondent has put a **cap of 11.25%** of interest which is beyond the power, jurisdiction and authority of AERA.
- 17.** Learned senior counsel Mr. Sajan Poovayya has placed reliance upon the actual rates of interest paid by this appellant to the

financers - banks for the year **2013-2016** which is higher than 11.25%.

18. Learned senior counsel Mr. Sajan Poovayya for the appellant has placed reliance on two tables given on paragraphs **Nos. 8.3.8** and **8.3.9** of the memo of this AERA Appeal and on the basis of these two tables, it is submitted by learned senior counsel for the appellant that applying the cap of interest rate of 11.25%, the respondent has issued a communication dated 14.06.2023 (Annexure-1) which deserves to be quashed and set aside for the reason that Respondent No.1 ought to have paid actual Rate of Interest.

19. Learned senior counsel for the appellant has submitted that the following is the calculation of this appellant as mentioned in the Paragraphs Nos. 8.3.8 and 8.3.9-

“8.3.8 The approach adopted by the Respondent No.1/AERA in computation of DF billable amount based on interest rate of 11.25% or actual whichever is lower (as against considering actual interest rate) and its cascading effect on the Appellant is demonstrated in the illustration below:

THE RESPONDENT NO.1/AERA’S APPROACH OF CALCULATION OF BALANCE DF BILLABLE AMOUNT

	Actual Billing	Opening Loan	Interest Rate as per AERA	Interest payment @11.25%	Principal Repayment	Closing Loan
	A	b	c	d	e=a-d	f=a-e
2013	345	2603	11.25%	195.2	150.2	2453
2014	370	2453	11.25%	257.0	112.5	2340
2015	408	2340	11.25%	242.3	165.4	2175
2016	438	2175	11.25%	222.3	215.8	1959
2017	472	1959	11.25%	179.4	292.6	1666
2018	505	1666	11.25%	138.4	366.8	1300
2019	488	1300	11.25%	109.4	378.8	921
2020	163	921	11.25%	45.1	117.7	865
2021	121	865	11.25%	90.2	30.4	835
2022	381	835	11.25%	73.7	307.8	527
2023	43	527	11.25%	4.4	38.4	488

8.3.9 In view of the aforesaid approach where interest rate is capped at 11.25% or actual whichever is lower, the closing principal (DF billable amount) as on 31.01.2013 is Rs. 488 Crore.

ACTUAL SCENARIO BASED ON ACTUAL INTEREST RATE

	Actual Billing	Opening Loan	Actual interest rate	Interest based on actual interest rate	Principal Repayment	Closing Loan
	A	b	c		e=a-d	f=a-e
2013	345	2603	12.03%	223.5	121.8	2481
2014	370	2481	12.39%	303.4	66.1	2415
2015	408	2415	12.22%	288.3	119.4	2296
2016	438	2296	12.03%	266.8	171.3	2124
2017	472	2124	10.27%	207.1	264.9	1859
2018	505	1859	9.26%	157.0	348.1	1511
2019	488	1511	9.73%	131.0	357.3	1154
2020	163	1154	10.34%	57.4	105.5	1110
2021	121	1110	10.53%	117.5	3.1	1107
2022	381	1107	10.19%	102.9	278.6	829
2023	43	829	10.00%	6.9	35.9	793"

20. In view of the aforesaid calculation, it is submitted by learned senior counsel for the appellant that the communication at Annexure A-1 deserves to be quashed and set aside because still the DF has not been recovered and the same shall be recovered approximately by the end of August, 2024 which will be subject to final verification of the accounts by the independent auditor.

21. Learned senior counsel for the appellant has submitted that the **calculation of AERA** – Respondent No.1 is as under:

**“THE RESPONDENT NO.1/AERA’S APPROACH OF
CALCULATION OF BALANCE DF BILLABLE
AMOUNT**

	Actual Billing	Opening Loan	Interest Rate as per AERA	Interest payment @11.25%	Principal Repayment	Closing Loan
	A	b	c	d	e=a-d	f=a-e
2013	345	2603	11.25%	195.2	150.2	2453
2014	370	2453	11.25%	257.0	112.5	2340
2015	408	2340	11.25%	242.3	165.4	2175
2016	438	2175	11.25%	222.3	215.8	1959
2017	472	1959	11.25%	179.4	292.6	1666
2018	505	1666	11.25%	138.4	366.8	1300
2019	488	1300	11.25%	109.4	378.8	921
2020	163	921	11.25%	45.1	117.7	865
2021	121	865	11.25%	90.2	30.4	835
2022	381	835	11.25%	73.7	307.8	527
2023	43	527	11.25%	4.4	38.4	488”

22. In view of the two tables, it is submitted that though AERA has allowed 11.25% interest p.a., **MIAL is claiming "actual" Rate of Interest** meaning thereby to if the actual Rate of Interest is slightly more than 11.25%, the same should be allowed to be recovered by this appellant. **Appellant is claiming much lesser Rate of Interest** for several years **from 2017 onwards** as stated in aforesaid tables as for example for the year 2016 appellant is claiming 10% something, for the year 2017 appellant is claiming 9.26%, for the year 2019 appellant is claiming 9.73% etc., though Respondent No.1 has permitted @11.25% Rate of Interest.

23. It is further submitted by learned senior counsel for the appellant that on the basis of various Annexures annexed with memo of this AERA Appeal and which are annexed with further affidavits filed by the appellant and on basis of documents submitted by this appellant to AERA during consultation process that actual Rate of Interest was pointed out to AERA time and again as for example, communication dated 15.03.2013 (Annexure A-15 to the memo of this appeal). In the aforesaid communications, the actual Rate of Interest pointed out was higher than 11.25%, similarly, by several other communications it was pointed out to AERA that Rate of Interest is

a **floating one** and no objection was raised by AERA for the actual Rate of Interest.

24. Counsel for the appellant has placed reliance upon Annexure A-27 especially Appendix-1 thereof, similarly, the counsel for the appellant has placed reliance upon the communications wherein it is categorically mentioned that Rate of Interest is **floating Rate of Interest**, thus, fixing a cap of 11.25% interest p.a. is beyond the power, jurisdiction and authority of AERA.

25. It is further submitted by counsel for the appellant that if the appellant is taking loan on a fixed Rate of Interest and later on if the **Repo Rate** or **base lending rate** of financing bank has been reduced, the respondent may point out that why MIAL has not taken loan on Floating Rate of Interest. Commercially, it is always advisable to have **securitisation** on floating Rate of Interest for the appellant and, therefore, also, AERA ought to have considered Actual Rate of Interest for every year instead of putting a cap of 11.25% from the years 2013-24. There cannot be the same Rate of Interest for one decade.

26. It is further submitted by counsel for the appellant that the **rate of interest depends on various factors** —

(a) Repo rate

- (b) Base lending rate
- (c) Amount of loan
- (d) Period of loan
- (e) Nature of security against securitisation
- (f) Credit and capacity of Loanee (MIAL) as the credit of Loanee increases, the Rate of Interest decreases.

27. The aforesaid factors are **not exhaustive**, still there are other commercial factors governing the Rate of Interest but the fact remains that there is no fraud, undue influence, or any under hand dealing, etc., while getting the aforesaid loan on future collection of the DF. There are no such allegations by AERA upon this appellant and, therefore, actual Rate of Interest ought to have been considered by AERA.

28. It is further submitted by counsel for the appellant that there is no rationale in fixing the rate of interest at the rate of 11.25% that cannot be any *ipse dixit*. If AERA has fixed 11.25% then why not 11.27% or 11.22%? Capping the Rate of Interest at 11.25% is absolutely arbitrary action on part of the respondent. Whenever there is arbitrariness, there is always discrimination and where there is discrimination, there is violation of equality and, therefore, there is **arbitrariness in capping the Rate of Interest** and hence, there

is violation of equality by AERA. Counsel for appellant submits that contractual obligations ought to be respected by AERA unless there is fraud, misrepresentation, undue influence, mistake, or coercion by AERA. In fact, the appellant has been claiming a much lesser rate of interest than 11.25% for several years as stated in aforesaid table of calculation presented by this appellant before AERA.

29. Counsel for appellant has also pointed out difference between project loan and DF loan and has submitted that Project Loan which is based on tangible security is at lower Rate of Interest whereas DF loan is not based on tangible assets and, therefore, Cost of Debt is higher in case of DF loan in comparison with project loan.

