

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Reserved on: 17th February, 2025

Pronounced on: 16th April, 2025

AERA APPEAL/4/2016

Delhi International Airport Ltd. ...Appellant

Versus

1. Union of India, Through Ministry of Civil Aviation;
2. Airports Authority of India;
3. Airports Economic Regulatory Authority of India; ...Respondent(s)

WITH

AERA APPEAL/5/2016

GMR Hyderabad International Airport Ltd. ...Appellant

Versus

1. Union of India, Ministry of Civil Aviation;
2. Airports Economic Regulatory Authority of India; ...Respondent(s)

WITH

AERA APPEAL/6/2016

Mumbai International Airport Ltd. ...Appellant

Versus

1. Airports Economic Regulatory Authority of India;

2. Ministry of Civil Aviation;

3. Airports Authority of India;

...Respondent(s)

WITH

AERA APPEAL/7/2016

Bangalore International Airport Ltd.

...Appellant

Versus

1. Airports Economic Regulatory Authority of India;

2. Union of India, Through Ministry of Civil Aviation;

...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.4/2016</u> For <u>DIAL</u> Mr. Ramji Srinivasan, Sr. Adv. with Mr. Milanka Chaudhury, Ms. Ashly Cherian, Mr. Ravneet Singh, Advocates.</p>	<p><u>In AERA Appeal No. 4/2016</u> For <u>AERA (R-3)</u> Mr. PC Sen, Sr. Adv. with Mr. Kunal Sharma, Mr. Subhendu Bhattacharya, Mr. Vaishnav Kumar, Mr. Adhirath Chaudhary, Ms. Rashi Goswami, Advocates with Dr. Anand Kumar, Dr. Shreya Sharma.</p>
<p><u>In AERA Appeal No.5/2016</u> For <u>HIAL</u> Mr. Milanka Chaudhury, Ms. Ashly Cherian, Mr. Ravneet Singh, Advocates.</p>	<p><u>In AERA Appeal No.5/2016</u> For <u>AERA (R-2)</u> Mr. PC Sen, Sr. Adv. with Mr. Kunal Sharma, Mr. Subhendu Bhattacharya, Mr. Vaishnav Kumar, Mr. Adhirath Chaudhary, Ms. Rashi Goswami, Advocates with Dr. Anand Kumar, Dr. Shreya Sharma.</p>
<p><u>In AERA Appeal No.6/2016</u> For <u>MIAL</u> Mr. Sajan Poovayya, Sr. Adv. with Ms. Amrita Narayan, Mr. Ashwin Rakesh, Mr. Saurobroto Dutta, Mr. Madhav Sharma, Advocates.</p>	<p><u>In AERA Appeal No. 6/2016</u> For <u>AERA (R-1)</u> Mr. PC Sen, Sr. Adv. with Mr. Kunal Sharma, Mr. Subhendu Bhattacharya, Mr. Vaishnav Kumar, Mr. Adhirath Chaudhary, Ms. Rashi Goswami, Advocates with Dr. Anand Kumar, Dr. Shreya Sharma.</p>
<p><u>In AERA Appeal No.7/2016</u> For <u>BIAL</u> Mr. Manu Kulkarni, Mr. Ankit Parhar, Ms. Sriparna Dutta Choudhury, Ms. Shristi Widge, Ms. Kopal Tewary, Advocates.</p>	<p><u>In AERA Appeal No. 7/2016</u> For <u>AERA (R-1)</u> Mr. PC Sen, Sr. Adv. with Mr. Kunal Sharma, Mr. Subhendu Bhattacharya, Mr. Vaishnav Kumar, Mr. Adhirath Chaudhary, Ms. Rashi Goswami, Advocates with Dr. Anand Kumar, Dr. Shreya Sharma.</p>

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JUDGEMENT

Per Justice D.N. PATEL, Chairperson

AERA APPEAL NO.4 OF 2016, AERA APPEAL NO. 5 OF 2016, AERA APPEAL NO. 6 OF 2016 & AERA APPEAL NO. 7 OF 2016

For any reference, AERA Appeal No. 4 of 2016 shall be treated as the main matter unless expressly stated otherwise.

1. These appeals have been preferred by the Airport Operators, namely

Viz.:

**i. A.A. No.4 of 2016– Delhi International Airport Limited
(hereinafter referred to as DIAL)**

**ii. A.A. No.5 of 2016 – Hyderabad International Airport Limited
(hereinafter referred to as HIAL)**

**iii. A.A. No.6 of 2016 – Mumbai International Airport Limited
(hereinafter referred to as MIAL)**

**iv. A.A. No.7 of 2016 – Bangalore International Airport Limited
(hereinafter referred to as BIAL)**

2. These appellants have challenged Order No.7/2016-2017 dated 6.6.2016 passed by Airports Economic Regulatory Authority of India

(hereinafter referred to as "**AERA**"), in exercise of its powers under **Section 13(1)(a) of AERA Act, 2008** (hereinafter referred to as the **AERA Act, 2008** for the sake of brevity).

3. The aforementioned impugned order passed by AERA is at **Annexure A-1 of AERA Appeal No.4 of 2016**. For the ready reference of Annexures, **the lead matter is treated as AERA Appeal No.4 of 2016**.

4. By the impugned order at **Annexure A-1, AERA has fixed the ceiling cost of Rs.65,000/- per sq. mtr. for the terminal building and Rs.4,700/- per sq. mtr. for runway/taxiway/apron** (excluding earth work up-to sub-grade level) **based on the project cost calculation for Cochin Airport as a Benchmark for evaluating capital costs** incurred by Airport Operators of Major Airports for the purpose of tariff determination.