30. Counsel for the appellant has further submitted that securitisation of DF account was done with **IDBI Bank** and **Axis Bank**. These banks from where the DF loan is taken with a floating Rate of Interest by this appellant are very reputed banks in comparison with private lenders or private co-operative banks. IDBI Bank and Axis Bank are reliable banks.

31. Counsel for the appellant has submitted that earlier order of AERA dated 21.12.2012 was under challenge before this Tribunal and ultimately before Hon'ble the Supreme Court and as stated hereinabove, this Tribunal while passing an order dated 16.07.2020

in **AERA Appeal No.2 of 2013** has observed that if there is a change in rate of interest in future and if impact is significant that requires consideration then reserve the observation in paragraphs nos.6 and 9 of this judgment dated 16.07.2020 in AERA Appeal No. 2 of 2013. Meaning thereby to, in the impugned order dated 21.12.2012 it was held as a valid one but in future, from the year 2013 onwards, if the Rate of Interest is changed and if the impact is significant, the same should be considered by AERA and, therefore, this appellant is claiming **actual** Rate of Interest which was higher than 11.25% for the FY 2013, 2014, 2015, 2016 which is 12.03%, 12.39%, 12.22%, and 12.03% respectively and for the rest of the years, appellant has claimed actual Rate of Interest which is much less than 11.25% thus, approach of the appellant is consistent whereas approach of AERA to apply same Rate of Interest from the years 2013-2024 is arbitrary and in fact **AERA cannot decide the Rate of Interest**. It is the bank which decides the Rate of Interest which depends on a variety of factors as stated hereinabove. No bank can give the same Rate of Interest for every loan to every person. The Rate of Interest varies from year to year when the loan was based upon a floating Rate of Interest. If this appellant would have taken a loan with a fixed Rate of Interest, it would have been an

inefficient loan. There is a commercial prudence in taking a loan of such a higher amount with a floating Rate of Interest.

32. Counsel for the appellant has also submitted that while computation of DF levy of Rs.2515 Crore, the respondent had considered **estimated collection** for the period running from **May, 2012 to December, 2012**. In fact, the actual collection was much less than the collection estimated. AERA has calculated the figure of estimated collection at Rs.2515 Crores from the period running from May, 2012 to December, 2012 whereas actual collection was lower by Rs.132.80 Crore. The details of this calculation has been pointed out by learned senior counsel for the appellant that this was pointed out to AERA vide communication dated 15.03.2013. This aspect of matter has also not been appreciated by AERA while calculating the recoverable amount of DF and therefore also, communication at Annexure A-1 dated 14.06.2023 deserves to be quashed and set aside.

33. Counsel for appellant submits that they are **not pressing any issue of impact of DF collection charges**, in fact, Rs.100 per embarking domestic passenger and Rs.600 per embarking international passenger out of the aforesaid amount, different airlines are deducting collection charges at Rs.2.5 for domestic and Rs.5 for per international passenger. Thus, the aforesaid amount per

passenger is being deducted by airlines which are collecting DF. This amount is being deducted from total recoverable DF. Appellant is not pressing this issue at this stage.

- 34.** Learned Senior Counsel for appellant has placed reliance upon the judgment of the Hon'ble Supreme Court in *Consumer Online Foundation & Ors. vs. UOI & Ors.* (2011) 5 SCC 360 and the judgment and order of this tribunal in *AERA Appeal No. 5 of 2013* dated 16.07.2020.

Arguments canvassed by counsel for Respondent No.1-

AERA

- 35.** It is submitted by learned counsel Mr. Ankur Sood on behalf of AERA that the issue of **capping of interest @ 11.25% has already been decided by this Tribunal** vide judgment and order dated 16.07.2020 in **AERA Appeal No.2 of 2013** (in the case of MIAL). It is submitted by the counsel for AERA that the issue of capping of interest is fully covered by order of AERA dated 21.12.2012 and 28.01.2016.
- 36.** Counsel for Respondent No.1 - AERA has taken this Tribunal to both the aforesaid orders passed by AERA on 21.12.2012 and 28.01.2016

and on the basis of these two orders of AERA, it is further submitted by counsel for Respondent No.1 – AERA that earlier also there was a prayer by the appellant that the capping upon the interest rate should be removed but this prayer was rejected by AERA as well as by this Hon'ble Tribunal in AERA Appeal No.2 of 2013 vide judgment dated **16.07.2020**.

37. It is further submitted by counsel for Respondent No.1 - AERA that vide the present appeal the appellant is seeking review/**reconsideration of the aforesaid orders of AERA** as well as judgment of TDSAT which is not permissible, hence, the present appeal deserves to be dismissed.

38. Counsel for Respondent No.1 - AERA further submitted that AERA passed orders on 24.03.2021, 28.03.2022, 30.06.2022, 29.03.2023 whereby the DF levy period was extended due to **low footfall during COVID-19** period. These orders have not been challenged by this appellant and they have taken benefit of the aforesaid orders and therefore, the **appellant cannot approbate and reprobate** at the same time.

39. Counsel for Respondent No.1 - AERA further submitted that the appellant has not produced any evidence on record that the appellant had ever made efforts for reduction of cost of debt. In fact, the rate

of interest fixed by AERA @ 11.25% p.a. is based upon the communication by this appellant. The figure of 11.25% interest rate has been given by this appellant.

- 40.** It is further submitted by counsel for Respondent No.1 - AERA that **MIAL has never approached AERA to seek a revision** or review of the upper cap of 11.25% p.a. interest rate in respect of DF loan.
- 41.** Counsel for Respondent No.1 – AERA has further submitted that the rate of interest as claimed by this appellant cannot be given higher than 11.25% p.a. because the graph of repo rate produced by the appellant itself shows that there is a declining trend after 28.01.2014 whereas interest rate claimed by the appellant on DF loan from 2013-2016 shows no such declining trend.
- 42.** It is further submitted by counsel for Respondent No.1 - AERA that the cost of debt is much lower in project loans whereas in case of DF loan the cost of debt is much higher. In fact, there is no difference between Project Loan and DF loan because both are adequately secured.
- 43.** It is further submitted by counsel for Respondent No.1 - AERA that this appellant is challenging communication dated 14.06.2023 which does not deal with the issue of ROI on DF loan.

44. It is submitted by counsel for Respondent No.1 - AERA that calculation of Rs.488 Crores has been done by the auditor of Airports Authority of India (AAI) and, therefore, the said figure has been mentioned in the communication dated 14.06.2023 (Annexure P-1) and as per Airports Authority of India (Major Airports) Development Fee Rules, 2011, **AAI is a monitoring authority for the DF fund** and therefore this figure of Rs.488 Crores cannot be reviewed in the present appeal.

45. It is further submitted by counsel for Respondent No.1 - AERA that so far as claim of amount for the initial period of the year 2012 is concerned, the total loan securitization as appended in table 9 of AERA order dated 28.01.2016 is Rs.2647.80 Crores out of which admittedly the appellant has made repayment of Rs.111.40 Crores and, therefore, the balance outstanding comes to Rs.2536.40 Crores and hence, no error has been committed by AERA while passing the DF orders and the claim of the appellant is logically flawed and factually incorrect.

46. It is further contended by counsel of Respondent No.1 - AERA that **as per AAI the entire DF amount has been collected by this appellant** and in fact **there is over-recovery** in the facts of the

present case in the DF amount which is lying in a **separate escrow account.**

47. In view of the aforementioned submissions, the present appeal preferred by the appellant deserves to be quashed and set aside.

ARGUMENTS CANVASSED BY AAI- R2

48. We have heard learned counsel for AAI - R2 who has pointed out the role of AAI in pursuance of Airports Authority of India (Major Airports) Development Fee Rules, 2011. It is submitted by counsel of Respondent No.2 that as per Airports Authority of India (Major Airports) Development Fee Rules, 2011, **AAI is empowered to monitor the DF amount** and for the specific purposes only, this DF amount can be utilised by Airport Operator-MIAL for development for CSMI Airport and there cannot be any other use of this DF. This amount has to be deposited in a separate escrow account and before withdrawing this amount, application has to be moved by Airport Operator for its use and then **AAI permits the withdrawal** for the development of CSMI Airport, Mumbai.

49. It is submitted by counsel for the Respondent No.2 that if there is additional amount which is recovered and remains in a separate escrow account, the same shall be utilised as per Rule 4 (5) (iii) of

Airports Authority of India (Major Airports) Development Fee Rules, 2011, for the welfare of development of airport. It is further submitted that they have calculated the amount of Rs.488 Crores as recoverable amount on the basis of Rate of Interest @11.25% p.a.

REASONS AND ANALYSIS

- 50.** The appellant – Mumbai International Airport Limited-(MIAL) has preferred the present appeal under **Section 18** of Airports Economic Regulatory Authority of India Act (**AERA Act, 2008**) with a prayer that the **actual Rate of Interest (ROI)** i.e. the contractual interest which should have been considered by Respondent No.1 – AERA, **for the purpose of computation of the balance of Development Fee (DF)**, thereby **appellant is challenging an order passed by Respondent No.1 bearing No.9 of 2023-24 dated 14.06.2023 for the levy of DF for Project Work and Metro Connectivity Project** at Chhatrapati Shivaji Maharaj International Airport, Mumbai (Hereinafter referred to as **CSMIA** for the sake of brevity). The impugned order is at **Annexure A-1** to the memo of this appeal.
- 51.** The issue involved in the present appeal is about the calculation of DF because the said calculation involves interest thus, in fact, the

ROI is under dispute in calculation of balance of DF recoverable by this appellant from different stakeholders.

- 52.** Operation Management Development Agreement (**OMDA**) was entered into between this Appellant and Airports Authority of India (**AAI**) on 04.04.2006 whereby appellant was granted an **exclusive right and authority to undertake some of the functions of R2-AAI**, being the functions of operation, maintenance, development, design, construction, upgradation, modernisation, finance and management of CSMI Airport, Mumbai and to perform services and activities constituting Aeronautical Services and Non- Aeronautical Services (excluding Reserved Activities as defined in OMDA) at the CSMI Airport, Mumbai.
- 53.** Appellant had also entered into a **State Support Agreement (SSA)** with Hon'ble the President of India acting through the Ministry of Civil Aviation, Govt. of India on 26.04.2006 (**Annexure A-3** to the memo of this appeal).
- 54.** Several other agreements were also entered into after **OMDA** and **SSA** like **Lease Deed Agreement, CNS/ATM Facilities and Services Agreement, Airport Operator Agreement** etc.
- 55.** The appellant took over the operations of CSMI Airport, Mumbai on **03.05.2006** in pursuance of **Clause 8.3 and 8.4** of Operation

Management Development Agreement (**OMDA**) (Annexure A-2). The appellant had submitted Master Plan and Major Development Plan for CSMI Airport, Mumbai in the month of October, 2006. The submission of the aforesaid plans was made after detailed discussions with AAI. Thereafter, both the **updated Master Plan and Major Development Plan were submitted in May, 2007 and November, 2007** respectively which **resulted in an increase in the project cost** from what was estimated earlier.

56. It further appears from the facts of the case that to **bridge the funding gap, appellant approached MoCA** in December, 2008 – February, 2009 to fund the gap of **Rs.2350 Crores** through DF under **Section 22A** of the Airports Authority of India Act, 1994 (**AAI Act, 1994**). MoCA, after conducting detailed diligence of the project cost, including verification by Engineers India Ltd. and separate assessment by MoCA - appointed auditors, conveyed its approval vide communication dated 27.02.2009 for sanction of **Rs.1543 Crores** as funding gap.

57. Thus, the aforesaid funding gap was to be bridged through DF collection by the appellant at CSMI Airport, Mumbai at **Rs.100** for every domestic embarking passenger and **Rs.600** for every international embarking passenger with effect from 01.04.2009.

Thus, the DF was permitted to be collected initially by MoCA vide communication dated 27.02.2009.

58. This communication dated 27.02.2009 was under challenge by Consumer Online Foundation & Ors. before Hon'ble the Supreme Court of India. Hon'ble the Supreme Court of India held that AERA Act, 2008 came into force with effect from 01.01.2009 and therefore, AERA should decide the levy of DF and a fresh order is to be passed by AERA-Respondent No.1.

59. Thus, Hon'ble the Supreme Court, in the case of **Consumer Online Foundation & Ors. Vs. Union of India and Ors. (2011) 5 SCC 360** has quashed and set aside the communication of MoCA dated 27.02.2009 and directed AERA to decide the levy of DF.

60. MoCA notified **Airports Authority of India (Major Airports) Development Fee Rules, 2011** (Annexed as **Annexure A-7**) to monitor and regulate the receipts and utilization of DF.

61. Meanwhile, appellant filed its Multi-Year Tariff Proposal (**MYTP**) on 11.10.2011 with AERA-Respondent No.1 in which it was pointed out with **detailed reasoning** for **increase in the Project Cost from Rs.9802 Crores to Rs.12,380 Crore.**

62. The Respondent No.1-AERA on 06.01.2012 issued Consultation Paper No.33/2011-12 to consider the request of this appellant for

levy and collection of DF for CSMI Airport, Mumbai on the basis of funding requirement for Rs.9802 Crore.

- 63.** The Respondent No.1-AERA passed an **interim DF order** dated 18.04.2012 for the levy of DF whereby AERA approved funding gap of Rs.876 Crores and allowed levy of DF for the period of 23 months. As per this interim DF order, the DF was to be recovered from May, 2012 to March, 2014.
- 64.** It further appears from the facts of the present case that as per this interim DF order dated 18.04.2012, the ROI of 11.25% was permitted upon securitisation of DF amount because at that point of time, the contractual agreement entered into by this appellant with the lenders was at 11.25%.
- 65.** Looking to Annexure A-27, it appears that this appellant had securitised the DF to be collected with **IDBI Bank** and this appellant got sanction of Rupee Term Loan of Rs.375 Crores vide communication of IDBI Bank dated 06.08.2012 which states clearly that effective ROI is 11.25% p.a., on a **"fully floating basis"** thus, the **ROI would automatically change with the change in IDBI Bank's base rate.** Similarly, on 29.08.2012, **Axis Bank** sanctioned the Rupee Term Loan of **Rs.375 Crores** wherein also the applicable ROI was 11.25% p.a., on a **"fully floating basis"**. On the basis of

aforesaid two communications, one by IDBI Bank dated 06.08.2012 and another by Axis Bank dated 29.08.2012, this appellant - MIAL informed Respondent No.1 vide communication dated 20.12.2012 (Annexure A-26) of the ROI secured by this appellant by securitising the DF.

66. Thereafter, AERA passed an order bearing No. 29/2012-13 dated 21.12.2012 (Annexure A-12 to the memo of this appeal) whereby AERA inter-alia determined the DF at Rs.3400 Crores @ Rs.100 per embarking domestic passenger and Rs.600 per embarking international passenger. This order of AERA permitted the collection of DF by this appellant with effect from 01.01.2013.

67. This "DF order" is dated 21.12.2012 which was under challenge by this appellant vide AERA Appeal No. 2 of 2013.

68. Respondent No.1 vide order dated 28.01.2016, allowed the levy of Metro Development Fee (MDF) of Rs.20 per embarking domestic passenger and Rs.120 per embarking international passenger towards metro connectivity project at CSMI Airport, Mumbai. Thus, MDF and DF were permitted and finalized a rate of Rs.120 per embarking domestic passenger and Rs.720 per embarking international passenger.

69. On 16.07.2020, this Tribunal passed judgment and order in AERA Appeal No. 2 of 2013 on the issue of applicable ROI (**Annexure A-18**).
70. After the DF order was issued by Respondent No.1 dated 21.12.2012 (Annexure A-12), this appellant - MIAL, requested the Respondent No.1 to review and to extend the levy of DF time and again (from March, 2021 to June, 2023) because of **severe impact of COVID-19 on the Aviation Sector** and due to **shortfall in collection of DF and MDF**.
71. Meanwhile, there are communications between IDBI Bank with AERA for suitable extension of period of levy of DF based on actual traffic numbers and ROI charged for DF securitisation to ensure recovery of entire DF along-with interest (**Annexure A-13** to the memo of this appeal). This communication by IDBI to AERA is dated 10.01.2013 seeking clarification from respondent no.1.
72. AERA- Respondent No.1 vide letter dated 23.01.2013 (**Annexure A-14** to the memo of this appeal) reverted to IDBI Bank stating that the amount/rate/tenure of DF will be reviewed taking into consideration, inter-alia securitisation of DF amount, **consequential interest charges**, any additional means of finance, actual traffic, monthly billing of DF and will issue necessary orders, if needed, so

that amount of DF (as determined by Respondent No.1) becomes available to the project.