5. These appeals have been preferred by Airport Operators under **Section 18(2) of AERA Act, 2008**.

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
AETRA	“Passenger Satisfaction Survey” conducted by Airports Council International (ACI) & International Air Transport Association (IATA).
AOC	Airlines Operators Committee
APAO	Association of Private Airport Operators
AUCC	Airport Users Consultative Committee
BIAL	Bangalore International Airport Limited
CAGR	Compound Annual Growth Rate
CAR	Civil Aviation Requirements
CIAL	Cochin International Airport Limited
CPWD	Central Public Works Department

CWIP	Capital Work in Progress
DGCA	Directorate General of Civil Aviation
DIAL	Delhi International Airport Limited
ESCOI	Empowered Sub-Committee of the Committee on Infrastructure
FCP	First Control Period
FIA	Federation of Indian Airlines
GHIAL	GMR Hyderabad International Airport Limited
HIAL	Hyderabad International Airport Limited
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
IDC	Interest During Construction
IGIA	Indira Gandhi International Airport
IMG Norms	Inter-Ministerial Group Norms
JVC	Joint Venture Company
MDP	Market Discovered Price
MIAL	Mumbai International Airport Limited
MoCA	Ministry of Civil Aviation
MYTP	Multi Year Tariff Proposal

OMDA	Operation, Management and Development Agreement
PPP	Public Private Partnership
RAB	Regulatory Asset Base
RGIA	Rajiv Gandhi International Airport
RITES	Rail India Technical & Economic Service
SCP	Second Control Period
SGSA	State Government Support Agreement
SPV	Special Purpose Vehicle
SSA	State Support Agreement
TDSAT	Telecom Disputes Settlement and Appellate Tribunal

FACTUAL MATRIX

(A) Delhi International Airport Private Limited (“DIAL”/ “Appellant”) is a company engaged *inter alia* in operating, maintaining, developing, designing, constructing, upgrading, modernizing and managing the Indira Gandhi International Airport, Delhi (IGIA, Delhi).

(B) Union of India (“UOI”) is Respondent No.1 in the present appeal through Ministry of Civil Aviation (MoCA) which is the Nodal Ministry for governing Civil Aviation in India.

(C) Airports Authority of India (“AAI”/ “Respondent No. 2”) is an authority constituted under Section 3 of Airports Authority of India Act, 1994. Airports Economic Regulatory Authority of India (AERA) is the Respondent No. 3 in the present appeal and is a statutory body constituted under the Airports Economic Regulatory Authority of India Act, 2008 (AERA Act)

(D) Airports Authority of India Act, 1994 (“AAI Act”) was amended to enable setting up of private airports and leasing of existing airports to private operators. Government of India thereafter approved the modernization, upgradation and development of the Delhi and

Mumbai airports through private sector participation.

(E) AAI invited tenders from private participants for operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the IGIA, Delhi. DIAL was selected for this purpose pursuant to a transparent and competitive bidding process.

(F) DIAL and AAI entered into Operations, Management and Development Agreement ("OMDA") whereby AAI granted to DIAL the exclusive right and authority to undertake the functions of operations, maintenance, development, design, construction, upgradation, modernizing, finance and management of the IGIA, Delhi. As per Clause 8.3 of the OMDA, DIAL was required to prepare a Master Plan setting out road map for the development, upgradation and expansion of the IGIA, Delhi (including aeronautical and non-aeronautical assets) planned over a 20-year time horizon. Clause 8.4 of the OMDA required DIAL to also prepare the Major Development Plan based on the Master Plan.

(G) DIAL and Ministry of Civil Aviation (**hereinafter referred to as MoCA for the sake of brevity**) entered into a State Support

Agreement (**hereinafter referred to as SSA for the sake of brevity**). As per this agreement, AERA is empowered to set aeronautical charges. For the fixation of aeronautical charges, AERA would have to follow the principles of tariff fixation provided in Schedule -1 provided in **SSA**. Counsels appearing for the appellants have referred Clause 3.1.2 of SSA and Clauses 2, 8 and 10 of Schedule – 1 of the SSA.

(H) AERA Act, 2008 was notified on 1.1.2009 and much reliance has been placed by counsels for both the sides on Section 13 of AERA Act, 2008.

(I) An inter-ministerial group issued the norms and Standards for Capacity of Airport Terminals (**hereinafter referred to as IMG norms for the sake of brevity**). **These IMG norms were issued on 20.4.2009, which is at Annexure A-7 to the memo of AERA Appeal No. 4 of 2016.**

(J) AERA issued Order No.3/2012-13 dated 20.4.2012 which is a tariff order for DIAL for the first control period (01.04.2009 to 31.03.2014). AERA while determining the tariff considered the Capital Expenditure

incurred by DIAL. While passing this tariff order, AERA has referred to certain Clauses of SSA. Thus, AERA has **not** followed IMG norms.

(K) AERA issued a Consultation Paper No.5/2014-15 on 12.06.2014 in the matter of Normative Approach to Building Block in Economic Regulation of Major Airports setting out certain proposed normative parameters for various cost components related to determination of tariff. AERA notes that cost per Sq. mtr. of a modern airport terminal building in India varies between Rs.43,333/- per Sq. mtrs (Cochin) to Rs.1,45,000/- per Sq. mtrs. (Bangalore). AERA also proposed to consider capital cost of terminal building at a ceiling of Rs.65,000/- per sq. mtrs. or actuals (whichever is lower) and a ceiling cost of Rs.7,000 per Sq. mtrs. or actuals (whichever is lower) for capital cost of Runway/Taxiway and Apron (excluding earthwork up-to the sub grade level).

(L) Thereafter, Stakeholders Consultation Meeting took place and the stakeholders had given details in response to AERA's Consultation Paper on 08.12.2014 in which two major concerns were shown by the Airport Operators about the applicability of IMG Norms to airports developed through Public Private Partnership mode and secondly it was

pointed out by the Airport Operators that **“One Size-Fits All”** approach of AERA is not permissible.

(M) Thereafter, approximately 1.5 years period had gone and on 23.05.2016, AERA issued a letter to DIAL for its comments regarding details on capital cost of terminal including the cost of pavements with/without soil filling for Category (E) type.

(N) Airport Operators replied to AERA in the prescribed format indicating the cost towards terminal building and associated apron work and sought for more time in case any further details were required by AERA. On **06.06.2016**, AERA issued an order adopting the Benchmark Capital Cost at Rs.65,000/- per sq. mtr. for terminal building and Rs.4,700/- per sq. mtr. for runway/taxiway/apron (excluding earth work up-to sub grade level). AERA had relied upon IMG Norms (**Annexure A-7**) dated 20.04.2009 as well as Consultation Paper dated 12.06.2014 as well as per square meter cost of Cochin Airport as the cost for building an airport at par with international standards.

(O) Being aggrieved by the aforesaid order dated 06.06.2016 passed by AERA, the present appeals have been preferred by -

DIAL – AERA Appeal No.4 of 2016;

HIAL – AERA Appeal No.5 of 2016;

MIAL – AERA Appeal No.6 of 2016; &

BIAL – AERA Appeal No.7 of 2016 before this Tribunal.

ARGUMENTS CANVASSED BY THE APPELLANT – DIAL

6. Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL submitted that IMG Norms are not applicable to the facts of the present case because IMG Report which is one of the basis for passing the impugned order was intended solely as a guideline for Airport Authority of India. It was not envisaged to be applicable to Public Private Partnership (PPP) Airports which are governed by their own standards and specifications.

7. It is further submitted by learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL that IMG Norms re-indicated that unit cost of construction for PPP Airports should be on case-to-case basis and there cannot be a benchmarking exercise for new developments. It has also been mentioned in IMG Norms that the benchmarking should be set prior to inviting bids for the airport.

8. It was further submitted by the Learned Senior Counsel Mr. Ramji

Srinivasan on behalf of DIAL that the bidding process of IGI Airports did not propose any Unit Costs for assets.

9. It is also submitted by Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL that AERA lacks jurisdiction to set pre-emptory ceilings on Capital Expenditure under **Section 13(1)(a) of AERA Act, 2008**. As per **Section 13(1)(a)(i) of AERA Act, 2008**, AERA is mandated to determine aeronautical tariff based on “**Capital Expenditure Incurred**” by Airport Operator. Thus, AERA is neither empowered to suggest any cost on capital expenditure nor empowered to determine specifications of the materials, which is to be used while indicating capital expenditure nor AERA is empowered to review the capital expenditure to be incurred.

10. It is further submitted by Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL that as per Proviso to Section 13(1)(a) of AERA Act, 2008, there will be different tariff for different airports and, therefore, “**One Size-Fits All**” approach to determine the capital cost by the impugned order is contrary to AERA’s mandate under **Section 13 of AERA Act, 2008**.

11. It is further submitted by the Learned Senior Counsel Mr. Ramji

Srinivasan on behalf of DIAL that AERA lacks jurisdiction to consider “efficient costs” and ignore the actual cost incurred. It is also submitted that AERA has sought to give a cloak of legitimacy to the Impugned Order by stating that normative costs decided in the Impugned Order are the efficient capital expenditure, which can be considered for determination of aeronautical tariff [Para 11 of AERA’s Counter Affidavit]. However, such mandate is contrary to **Section 13(1)(a)(i)** of the AERA Act and cannot be traced to any of its other functions under the AERA Act. Under **Section 13(1)(a)(i)** of the AERA Act, AERA is mandated to take into consideration *“the capital expenditure incurred and timely investment in improvement of airport facilities”* for determining the tariff for aeronautical services. Accordingly, AERA is not empowered to suggest its own capital costs, determine specifications of materials or regulate the capital expenditure.

12. It is further submitted by Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL that AERA’s attempt at reading the term “efficient” before the term “*capital expenditure incurred*” in **Section 13(1)(a)(i)** of the AERA Act is contrary to the plain and unambiguous language of the provision or misconstrue its function of determining

tariff to include the function of determining capital expenditure. In fact, AERA's assertion of its function to assess efficiency in capital expenditure is contrary to its understanding of its powers advanced before this Hon'ble Tribunal.

13. Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL has relied upon the decisions rendered by this Tribunal in case of **DIAL Vs. AERA** in **AERA Appeal No. 10 of 2012** judgment dated 23.4.2018 as well as judgment delivered by Hon'ble the Supreme Court of India in **DIAL Vs. AERA** reported in **(2022) SCC ONLINE SC 850** especially paragraph 138 thereof. On the basis of aforesaid decisions, it is submitted by learned senior counsel appearing for DIAL that capital expenditure can be looked into from a narrow hole based on the certificates issued by Chartered Accountants or Audited Financial Statements.