- 73.** It further appears from facts of the case that on 16.03.2013, this appellant informed Respondent No.1 that IDBI Bank and Axis Bank have sanctioned an aggregate amount of **Rs.2647.80 Crores** of loan against securitisation of DF receipts (**Annexure A-15** to the memo of the appeal). The loan was contracted @ **12.25%** (base rate of 10.25% and spread of 2.0%) on a "**fully floating basis**".
- 74.** AERA vide communication dated 18.04.2013 (Annexure A-16 to the memo of this appeal) duly noted the securitisation of DF amount by MIAL- appellant i.e. the ROI of 12.25% on "**fully floating basis**".
- 75.** Appellant had requested vide various communications between August, 2020 to November, 2022 to AERA - Respondent No.1 to consider the "**actual**" ROI prevailing at that point of time while computing the time frame for the extension of levy of DF rather than consistent rate of 11.25% as mentioned by AERA in the DF order.
- 76.** It also appears from the facts of the case that an order was issued by Respondent No.1 dated 23.12.2022 whereby the direction was given to Respondent No. 2 - AAI for computation of remaining DF billable amount wherein it fixed the ROI @ 11.25%, this

communication between Respondent No.1 and Respondent No.2 is at Annexure A-21 to the memo of this appeal.

77. Thereafter, AERA has issued an impugned order dated 14.06.2023 whereby it allowed this Appellant to collect DF till 31.12.2023 in which it is noted that the balance DF is at Rs.488.3 Crores as of 31.01.2023.

78. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya, on behalf of the appellant that initially AERA-Respondent No.1 issued **DF order** on 21.12.2012 (**Annexure A-12** to the memo of this appeal). We have perused Annexure A-12 to the memo of this appeal which is an order passed by AERA in which it is categorically mentioned that if a part of DF or the entire DF is securitised by the Airport Operator, the lender (normally a bank) advances that amount as a loan or debt and charges interest during the tenure of the loan.

79. Looking to **Annexure A-12** which is an order of AERA dated 21.12.2012 wherein it has also been mentioned that the interest to be paid to the lenders (normally the banks) on the securitization of DF would be limited to the actual interest paid by the Airport Operator- appellant - MIAL based on the factors like periodicity of paying interest. For the ready reference, paragraph 5.131 and

paragraph 5.132 of the order dated 21.12.2012 (Annexure A-12)

passed by Respondent No.1 reads as under:

“5.131. As far as CSI Airport Mumbai is concerned, **the DF Order no. 02/2012-13 dated 18.04.2012 for the amount of Rs 876.27 crores was not based on the NPV value but on the current value. MIAL had not securitized any DF amount at that time.** MIAL, in its comments to the Consultation Paper – 22/2012-13 dated 11.10.2012, have given the Auditor certificate that it has securitized an amount of **Rs. 750 Crores from the bank.**

5.132 The Authority notes that it had proposed adoption of the first approach (i.e. expensing of interest as discussed in 5.129) in its Consultation Paper – 22/2012-13 dated 11.10.2012. MIAL in its letter dated 10.12.2012 has stated that

*“The Authority may kindly observe that DF is capital receipt for funding of project. **Any Interest outgo because of securitization of DF for funding the project cost also needs to be considered while sanctioning DF i.e. over and above Present Value of DF,** interest amount should also be allowed to be collected through DF. The Authority has correctly adopted this approach while approving DF for IGI Airport, Delhi.”*

5.133. The Authority has carefully considered this submission and has decided to adopt the second approach, namely **to include the interest component in the total allowed DF to be billed (vide para 5.129.2 above).”**

[Emphasis Supplied]

80. In view of the aforesaid order passed by AERA, it has been decided by AERA to include a component of interest in the total allowed Development Fee (**DF**) to be billed.

81. It has been further observed in **para nos. 5.135 and 5.136** of the order passed by AERA dated 21.12.2012 (**Annexure A-12**) as under:

“5.135. For the present calculation, the Authority has reckoned the amount of Rs. 2515.00 Crores on NPV basis (Calculation Vide Table 12) for the purposes of calculation of the time period as well as the total allowable DF to be billed (which would also represent interest component, as is explained in para 5.129). These calculations are based on the traffic forecast as considered by the Authority at time of Consultation Paper – 22/2012-13 dated 11.10.2012 (Calculations vide Table 14). The Authority has also reckoned interest @11.25%, as MIAL has informed, it being contracted interest rate with the lenders.

5.136 To summarise, therefore, the Authority would calculate the amount of Rs. 2515.00 crores on NPV basis with an interest rate of 11.25% and taking the traffic projections as assumed by it in its Consultation Paper – 22/2012-13 dated 11.10.2012. The total period for which the DF billing would be allowed to cover the amount of **Rs. 2515.00 crores** on NPV basis as of 01.01.2013 extends upto **April 2021**. According to the above calculations, the total amount of DF billing allowed is therefore estimated at **Rs. 3845.50 Crores** of which **Rs. 2515.00 Crores will represent the balance DF as on 01.01.2013, the remaining amount of Rs.1330.50 Crores representing the interest component** (vide Table 14). It is also clarified that the interest calculations in this table are based on monthly interest rate at **0.89%**. The total amount of interest to be paid to the lenders on the securitization of the **DF would however be limited to the actual interest paid**

by MIAL based on the factors like periodicity of paying interest (Quarterly or half-yearly Interest).”

[**Emphasis Supplied**]

82. In view of the aforesaid order, it appears that AERA permitted total amount of DF billing @ Rs.3845.50 Crores, out of which Rs.2515.00 Crores will represent the balance DF as on 01.01.2013 and the remaining amount of Rs.1330.50 Crores is representing interest component.

83. Moreover, **looking to paragraph 5.136** of the aforesaid order dated 21.12.2012, **it appears that AERA had permitted that the actual interest shall be paid to the lenders.** No capping of interest has been suggested by AERA vide their order dated 21.12.2012 (Annexure A-12). It ought to be kept in mind by AERA that rate of interest was **fluctuating and floating**. The lenders have categorically stated that the rate of interest would be a floating one and this has been communicated by this appellant to the respondent.

84. It further appears from the “**DF order**” passed by respondent dated 21.12.2012 (**Annexure A-12**) that cap of interest @ 11.25% was never intended. On the contrary, looking to paragraph 5.136, it has

been clarified that **the actual rate of interest** shall be applied in calculation of the DF amount.

85. Thus, the DF order dated 21.12.2012 (Annexure A-12) has categorically noted that the Respondent No.1-AERA has calculated an interest @ 11.25% based on contracted interest rate with the lenders (mostly the banks). It is needless to state that the contracted interest rate applied in the DF order was prevalent in 2012. This fact has been mentioned in paragraph 5.135 of the DF order dated 21.12.2012. For the ready reference, paragraph 5.135 has already been incorporated in earlier paragraphs.

86. The rate of interest which was prevailing in 2012 which was 11.25% cannot be made applicable for the entire period of **11 years** of DF levy (from **01.01.2013 to 31.12.2023**). Thus, the DF was permitted to be levied for the aforesaid period of 11 years and securitisation of DF levy was done by this appellant. A loan/debt was given by IDBI and Axis Banks with a floating rate of interest and, therefore, the same rate of interest of 11.25% which was prevailing in the year 2012 cannot be made applicable for the entire period of 11 years. **This aspect of the matter has not been properly appreciated by AERA. Hence, we hereby quash and set aside**

the calculation of DF amount @ 11.25% p.a. for interest for the entire period of 11 years and as stated in paragraph 5.136, actual rate of interest should have been applied in calculation of the DF amount.

87. The actual interest rate-based calculation of DF amount up to the year 2023 is as under:

"ACTUAL SCENARIO BASED ON ACTUAL INTEREST RATE

	Actual Billing	Opening Loan	Actual interest rate	Interest based on actual interest rate	Principal Repayment	Closing Loan
	A	b	c		e=a-d	f=a-e
2013	345	2603	12.03%	223.5	121.8	2481
2014	370	2481	12.39%	303.4	66.1	2415
2015	408	2415	12.22%	288.3	119.4	2296
2016	438	2296	12.03%	266.8	171.3	2124
2017	472	2124	10.27%	207.1	264.9	1859
2018	505	1859	9.26%	157.0	348.1	1511
2019	488	1511	9.73%	131.0	357.3	1154
2020	163	1154	10.34%	57.4	105.5	1110
2021	121	1110	10.53%	117.5	3.1	1107
2022	381	1107	10.19%	102.9	278.6	829
2023	43	829	10.00%	6.9	35.9	793"

88. In view of the aforesaid table, it is clear that this appellant is claiming actual rate of interest which maybe slightly higher than 11.25% and sometimes it is much less than 11.25%. This appellant has not claimed 11.25% interest for all the years. From the year 2017 till 2023, this appellant is claiming interest in the range of @ 9.26%

to 10.53% which is much lesser than 11.25% whereas, for the year 2013 to 2016, appellant is claiming interest in the range of 12.39% to 12.03%. Thus, this appellant is claiming actual rate of interest for the period of years 2013 to 2023 in light of DF order (**Annexure A-12**), particularly paragraph 5.136.