14. It is further submitted by Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL that AERA has failed to consider the concession granted by the Central Government. Learned Senior Counsel has relied upon several Clauses of OMDA to be read with SSA. Learned Senior Counsel has referred to Clause 8.1 and Clause 9 of OMDA to be

read with Schedule-1 of OMDA and Clauses of SSA especially about the Master Plan and Major Development Plan, which is Clause 8 of Schedule-1 of SSA (Annexure A-4) to the memo of AERA Appeal No.4 of 2016. On the basis of the aforesaid agreements namely OMDA (Annexure A-3) and SSA (Annexure A-4), it is submitted by the Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL that AERA cannot presuppose the cost to be incurred without considering the specifications and standards to build, develop and maintain the airport governed by PPP model. Thus, by setting the ceiling costs vide the impugned order, AERA has transgressed into the domain of airports' design and specifications by setting a ceiling on capital expenditure. Thus, AERA has ignored OMDA and SSA while passing the impugned order and hence, the impugned order dated 06.06.2016 (Annexure A-1) in AERA Appeal No.4 of 2016 deserves to be quashed and set aside.

15. It is further submitted by Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL that AERA's "One Size-Fits All" approach in the impugned order is arbitrary and contrary to the provisions of Section 13(1)(a) of AERA Act, 2008 which acknowledges that there will be different tariff for different airports. It ought to be kept in mind that

each airport operated under PPP model is governed by the respective Concession Agreements with varied terms and conditions. Setting uniform standards for every airport will be in violation of concession agreements. Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL has placed reliance upon costs of terminal building at various airports including Bengaluru, Guwahati, Trivandrum, Delhi, Mumbai and Kolkata etc. and several other international airports. These are pointed in table no.5 and table no.6 of Consultation Paper which is at Annexure A-5 of the memo of AERA Appeal No.4 of 2016 at page no. 343 and 344. AERA's classification of all airports in a single category for the purpose of setting ceiling of capital costs irrespective of their specific standards is unreasonable and arbitrary. Such a classification suffers from vice of being over-inclusive, thus, it tantamounts to treating unequals as equals and offends the **Doctrine of Equality**.

16. Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL has also pointed out that AERA in Consultation Paper has referred to the possibility of "gold plating by the Airport Operators" and "feeling in some quarters thus, the cost of airport needs to be contained and rationalized ...". The mere possibility of occurrence of gold plating and

feeling of certain stakeholders cannot form the basis for AERA to pass the impugned order. AERA cannot conduct a predetermined tariff exercise in the nature of impugned order based on such extraneous and unverified report. Thus, it is submitted by Learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL that in pursuance of the aforesaid regulations & supporting arguments, impugned order dated 06.06.2016 (Annexure A-1) deserves to be quashed and set aside.

17. Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL has submitted that AERA has no power to cap capital cost by the virtue of provisions of AERA Act, 2008. There is no provision for providing any ceiling on capital expenditure for the purpose of determining the aeronautical tariff for Major Airports. On the contrary as per Section 13(1)(a)(i) of AERA Act, 2008 AERA is mandated to take into consideration the **“Capital Cost Incurred”** for determining aeronautical tariff AERA has no power to fix any cap on capital expenditure and ample checks and balances to verify the actual expenditure incurred.

18. Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL has submitted that the impugned order violates the principle of natural

justice and transparency mainly for the reason that the impugned order has been passed without considering the representations including the relevant documents and expert reports submitted by various stakeholders including MIAL. It is alleged by the Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL that AERA has selectively picked up one of the issues from the Consultation Paper and, therefore, it is a pre-meditative mindset by AERA while passing the impugned order. The Consultation Paper was issued on 12.6.2014 and the responses were filed by the stakeholders on 8.12.2014. No action was taken for approximately two years and AERA has not taken any steps for long interval of period and abruptly after calling for the cost details from Airport Operators, the impugned order was issued and adopted Rs.65000/- per sq.mtr. as a capital cost for terminal building and Rs.4700/- per sq.mtr. towards capital cost for runway/taxiway/apron for the purposes of determination of tariff. AERA has ignored OMDA (Annexure A-3) and SSA (Annexure A-4).

19. It is further submitted by Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL that the impugned order dated 6.6.2016 (**Annexure A-1**) is arbitrary to the extent it treats all airports as equal.

20. It is further submitted by Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL that AERA has failed to appreciate that each airport differs on the aspects of:

- Infrastructure;
- Designing;
- Planning

The unit cost of construction of airport facilities can vary in specification and in price due to various reasons including traffic type, degree of picking, facility specifications, needs of users, local cost and conditions etc.

21. It is further submitted by Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL that the terminal cost for various airports in Goa (MOPA), Bengaluru, Lucknow, Guwahati has been approved by AERA in the range of Rs.1,30,000/- per sq. mtr. to Rs.1,50,000/- per sq. mtr. Further, the quality and services provided also depend upon whether the airport is an origin and destination (O&D) airport hub, low-cost carrier (LCC terminal), profile of its traffic, rate of growth, engineering, geological conditions, local conditions etc. Thus, the approach of AERA by impugned order in treating Major Airports in a

similar manner in terms of per unit capital cost is clearly inconsistent with objectives of AERA Act, 2008.

22. It is further submitted by Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL that the impugned order is an attempt to avoid Consultation Process under Section 13(4) of the AERA Act mainly for the reason that the impugned order has not acted in a transparent manner and has not considered the comments and suggestions of the Appellants. AERA has adopted a pre-conceived benchmark costs proposed in the Consultation Paper without either considering the completed cost of various Major Airports or the comments of stakeholders.