89. Much has been argued by counsel for Respondent No.1 that as per paragraph 5.135 of the DF order dated 21.12.2012, the capping of rate of interest was done at 11.25% p.a. This contention is not accepted by this Tribunal mainly for the reason that paragraph 5.135 cannot be read in isolation. Moreover, looking to paragraph 5.135, this appellant had conveyed to Respondent No.1 the prevailing rate of interest in the year 2012 which was 11.25%, **but**, that does not mean that for the whole period of 11 years (01.01.2013 to 31.12.2023), the rate of interest will be 11.25%. In fact, the lenders have already stated that the interest rate is a fluctuating rate of interest. Moreover, looking to paragraph 5.136 it has been clarified by AERA that **"actual rate of interest"** shall be paid to lenders by the Airport Operator, thus, upon conjoint reading of paragraph 5.135 and paragraph 5.136 we are not accepting the contention of AERA that 11.25% interest rate shall be applicable for entire period of 11

years of levy of DF. On the contrary, we hereby hold that the actual rate of interest shall be paid to lenders by the Airport Operator-appellant-MIAL. **Thus, the calculation of DF amount shall be based upon actual Rate of Interest paid by Airport Operator-Appellant- MIAL to the lenders.**

90. In view of the aforesaid facts and DF order dated 21.12.2012, we hereby quash and set aside the communication of AERA dated 14.06.2023 (Annexure A-1 to the memo of this appeal) as the same is arbitrary and is not aligned with the DF order dated 21.12.2012. AERA ought to have applied the actual rate of interest paid by Airport Operator-MIAL for the purposes of computing the amount of DF to be collected. As a statutory regulator, Respondent No.1-AERA is bound to adopt a fair, transparent and consistent approach in line with its own orders to avoid such conflicts and ensure smooth functioning of the airports.

91. It has been rightly pointed out by learned senior counsel for appellant that whenever the intention of Respondent No.1- AERA has been to cap or impose a cap on rate of interest, it has explicitly made it clear in its orders. For the ready reference, paragraph 5.6.2 of the

3rd Control Period Tariff Order issued by Respondent No.1 is reproduced herein below:

“5.6.2. The Authority decides to consider Cost of Debt at 10.30% without allowing any additional cap of additional 50 bps on the existing rates as detailed in Para 5.5.11. However, the Cost of Debt shall be subject to True up at the time of determination of tariff for the next control period subject to maximum of 10.30%”.

[**Emphasis Supplied**]

92. The DF order dated 21.12.2012 was challenged by MIAL before this tribunal by way of AERA Appeal No.2 of 2013 and the rate of interest applied by AERA was under challenge. The judgment was delivered by this Tribunal on 16.07.2020 in an appeal preferred by MIAL (AERA Appeal No.2 of 2013) and in appeal preferred by Federation of Indian Airlines (**FIA**) in AERA Appeal No.5 of 2013 and **paragraphs 6 and 9 thereof** read as under:

“**6.** So far as rate of **interest at 11.25% is concerned**, on behalf of AERA it was explained that the same rate of interest finds mention in the loan agreement; it was prevailing at the time of the Order and it was also projected in the demand papers submitted by MIAL. The Regulator has sufficient powers to take care of impact of some changes either way in the rate of interest in future, if the impact is significant and requires consideration. According to learned counsel, this issue also has no merits so as to

require any interference with the exercise fairly done by AERA in arriving at the allowable Project Cost at Rs.3400 crores and the rates of DF as Rs. 100/- per embarking domestic passenger and Rs.600/- per embarking international passenger, w.e.f. 01.01.2013.

9. So far as rate of interest is concerned, the issue is found to be non-substantial and of no practical effect. Changes in the rate of interest in future cannot be predicted and if changes have taken place, the effect can always be trued-up in future if the effect is substantiated and requires redressal at the hands of AERA. Hence, none of the three issues that have been agitated are found to have any merit, particularly in the light of judgment dated 20.03.2020 rendered in the case of DIAL.”

[Emphasis Supplied]

93. In view of the aforesaid decision of this Tribunal in AERA Appeal No.2 of 2013 between MIAL Vs. AERA, it has been categorically observed by this Tribunal in paragraph 9 that so far as the rate of interest is concerned, **changes in rate of interest in future can't be predicted** and it has been further decided by this Tribunal that if changes in rate of interest have taken place, the effect can always be trued-up in future, if the effect is substantiated and requires redressal at the hands of AERA. Thus, looking to the fluctuating rate of interest applied by the lenders, which is actually paid, by the

Airport Operator – MIAL, if the effect is substantiated, the same requires redressal.

94. As stated hereinabove, the difference in calculation is of approximately Rs.300 Crores which is substantial and has been substantiated and therefore it requires redressal. Nowhere in the aforesaid decision it has been observed that same rate of interest shall be made applicable which was prevailing in the year 2012 for the entire period of DF levy which is 11 years running from 01.01.2013 to 31.12.2023.

95. The judgment given by this Tribunal is for the DF order dated 21.12.2012 which was under challenge. Thus, the situation of rate of interest prevailing in 2012, was approved by this Tribunal which was 11.25% p.a, but, for future i.e. after 2012, if the rate of interest changes and has a substantial effect upon the debt to be paid by the Airport Operator, the same requires redressal and here the difference is approximately Rs.300 Crore. This aspect of the matter has not been properly appreciated by AERA while issuing the communication dated 14.06.2023 (Annexure A-1). **Hence, we hereby quash and set aside the communication dated 14.06.2023 and direct AERA**

to compute the actual rate of interest while calculating the levy of DF by the Airport Operator.

96. The difference in calculation is evident from the following two tables:

“THE RESPONDENT NO.1/AERA’S APPROACH OF CALCULATION OF BALANCE DF BILLABLE AMOUNT

	Actual Billing	Opening Loan	Interest Rate as per AERA	Interest payment @11.25%	Principal Repayment	Closing Loan
	A	b	c	d	e=a-d	f=a-e
2013	345	2603	11.25%	195.2	150.2	2453
2014	370	2453	11.25%	257.0	112.5	2340
2015	408	2340	11.25%	242.3	165.4	2175
2016	438	2175	11.25%	222.3	215.8	1959
2017	472	1959	11.25%	179.4	292.6	1666
2018	505	1666	11.25%	138.4	366.8	1300
2019	488	1300	11.25%	109.4	378.8	921
2020	163	921	11.25%	45.1	117.7	865
2021	121	865	11.25%	90.2	30.4	835
2022	381	835	11.25%	73.7	307.8	527
2023	43	527	11.25%	4.4	38.4	488

ACTUAL SCENARIO BASED ON ACTUAL INTEREST RATE

	Actual Billing	Opening Loan	Actual interest rate	Interest based on actual interest rate	Principal Repayment	Closing Loan
	A	b	c		e=a-d	f=a-e
2013	345	2603	12.03%	223.5	121.8	2481
2014	370	2481	12.39%	303.4	66.1	2415
2015	408	2415	12.22%	288.3	119.4	2296
2016	438	2296	12.03%	266.8	171.3	2124
2017	472	2124	10.27%	207.1	264.9	1859
2018	505	1859	9.26%	157.0	348.1	1511

2019	488	1511	9.73%	131.0	357.3	1154
2020	163	1154	10.34%	57.4	105.5	1110
2021	121	1110	10.53%	117.5	3.1	1107
2022	381	1107	10.19%	102.9	278.6	829
2023	43	829	10.00%	6.9	35.9	793''

97. Looking to paragraph 9 of the aforesaid decision, it is explicitly clear that MIAL's submission of increase of rate of interest in the year 2012 was not approved, but, it has been held that the change in rate of interest in future cannot be predicted and if the change has taken place, the effect can always be trued up in future if effect is substantiated.