23. It is further submitted by Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL that the IMG Norms are not applicable to PPP Airports. Learned Senior Counsel for the appellant has placed reliance upon Clause – G of IMG Norms report from page number 241 of AERA Appeal No.6 of 2016. On the basis of the aforesaid Clause – G in IMG Norms, it is explicitly clear that it is not applicable to PPP Airports. This report carves out an exception for the airports developed under PPP model.

24. The terminal building of Cochin Airport cannot be equated with terminal building of Mumbai Airport or the Delhi Airport as operational and infrastructural parameters of each airport differ significantly.

25. It is further submitted by Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL that there is consistent approach by AERA in case of other airports because IMG Norms are of the year 2016. Though these norms were in existence for Chennai Airport, Rs.1 Lakh per sq. mtr. cost for terminal building was allowed. Similarly, for Patna International Airport for First Control Period tariff order which is dated 21.10.2019, Rs.1 Lakh per sq.mtr. was allowed. Similarly, for Lucknow Airport as per second Control Period tariff order dated 16.2.2018, AERA has allowed Rs.79,846/- as a capital cost for terminal building. Thus, AERA selectively applied IMG Norms for selected airports. This inconsistent approach reflects the fact that **“actual cost incurred”** **should be appreciated** at the time of tariff determination instead of prefixed cost of terminal building based in Cochin airport.

26. Learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL has placed reliance upon the following decisions:

- Delhi International Airport Limited Vs. Airports Economic

Regulatory Authority of India (AERA Appeal No. 10 of 2012)

- Delhi International Airport Limited Vs. Airports Economic Regulatory Authority of India (AERA Appeal No. 7 of 2012)
- Delhi International Airport Limited Vs. Airports Economic Regulatory Authority of India (2022 SCC OnLine SC 850)
- Delhi International Airport Limited Vs. Airports Economic Regulatory Authority of India (AERA Appeal No. 1 of 2021)
- Union of India Vs. N. Murugesan (2022 2 SCC 25)
- Mohinder Singh Gill Vs. Chief Election Commr. (1978 1 SCC 405)
- Bhavnagar University v. Palitana Sugar Mill (P) Ltd., 2003 2 SCC 111
- Clariant International Ltd. Vs. SEBI, 2004 8 SCC 524
- State of Gujarat Vs. Shri Ambica Mills Ltd., 1974 4 SCC 656
- U.P. Power Corpn. Ltd. Vs. Ayodhya Prasad Mishra, 2008 10 SCC 139
- Onkar Lal Bajaj Vs. Union of India, 2003 2 SCC 673
- GMR Hyderabad International Airport Limited Vs. Airports Economic Regulatory Authority of India, AERA Appeal No. 4 of 2021.

27. In the facts, reasons & judicial pronouncements, it is submitted by the counsel for MIAL that the impugned order dated 06.06.2016 (Annexure A-1) deserves to be quashed and set aside.

ARGUMENTS CANVASED BY APPELLANT – HIAL

28. Learned Counsel Mr. Milanka Choudhary on behalf of HIAL has adopted the arguments canvassed by counsels for DIAL and MIAL and has submitted that AERA has no power, jurisdiction and authority to put cap upon capital expenditure for the terminal building at Rs.65,000/- per sq. mtr. and Rs.4,700/- per sq. mtr. for runway/taxi way/apron. He has also placed reliance upon Section 13(1)(a)(i) of AERA Act, 2008 and has pointed out that the actual cost incurred should be verified with the help of the certificate given by Chartered Accountants and on the basis of the audited accounts and on the basis of this verified capital cost incurred, tariff should have been determined. This preset and prefixed or predetermined or cap on capital expenditure based on Cochin airport as mentioned in the impugned order is absolutely arbitrary and violative of provisions of AERA Act and runs contrary to the agreement of OMDA (Annexure A-3) and SSA (Annexure A-4) and, therefore, the impugned

order deserves to quashed and set aside.

ARGUMENTS CANVASSED BY RESPONDENT - AERA

29. Learned Senior Counsel Mr. Prashanto Chandra Sen on behalf of AERA has argued that AERA has power to regulate and determine the tariff under the provisions of AERA Act. Learned Senior Counsel for AERA has placed reliance on Section 13 of AERA Act, 2008. It is also submitted by Ld. Counsel that under Section 15 of the AERA Act, AERA is empower to issue such directions as it may consider necessary for the purpose of discharging of its functions under the AERA Act. Thus, the impugned order has been passed under Section 13 to be read with Section 15 of the AERA Act.

30. It is further submitted by Learned Senior Counsel Mr. Prashanto Chandra Sen on behalf of AERA that vide the impugned order, AERA has provided certain benchmarks for determining capital cost expenditure in relation to airports.

31. It is further submitted by Learned Senior Counsel Mr. Prashanto Chandra Sen on behalf of AERA that AERA has reviewed expenditures made by the respective Airport Operators and, whenever necessary, satisfied itself regarding its reasonableness through independent

evaluation by technical and financial consultation. It came to the attention of AERA that there is a steep increase in the cost of building, airport facilities and the report has been released alleging cost escalation/gold plating in the cost incurred by the Airport Operators which leads to a larger Return Asset Base (RAB) on which fair rate of return is calculated. Increase in capital cost also leads to higher depreciation cost as well as operational and maintenance expenditure of asset so created which ultimately leads to higher tariff for airport services which has to be passed on to the stakeholders. To avoid this situation, the impugned order has been passed by AERA dated 06.06.2016.

32. It is also submitted by Learned Senior Counsel on behalf of AERA that the benchmarking is a part of regulatory functions of AERA. This benchmarking of cost on "Tentative Basis" for the ceiling cost of terminal building, runway/taxiway/apron for the airports while evaluating the tariff proposal to the same is not the final determination of capital cost.