98. Counsel for Respondent No.1 submitted that the judgment delivered by this Tribunal is dated 16.07.2020 and, therefore, 11.25% rate of interest is approved up to the year 2020. This contention is not accepted by this Tribunal mainly for the reasons that DF order dated 21.12.2012 (**Annexure A-12**) was under challenge by MIAL in AERA Appeal No.2/2013 and, therefore, this Tribunal had examined the position prevailing in 2012. The judgment delivered by this Tribunal is confined to impugned order in (AERA Appeal No. 2 of 2013) dated 21.12.2012 and, therefore, paragraph 9 is to be read with paragraph 6 of the judgment and, therefore, the words used in paragraph 9 of the judgment given by this Tribunal dated 16.7.2020 in AERA Appeal

No. 2 of 2013 - **“changes in the rate of interest in future cannot be predicted.....”** meaning thereby to, the whole judgment of this tribunal was checking the veracity, legality and correctness of order dated 21.12.2012 and, therefore, for the year 2012, as the rate of interest was submitted by MIAL itself was 11.25%, the same was not interfered with by this Tribunal, but, **the issue was kept open for future years i.e. after the year 2012** onwards to the effect that the changes in interest rate in future cannot be predicted and if rate of interest changes, the effect can always be trued up in future if the effect is substantiated. Thus, the words **“in future”** used in paragraph 9 is used in context of the period after the year 2012 onwards because the impugned order was dated 21.12.2012 which was under challenge before TDSAT in AERA Appeal No.2 of 2013. Because of paragraph 6 of the judgment dated 16.07.2020, the appeal preferred by MIAL was dismissed with an observation in paragraph 9, about future period i.e. period after the year 2012, if rate of interest is changed, the necessary true-up can be given in future. Thus, “the future period” means “the period after 2012” as per paragraph 9 of the judgment given by this Tribunal given on 16.07.2020 in AERA Appeal No. 2 of 2013.

99. Moreover, the observations of paragraph 9 in the order of this tribunal dated 16.07.2020 in AERA Appeal No.2 of 2013 have not been challenged by AERA.

100. From the aforesaid decision of this tribunal in which DF order dated 21.12.2012 (**Annexure A-12**) was under challenge, the rate of interest cannot be said to have been approved by Tribunal up-to the year 2020. What is approved by this Tribunal is the rate of interest at 11.25% p.a. which was prevailing while passing the impugned order in that appeal, but, for future years i.e. after 2012 onwards, as observed in paragraph 9 of the decision given by this Tribunal, if the rate of interest changes, the effect of the same shall be given as a true-up. It has also been observed in paragraph 9 that change in rate of interest in future cannot be predicted meaning thereby to that there cannot be same rate of interest in future.

101. In view of the aforesaid decision, the Appellant has duly provided the actual rate of interest towards the debt to the Respondent No.1/AERA, which the Respondent No. 1/AERA has overlooked while considering the applicable rate of interest to be 11.25% or actual, whichever is lower. Eventually, by capping the rate of interest at 11.25%, Respondent No. 1/AERA has acted in teeth of the Judgement

dated 16.07.2020. The rate of interest is a fluctuating phenomenon and therefore, the Respondent No.1/AERA ought to have applied the actual rate of interest based on the contractual agreements for computing the outstanding interest amount.

102. Thus, not employing the applicable existing interest rate has led to a substantial difference in the balance amount of DF to be collected. The difference has arisen primarily due to the rate of interest calculated by the Respondent No.1/AERA and the actual interest paid by the Appellant towards computation of the outstanding DF amount.

103. In view of the aforesaid facts and decision of this Tribunal dated 16.7.2020, it is significant to note that not allowing the actual rate of interest is not only detrimental to the interest of the Appellant, but, also hampers the smooth functioning of the airport. Further, it is the cost that has "actually" been incurred by the Appellant and it will become economically unviable for the efficient operations of the airport if the same is not allowed to be recovered.

104. Thus, in fact, it would not be out of place to mention that the interest rate was more than 11.25% till 2017 only (era of high interest rates in India and globally). After that, the Appellant made efforts to secure interest at favourable conditions and interest was consistently

below 11.25% till November 2023 by which time the entire DF loan was repaid. So, it is wrong for the Respondent No. 1/AERA to contend that the Appellant did not make efforts for lowering the interest rate.

105. Much has been argued out by the counsel for AERA-Respondent No.1 that in Order No. 46/2015-16 dated 28.01.2016 the cost of loan was calculated upon securitization of the DF and the interest on DF securitization was to be @ 11.25% p.a. It was also contended by the counsel for Respondent No.1 that the rate of interest fixed by AERA was on the basis of material placed by appellant before Respondent No.1 and appellant has failed to provide any evidence to prove that it made its best endeavor to get the loan/debt upon securitization of DF receipts at the rate lesser than the contractual rate of interest.

106. The aforesaid contentions of Respondent No.1 are not accepted by this Tribunal mainly for the reasons that: -

- I. AERA itself has passed a DF order dated 21.12.2012 (Annexure A-12) in which AERA has not applied any cap upon interest @ 11.25%.
- II. As per DF order dated 21.12.2012 (Annexure A-12), paragraph 5.136 states that **“the total amount of interest to be paid to the lenders on the securitization of the DF would however be limited to the actual interest paid by MIAL...”** Thus, as per

DF order, the actual rate of interest paid by MIAL upon securitization of the DF was to be collected by Airport Operator – Appellant - MIAL.

- III.** The rate of interest prevailing in the year 2012 was 11.25% p.a. and this fact was conveyed by appellant to Respondent No.1 but that does not mean that on all the 11 years the same rate of interest or Cost of Debt will be levied by the lender.
- IV.** The rate of interest or Cost of Debt charged by the lenders was a floating rate of interest and this fact was brought to the notice of AERA. Thus, the rate of interest was never fixed at 11.25% for the whole period of levy of DF amount (from 01.01.2013 to 31.12.2023) - for 11 years. This correspondence is on the record of this AERA Appeal.
- V.** Looking to the communication by appellant to AERA dated **20.12.2012** (Annexure A-26), it has been mentioned categorically in paragraph 3 as under:

“3. Interest expense including rate of interest for loan against DF

The Rate of Interest for DF Loan is as under: -

Bank Name	Amount of Loan	Rate of interest
IDBI Bank	Rs. 375 crs.	IDBI Base Rate + 0.75% presently effective rate of interest is 11.25%

Axis Bank	Rs. 375 crs.	Axis Bank Base Rate + 1.25% presently effective rate of interest is 11.25%
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In addition to this company has paid processing/underwriting fees to Axis Bank and IDBI Bank at rate of 0.5% on the Rs. 375 Crores to each bank.”

[Emphasis Supplied]

In view of the aforesaid paragraph 3 in letter dated 20.12.2012, it has been pointed out by the appellant to AERA “**presently effective rate of interest**” is 11.25%. Meaning thereby to, 11.25% rate of interest was for the year 2012 only. This loan was given by IDBI Bank of Rs.375 Crores.

- VI.** The sanction letter of Rupee Term Loan of Rs.375 Crores given by IDBI Bank dated 06.08.2012 (Annexure A-27 (Colly)) has mentioned at Appendix-I (annexed with the aforesaid communication) that the rate of interest shall be “**fully floating i.e. the interest rate would automatically change with every change in IDBI’s BBR**”. For the ready reference, relevant part of Appendix-I which is annexed with sanction letter given by IDBI Bank to this appellant dated 06.08.2012 reads as under:

“Appendix – I

(Terms and conditions of the financial assistance)

Rupee Term Loan (RTL)

Borrower	Mumbai International Airport Limited (MIAL)
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Promoter(s)	GVK Airport Holdings Pvt. Ltd, Airport Company South Africa Global Limited, Bid Services Division (Mauritius) Limited			
Amount/Facility	Rupee Term Loan (RTL) of Rs.375 Crores (Rupees three hundred and seventy five Crores only) against Airport Development Fee (ADF) levied on embarking domestic and international passengers at Chhatrapati Shivaji International Airport aggregating to Rs. 876 Crores approved by Airport Economic Regulatory Authority (AERA) vide its order dated April 18, 2012.			
Purpose	The RTL shall be used for capex purposes and would bridge the temporary gap in the means of finance for the Upgradation and Modernisation Project of Chhatrapati Shivaji International Airport, Mumbai, being implemented by the company.			
Last Date of Drawal	The RTL shall be available for drawdown from the effective date (date of execution of loan agreement) till October 31, 2012 or such other extended time as may be granted by IDBI.			
Repayment	The RTL shall be repaid in nine structured quarterly instalments as under:			
	Date	Repayment	Date	Repayment
	01-10-2012	3%	01-01-2014	13%
	01-01-2013	6%	01-04-2014	13%
	01-04-2013	13%	01-07-2014	13%