33. It is also submitted by Learned Senior Counsel on behalf of AERA that the impugned order in no way prohibits either the Airport Operator

to seek a higher capital cost nor does it prohibit AERA in allowing higher cost.

34. It is further submitted by Learned Senior Counsel on behalf of AERA that the impugned order provides for greater transparency in decision making process. AERA being a regulator has to examine the capital expenditure proposed or incurred and if excessive investment is made without requirements of the asset, the same has to be curtailed by AERA.

35. It is also submitted by Learned Senior Counsel on behalf of AERA that under Section 13(1)(a)(iv) of AERA Act, AERA has to consider economic and viable operation of Major Airports while determining tariff, therefore, AERA issued impugned order to encourage economic efficiency to ensure that only efficient capital cost shall be considered for determination of aeronautical tariff to avoid any undue burden upon stakeholders.

36. Learned Senior Counsel on behalf of AERA has placed reliance upon the following decisions:

- Ayaubkhan Noorkhan Pathan Vs. State of Maharashtra (2013 4 SCC 465)

- Airports Economic Regulatory Authority of India Vs. Delhi International Airport Limited & Ors. (Civil Appeal Nos. 3098-3099 of 2023)
- Cellular Operators Assn. of India Vs. TRAI (2016 7 SCC 703)
- U.P. Coop. Cane Unions Federations Vs. West I.P. Sugar Mills Assn. (2004 5 SCC 430)
- A.P. Power Coordination Committee Vs. Lanco Kondapalli Power Limited & Ors. (2016 3 SCC 468)
- BSNL Vs. Telecom Regulatory Authority of India (2014 3 SCC 222)
- K Ramanathan Vs. State of Tamil Nadu (1985 2 SCC 116)
- Sidhartha Sarawgi Vs. Kolkata Port (2014 16 SCC 248)

37. In view of the aforesaid submissions, it is contended by Learned Senior Counsel on behalf of AERA that no error has been committed by AERA while passing the impugned order dated 06.06.2016 (Annexure A-1) which is in consonance with the provisions of AERA Act, 2008.

REASONS AND ANALYSIS

38. In the group of aforesaid four AERA Appeals, we have treated **AERA Appeal No.4 of 2016** as the lead matter for the reference of Annexures annexed with the petition and with the reply and rejoinder affidavits. **AERA Appeal No.4 of 2016** has been preferred by Delhi International Airport Limited (DIAL). The issues involved in these AERA Appeals are common.

39. The appellants are Airport Operators and they are operating at Delhi, Mumbai, Hyderabad and Bengaluru Airports. The appellant companies have been incorporated under the Companies Act, 1956 and is engaged inter-alia in operating, maintaining, developing, designing, constructing, upgrading, modernizing and managing IGI Airport and Chhatrapati Shivaji Maharaj International Airport (CSMIA), Hyderabad International Airport and Bengaluru International Airport. Airports Economic Regulatory Authority of India (AERA) is a statutory body constituted under the Airport Economic Regulatory Authority of India Act, 2008 and is empowered to determine tariff for aeronautical services at Major Airports. AERA is entrusted with the function of determination of tariff under **Section 13(1)(a) of the AERA Act,**

2008. The airports of the country which are also an indicator of the level of progress and development of a nation in public and national interest, needed modernization, development and upgradation entailing huge amount of investment. For the purpose of augmenting the airport infrastructure in the country, the Government of India came out with Airport Infrastructure Policy, 1997. The highlight of the said policy was introduction of private capital and management skills for the development, modernization and operation of airports. The policy sought to achieve upgradation and operation of major airports under the PPP (Public-Private Partnership) model.

40. Airports Authority of India Act, 1994 (hereinafter referred to as AAI Act, 1994 for the sake of brevity) was amended to enable setting up of private airports and leasing of existing airports to Private Operators. Therefore, notice inviting tenders was published and in pursuance of bidding process, appellants were selected and filing agreements, amounts, amongst others were included.

(a) Operations, Management and Development Agreement dated 04.04.2006 between the Appellant and the AAI/Respondent No. 3 (hereinafter referred to as '**OMDA**') whereby the AAI/ Respondent

No. 3 granted to MIAL the exclusive right and authority to undertake the functions of operations, maintenance, development, design, construction, upgradation, modernising, finance and management of the CSMIA.

(b) The State Support Agreement (hereinafter referred to as '**SSA**') dated **26.04.2006** between the President of India, acting through MoCA/ Respondent No. 2 and the Appellant.

41. OMDA is annexed as (**Annexure A-3**) and **SSA** is annexed as (**Annexure A-4**) to the memo of **AERA Appeal No.4 of 2016**.

42. By virtue of **OMDA**, the appellant has been granted exclusive right to determine, demand, calculate, retain and appropriate charges from the users of IGI Airport. It has also been mentioned in OMDA that charges to be levied for aeronautical services (aeronautical charges) shall be determined as per provisions of SSA.

43. SSA inter-alia provides the principles and methodology for the determination of tariff for the aeronautical services at IGI Airport. Schedule -1 thereof lays down the principles which are to be followed while fixing aeronautical charges.