	01-07-2013	13%	01-10-2014	13%
	01-10-2013	13%	Total	100%
	<p>Door-to-door maturity (from the date of first disbursement till the last date of repayment) shall not exceed 26 months</p> <p>Further, excess DF receipts in any month (out of approved ADF of Rs.876 crore) shall be mandatorily used for the purpose of meeting debt service obligation and prepayment of the Loan without any prepayment penalty in chronological order of maturity. To clarify, any prepayment shall be utilized towards immediate next scheduled repayment.</p>			
<u>Rate of Interest</u>	<p>The Borrower shall, until the RTL is fully paid off, pay to IDBI Bank interest on the principal amount of the RTL, as may be outstanding from time to time, <u>at IDBI Bank's Base Rate (BBR) plus 75 bps [Spread], fully floating i.e. the interest rate would automatically change with every change in IDBI BBR.</u></p> <p>[The present effective rate is 11.25% p.a. with prevailing BBR of 10.50%].</p> <p>The interest as above, shall be payable by the Borrower in arrears, on the 1st of each month (each an Interest Payment Date). Such interest shall become payable from the first Interest Payment Date falling immediately after the date of first disbursement of the RTL by IDBI Bank.</p>			
Interest Reset	IDBI Bank shall have the right to reset the Spread on RTL anytime if the Credit rating of the Borrower is			

	<p>downgraded by the external credit rating agency. (The "Interest Reset Dates").</p> <p>The Borrower shall then pay interest at such reset rate (the Reset Interest Rate) as may be notified by IDBI Bank to the Borrower.</p> <p>The Interest Rate or the Reset Interest Rate, as the case may be, shall hereinafter be referred to as "the Applicable Interest Rate".</p>
Further Interest	<p>All interest on the RTL and all other monies accruing due under the Facility Agreement or any other financing documents to be entered into between the Borrower and IDBI Bank shall, in case the same be not paid on the respective due dates, carry further interest at the Applicable Interest Rate (the Further Interest) computed from the respective due date until the date of actual payment. Such Further Interest shall be compounded monthly and shall become payable on demand or in the absence of any such demand, on the next Interest Payment Date falling after the date of default.</p>
Additional Interest for non-creation of security	<p>Disbursements made pending creation of security within the stipulated period as specified in the Security clause shall carry additional interest @1% p.a. (the Additional Interest) over and above the applicable interest rate from the expiry of the stipulated period till the creation of such security.</p> <p>The amount shall be payable on demand and in absence of any such demand, on the next Interest Payment Date falling after the stipulated date till the security specified is created</p>
Liquidated Damages	<p>In case of default in payment of any instalment of principal amount of the RTL and/or irregularity in any other facilities, interest thereon or other monies (except liquidated damages) on their respective due dates, the Borrower shall pay on such defaulted amounts, liquidated damages at the rate of 2% per annum for the period of default. Liquidated Damages shall be payable on demand and in the absence of any such demand on</p>

	the next Interest Payment Date falling after the date of default. Arrears of liquidated damages shall carry interest at the Applicable Interest Rate till the date of payment of the defaulted amount.
Security	<p>1. First charge on the ADF Escrow account on pari passu basis with the lenders participating in the proposed loan;</p> <p>2. Second charge over all bank accounts to the extent permitted by AAI under OMDA / Escrow Agreement, including but not....”</p>

[Emphasis Supplied]

VII. In the sanction letter of loan of Rs.375 Crores by Axis Bank, it has been mentioned categorically that the rate of interest will be fully floating payable at monthly intervals, this communication is dated 29.08.2012 by Axis Bank to this Appellant - MIAL (Annexure A-27 (Colly) at page no. 1751). For the ready reference, the relevant part of the terms and conditions of the loan given by Axis Bank as mentioned in their communication dated 29.08.2012 reads as under:

"5.	Rate of Interest	:	<ul style="list-style-type: none"> Axis Bank Base Rate + 1.25% (presently at 11.25%) p.a. fully floating payable monthly intervals (Initial Interest Rate)"
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VIII. The aforesaid document is at Annexure A-27 (Colly) which reflects that presently i.e. in the year 2012, the rate of interest was 11.25%

which was fully floating meaning thereby to, 11.25% was not fixed for the entire period of repayment of the loan. The rate of interest was variable and never a fixed one.

IX. Looking to Annexure A-15 to the memo of this appeal which is a communication dated 15.03.2013 which is between this appellant and Respondent No.1-AERA, it has been mentioned that rate of interest was 12.25% p.a., fully floating, for both, IDBI and Axis Banks. For the ready reference, the part of the communication dated 15.03.2013 (Annexure A-15 to the memo of this appeal) reads as under:

“The main terms and condition of the sanctioned loan against DF securitization is as under:

1.	DF Securitization Loan	Rs. 2,647.80 crore
2.	Rate of Interest	<p>a) IDBI Base Rate +2.00% p.a. fully floating. Presently IDBI Base Rate is 10.25% resulting in Rate of Interest at 12.25% p.a. fully floating.</p> <p>b) Axis Bank Base Rate +2.25% p.a. fully floating. Presently Axis Bank Base Rate is 10% resulting in Rate of Interest at 12.25% p.a. fully floating.</p> <p>The above interest is payable monthly</p>

3.	Underwriting fee	a) 0.75% on incremental loan of Rs. 2009.22 Crores b) 0.25% on the existing ADF Loan of Rs. 638.58 crore
4.	Upfront Fee	0.25% on the total loan of Rs. 2647.80 crore
5.	Tenor	Door-to-door tenure of 12 years and 1 month”

- X.** In view of the aforesaid communication, the floating rate of interest prevailing in the year 2013 was pointed out by this appellant to Respondent No.1 which was higher than 11.25%.
- XI.** The aforesaid communication which was at Annexure A-15 dated 15.03.2013 was received by Respondent No.1- AERA and AERA in their communication dated 18.04.2013 (Annexure A-16 to the memo of this appeal) has mentioned that AERA has noted the securitization of DF amount by MIAL. Till this point of time, AERA had never objected.
- XII.** In fact, AERA has acted in their order dated 28.01.2016 (Annexure A-17) in defiance of DF order dated 21.12.2012 (Annexure A-12), especially paragraph no 5.136 thereof. In the DF order, **actual interest** paid by MIAL to the lender was ordered to be appreciated whereas, in order dated 28.01.2016 (Annexure A-17), arbitrarily and

unilaterally the rate of interest has been fixed by AERA at 11.25% p.a. despite the fact that the rate of interest was a floating one.

XIII. Looking to paragraphs 6 and 9 of the judgment delivered by this Tribunal in AERA Appeal No.2 of 2013 judgment dated 16.07.2020, the changes in the interest rate in future cannot be predicted and if changes have taken place in the rate of interest, it has been held in paragraph 9 of the aforesaid judgment that the effect can always be given in truing-up in future.

XIV. Thus, there is inconsistency in the approach adopted by AERA against certain principles of law.

XV. The interest rates are generally applicable based on **market forces** and, therefore, while passing the DF order dated 21.12.2012, AERA had not applied any cap on rate of interest and taking inconsistent stand while passing order dated 28.01.2016, AERA applied cap upon the rate of interest.

107. In view of the aforesaid reasons, we are not agreeing with AERA that the rate of interest shall be 11.25% for the entire period of levy of DF which is 11 years starting from 01.01.2013 to 31.12.2023.

108. It ought to be kept in mind that there cannot be the same rate of interest or cost of debt for Project Term Loan and DF Loan. Counsel for AERA – Respondent No.1 submitted that the cost of debt on

Project Term Loan was much less than 11.25% and, therefore, there cannot be a demand of more than 11.25% of interest upon cost of debt on DF loan. We are not in agreement with this contention canvassed by counsel for Respondent No.1 mainly for the reasons that-

- I.** The cost of debt on **Project Term Loan** and cost of debt on **Development Fee Loan** are entirely different.
- II.** Project Term Loan is having security of tangible goods or properties like land, buildings, etc., whereas, the DF loan is given by the bank by taking a high risk because there is no tangible security for DF loan. DF loan is given upon a probability of recovery of development fee by the Airport Operator. Thus, there is no certainty in recovery of development fee by a person who is recovering the development fee (in the facts of the present case, it is Airport Operator - MIAL). Thus, the banks who are giving the loan are taking a very high risk in giving the loan on securitization of development fee. Thus, as per the broad principles of actuarial science, more the risk more will be the cost of debt.
- III.** AERA cannot presume that the cost of debt on Project Term Loan and cost of debt on Development Fee Loan will be the same.