44. Counsels for both the sides have referred Clauses of OMDA as well as SSA. The AERA Act was enacted to create an atmosphere of certainty in the economic regulation of major airports to provide encouragement to private sector and attract investment to meet the emergent needs of the Airport sector. **Section 13(1)(a) of the AERA Act** *inter alia* provides that while fixing tariffs for aeronautical services for major airports, the AERA/Respondent No.1 shall take into consideration:

- (i) the capital expenditure **incurred** and timely Investment in improvement of airport facilities;
- (ii) the service provided, its quality and other relevant factors;
- (iii) the cost for improving efficiency;
- (iv) economic and viable operation of major airports;
- (v) Revenue received from services other than the aeronautical services;
- (vi) the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise;
- (vii) any other factor which may be relevant for the purposes of this Act:

Provided that different tariff structures may be determined for different airports having regard to all or any of the above

considerations specified at sub-clause (i) to (vii)”

Further, Section 13(4) of the AERA Act also provides that while exercising its powers and discharging its functions, the AERA/ Respondent No.1 shall ensure transparency:

- “(a) by holding due consultations with all stake-holders with the airport;
- (b) by allowing all stake-holders to make their submissions to the authority; and
- (c) by making all decisions of the authority fully documented and explained.”

Therefore, reading the objects of the AERA Act together with the functions of AERA/ Respondent No. 1 under the said Act, it is clear that AERA/ Respondent No. 1 has the fundamental role to fix the aeronautical tariff and in doing so, it has to take into consideration the “capital expenditure incurred and timely investment in the improvement of airport facilities” besides other consideration including the “concession offered by the Central Government” under the OMDA and SSA. Further, all decisions of

AERA/Respondent No. 1 are to be fully documented and explained.

45. AERA issued Consultation Paper on 12.06.2014 in the matter of Normative Approach to Building Block in economic regulation of Delhi Airport. The Consultation Paper set out its final proposal for the purpose of inviting responses being **Proposal No.5** regarding norms for capital cost which reads as under:

“a. The Authority expects that while finalizing the scope of future capital works the Airport Operator would abide by the indicated norms. As illustration,

- i. IMG Norms for Terminal Building (for eg., 25 sq. mts per passenger for integrated Terminal Building)
- ii. Design criteria for Runway / Taxiway/Apron (Airside works) as may be available in published literature on the subject (ICAO Documents, DGCA CARs as may be applicable)

b. The Authority proposes to consider capital costs of terminal building at a ceiling cost of Rs. 65,000 per square meter or actuals whichever is lower.

c. The Authority proposes to consider capital costs of Runway/Taxiway/ Apron at a ceiling cost of Rs. 7,000 per square meter or actuals whichever is lower (excluding earthwork upto the sub grade level). The expenditure on the earthwork will be carried out as per the CPWD methodology.

d. The Authority proposes to consider the capital costs of other works based on a publicly available standard like the CPWD methodology (for Scheduled items CPWD schedule rates and for Market Items proper market rate analysis in line with CPWD framework and methodology)."

Copy of the Consultation Paper No. 05/2014-15 dated 12.06.2014 is annexed and marked as **Annexure-A5.**"

46. Thereafter, the impugned order was passed on 6.6.2016 in exercise of the powers conferred in **Section 13(1)(a) of AERA Act, 2008.**

Paragraph 11 of the said order which is impugned order (Annexure A-1) reads as under:

"ORDER

11. Thus the Authority, in exercise of powers conferred by Section

13(1)(a) of the Airports Economic Regulatory Authority of India Act, 2008, hereby orders that

- i Pending finalisation of a norm in this regard after going through a more rigorous process, the tentative ceiling cost of Rs.65000/- per sqm of the terminal building and Rs. 4700/- per sqm for the Runway/taxiway/Apron (excluding earthwork upto sub grade level) is approved as a reasonable benchmark for evaluating capital costs to be incurred by Airport Operators of major airports for the purpose of tariff determination on a tentative basis.
- ii The airport operators are advised to relook at the costs proposed in their submissions and justify the increase, if any, over and above the ceiling rates as indicated above.
- iii The Airport operators are expected to evaluate the costs in adoption of various alternatives finishes and the corresponding benefits that accrue to users in case of adoption of such alternative higher specifications.
- iv In case the rates are higher than the ceiling rate approved by the Authority, the justifications, so submitted by the airport operators on actual incurrence of the cost shall be examined by a duly

constituted Committee of experts to be constituted by Authority and based on their recommendations the final costs will be adopted.

These ceiling rates shall apply only in case of new projects where the works are yet to be awarded. In case of awarded projects, the capital costs will need to be examined by the committee approved for the purpose.”

47. The aforesaid order is under challenge in all these AERA Appeals. AERA lacks jurisdiction to set pre-emptory ceiling on capital expenditure under **Section 13(1)(a) of the AERA Act, 2008.**

48. It is argued at length by learned Senior Counsel Mr. Ramji Srinivasan on behalf of DIAL as well as learned Senior Counsel Mr. Sajan Poovayya on behalf of MIAL that AERA has no power or jurisdiction under Section 13(1) of AERA Act, 2008 to prescribe the Normative Approach to Building Block in economic regulation of Major Airports and fixing tentative ceiling for capital cost. This contention is denied by learned counsel appearing for AERA. For the ready reference, **Section 13(1)(a) of AERA Act, 2008** reads as under:

“(1) The Authority shall perform the following functions in respect

of major airports, namely: —

(a) **to determine the tariff** for the aeronautical services taking into consideration”

(i) **the capital expenditure incurred** and timely investment in improvement of airport facilities.

(ii) the service provided, its quality and other relevant factors.

(iii) the cost for improving efficiency.

(iv) economic and viable operation of major airports.

(v) revenue received from services other than the aeronautical services.

(vi) the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise.

(vii) any other factor which may be relevant for the purposes of this Act.