IV. Year after year, if, the loan is paid regularly, it increases the credit of the loanee and, therefore also, there will be change in cost of debt, in fact, this appellant is claiming much less rate of interest from 2017 onwards than what is stated in order dated 28.01.2016 (11.25%). These facts have been highlighted in tabular format in the preceding paragraphs.

109. Because of capping 11.25% rate of interest, the calculation of the development fee amount from 01.01.2013 to 31.12.2023 as per AERA is as under:

“THE RESPONDENT NO.1/AERA’S APPROACH OF CALCULATION OF BALANCE DF BILLABLE AMOUNT

	Actual Billing	Opening Loan	Interest Rate as per AERA (11.25% or Actual whichever is lower)	Interest payment @11.25%	Principal Repayment	Closing Loan
	A	B	c	D	e=a-d	f=a-e
2013	345	2603	11.25%	195.2	150.2	2453
2014	370	2453	11.25%	257.0	112.5	2340
2015	408	2340	11.25%	242.3	165.4	2175
2016	438	2175	11.25%	222.3	215.8	1959
2017	472	1959	10.27%	179.4	292.6	1666
2018	505	1666	9.26%	138.4	366.8	1300
2019	488	1300	9.73%	109.4	378.8	921
2020	163	921	10.34%	45.1	117.7	865
2021	121	865	10.53%	90.2	30.4	835
2022	381	835	10.19%	73.7	307.8	527
2023	43	527	10%	4.4	38.4	488

In view of the aforesaid approach where interest rate is capped at 11.25% or actual whichever is lower, the closing principal (DF billable amount) as on 31.01.2013 is Rs. 488 Crores.”

110. Thus, the capping upon rate of interest has resulted in a difference of more than Rs.300 Crore. The aforesaid calculation is based upon opening loan of Rs.2603 Crores whereas it is submitted by the appellant that the actual loan amount availed by this appellant from the lenders is at Rs.2647.80 Crore.

111. Looking to the Development Fee order dated 21.12.2012 (**Annexure A-12**), it has been mentioned categorically by Respondent No.1-AERA in paragraph No. "II.e":

"II.e. The Authority clarifies that the calculations made by it in the Table 13 are based on the assumptions made therein and therefore decides to periodically review the DF billing (based on traffic as well as on the basis of audited figures provided by AAI and MIAL), its securitization, consequent interest charge and any additional means of finance during the above mentioned tenure and make appropriate decisions as may be required based on such review."

[Emphasis Supplied]

Table no.13 in DF order dt 21.12.2012 (Annexure A-12) reads as under:

"Table 13: DF Rate as applicable from 01.01.2013

	Domestic per embarking passenger	International per embarking Passenger
Rate of Development Fee (in Rs.)	100	600"

In view of the aforesaid development fee order, periodical review in the calculation of levy of Development Fee was already envisaged in the Development Fee order dated 21.12.2012 on the basis of several factors as stated hereinabove including securitization and consequent interest charge, etc. thus, if the rate of interest is changed, the calculation of Development Fee to be levied will be changed and such review in calculation has already been mentioned in the original Development Fee order dated 21.12.2012 (Annexure A-12).

112. The aforesaid aspects of the matter have not been properly appreciated by AERA and, therefore, we, hereby, quash and set aside the decision of AERA in capping the rate of interest at 11.25% p.a. as the cost of loan upon securitization of DF amount. Consequently, we hereby quash and set aside the calculation of total amount to be levied as DF along with interest thereupon as mentioned by AERA. We, therefore, quash and set aside the Order No.9 of 2023-2024 dated 14.06.2023 (Annexure A-1 to the memo of this appeal). We, hereby, direct AERA-Respondent No.1 that "actual rate of interest" upon DF

securitization shall be calculated for the purpose of allowing levy of development fee by the Airport Operator.

113. We, further direct AAI – Respondent No.2 to conduct an audit for arriving at the calculation of levy of development fee on the basis of actual rate of interest, charged by the lender and paid by the Airport Operator - Appellant - MIAL and AAI will also verify the initial amount of loan, because, the whole calculation as stated hereinabove is being done on the opening loan amount of **Rs.2603 Crores** whereas it is contended by the appellant that actual DF Loan amount availed by this appellant is **Rs.2647.80 Crore**. The aforesaid two figures can be verified from books of account or from lender banks by the auditor. We therefore, direct AAI to conduct an audit to verify the actual DF Loan amount availed by this appellant and thereafter, to apply the actual rate of interest for allowing the levy of DF by this appellant.

114. The calculation of the total amount of levy of DF done by Airports Authority of India (AAI) – Respondent No.2, is based upon the capping of interest @ 11.25% p.a. As we have quashed and set aside the capping of interest on DF Loan, the calculation arrived at by AAI through their auditor also requires to be revised on the basis of –

- a. Actual amount of DF Loan and,

- b. The actual rate of interest charged by the lender and paid by the appellant.

115. AAI shall compute revised balance DF amount for the period beyond 31.12.2023. By our initial interim order dated 19.12.2023, we had allowed collection of Rs.100 per embarking domestic passenger and Rs.600 per embarking international passenger. We had also directed to deposit the DF in an escrow account and we had permitted utilization of the same as per Airports Authority of India (Major Airports) Development Fee Rules, 2011, this interim order has continued up to 31.08.2024 by extending the interim reliefs lastly vide order dated 01.08.2024. The revised balance Development Fee billable amount, shall be recomputed in light of the aforesaid directions and if there is any balance amount left out to be recovered, the period of levy of DF shall be extended by Respondent No-1.

116. If after calculation of revised balance Development Fee billable amount, nothing further is required to be collected towards the Development Fee, the levy of the development fee amount shall be stopped by the appellant.

117. If there is any additional amount of Development Fee levy collected and deposited in an escrow account, then the same shall be utilized

as per **Rule 4(5)(iii)** of Airports Authority of India (Major Airports) Development Fee Rules, 2011. For the ready reference, Rule 4(5) of the Airport Authority of India (Major Airports) Development Fee Rules, 2011, reads as under:

- "4. Development fees to have an account.- (1) ...
(2) ...
(3) ...
(4) ...
(5) The Authority shall make an arrangement with the scheduled bank to transfer the money deposited in the Development Fees Receipt Account in the following order of priority, namely:-
(i) to pay amount into the Development Fees Statutory Dues Account to ensure that at the last day of the month the amount transferred is equal to the monthly statutory dues for the following month;
(ii) to pay the remaining amount into the Development Fees Disbursement Account towards payment to the Airport Operator in accordance with the total amount of development fees determined by the Airports Economic Regulatory Authority and the fund from this account shall be disbursed to the Airport Operator as per the Drawdown Schedule for meeting the project cost directly or for servicing the debt to the lenders, raised against development fees.
(iii) any balance amount remaining after the entire amount of development fees as approved by the Airports Economic Regulatory Authority is paid, shall be transferred to Development Fees Surplus Account and the said amount shall be used for authorized investment by the Authority and the balance available, if any, in this account may be appropriated for subsequent determination of development fees."

[Emphasis Supplied]

118. Rest of the issues raised in this appeal especially about the impact of DF collection charges and ADF receivables have not been pressed by Learned Senior Counsel appearing for the appellant, hence, nothing requires to be decided on DF collection charges and ADF receivables.

119. We, therefore direct AAI- Respondent No.2 to complete the exercise as directed in paragraph number 113 of this judgment and order within a period of two weeks from the date of this order. Further, as observed in the previous orders dated 19.12.2023 and 21.02.2024 in these appeals, we direct AAI- Respondent No.2 to release the amount presently lying in the Escrow Account, forthwith to this appellant as per DF Rules, 2011.

120. Thus, the present appeal is allowed to the aforesaid extent and is hereby disposed of.

**(JUSTICE D.N. PATEL)
CHAIRPERSON**

**(SUBODH KUMAR GUPTA)
MEMBER**

/NS/