Provided that different tariff structures may be determined for different airports having regard to all or any of the above-considerations specified at sub-clauses (i) to (vii).”

[**Emphasis Supplied**]

49. In view of the aforesaid provisions of AERA Act, 2008, AERA shall determine the tariff for aeronautical services taking into consideration “the Capital Expenditure incurred”, meaning thereby to, AERA has to verify the Capital Expenditure incurred and if it’s found to be true, it has to be considered while determining the tariff for aeronautical services. The verification will be based upon Chartered Accountant’s certificates with the help of audited balance sheets etc.

50. AERA has no power, jurisdiction and authority to review the “capital expenditure to be incurred”. AERA has no power to suggest its own cost of capital expenditure. Similarly, AERA is not empowered to determine the specifications of materials which have to be used while undertaking the capital work. AERA cannot review the capital expenditure to be incurred.

51. The determination of aeronautical charges envisaged in AERA Act must be based on the “capital expenditure incurred” by the Airport Operator during that particular period.

52. Looking to the impugned order (**Annexure A-1**) passed under **Section 13(1)(a) of AERA Act, 2008**, pre-emptory exercise to fix

capital expenditure is not tariff determination exercise contemplated by Section 13(1)(a) of AERA Act, 2008.

53. AERA cannot determine the tariff by referring to Normative Benchmarks set through a separate order like the impugned order (Annexure A-1).

54. AERA must act within the confines of AERA Act and cannot assume powers which are not conferred by the AERA Act, 2008.

55. Looking to the impugned order dated 06.06.2016 (**Annexure A-1**), it is in violation of **Section 13(1)(a) of AERA Act, 2008**, because AERA does not have the power to regulate or cap the capital expenditure because under Section 13(1)(a) of AERA Act, 2008, AERA has to consider capital expenditure from the perspective of “**cost incurred**”. Thus, actual cost incurred has to be appreciated by AERA for determination of tariff and not pre-emptory ceiling on capital expenditure as mentioned in the impugned order (**Annexure A-1**) to the memo of AERA Appeal which got considered at the time of determination of tariff. Hence, impugned order at **Annexure A-1** is in violation of **Section 13(1)(a) of AERA Act, 2008**.

56. Moreover, as per the Proviso to Section 13(1)(a) of AERA Act, 2008, there will be different tariff for different airports. However, Impugned Order adopts **"One-Size-Fits-All"** approach to determine the cost of capital which is also contrary to AERA's mandate under Section 13(1)(a) of AERA Act, 2008.

"Efficient Costs" & "Actual Costs" incurred

57. It is contended by Learned Senior Counsel for AERA that AERA has jurisdiction to consider **"Efficient Costs"** and counsels for the appellant have submitted that AERA lacks jurisdiction to consider **"Efficient Costs"** and ignore **"Actual Cost incurred"**.

58. Looking to the provisions of Section 13(1)(a) of AERA Act, 2008, AERA has to consider the "Capital Cost Incurred" and timely investment in the enforcement of the "Airport Facilities" for determination of tariff for aeronautical services, but, AERA cannot suggest its own capital cost.

59. This Hon'ble Tribunal in its judgment dated **23.04.2018** in **DIAL Vs. AERA** in **AERA Appeal No. 10 of 2012** has accepted AERA's contention that capital expenditure can be looked at, from a narrow hole based on the certificates issued by Chartered Accountants or the audited

financial statements. For the ready reference, paragraph number 88 of the judgement reads as under:

“**88.** On the other hand, on behalf of AERA, Mr. Dhir has taken a firm stand that in the task of tariff determination, the project cost can be looked at from a narrow hole, only to examine the incurred cost as per available records and see that it relates to the approved and essential parts of the Airport. According to him, this had to be done on the basis of accounts bearing certificates granted or approved by the Chartered Accountant. His clear stand is that such cost cannot be re-examined on the yardstick of efficient cost but has to be taken as the incurred cost only, as appearing in the duly certified books of accounts. This submission appears to be weighty and deserves acceptance.”

60. The aforesaid arguments were reiterated by AERA before this Hon'ble Tribunal in a subsequent appeal. It has been held by this Tribunal in its judgment dated **20.03.2020** in **DIAL Vs. AERA** in **AERA Appeal No.7 of 2012** in Paragraph No. 22 thereof which reads as under:

"22. In respect of general issues noted above and flagged by the audit reports, financial and technical, the stand of FIA that there could have been better cost control deserves to be accepted. The OMDA and SSA, by accident or by design have permitted high degree of latitude to the JVC. As a result, the exact project cost came to light much later like a fate accompli. AERA had little or no scope to examine these aspects in exercise of its limited statutory role to determine the amount of DF in respect of major Airports as per Section 13 of the AERA Act. **The capital expenditure incurred in the project is one of the factors in determination of the tariff for the aeronautical services and this exercise of determining the tariff for the First Control Period had been done by AERA in respect of the Airport. For some good reasons the appeals against the tariff order for the First Control Period have been already heard and decided by this Tribunal. During the hearing of those appeals, some of the Airlines and FIA had objected to the capital expenditure reflected by the final project cost as accepted by AERA for determining the tariff. Such**

objections were considered and ultimately the stand of AERA that the capital expenditure found to have been "incurred" in an authorized manner for the permissible purpose relating to the project of developing the Airport at Delhi should be allowed towards the project cost. This was accepted by this Tribunal in the judgment dated 23.04.2018.

[Emphasis Supplied]

61. Thus, in view of the aforesaid decisions, AERA shall take into consideration "**the capital expenditure incurred**".

62. Hon'ble the Supreme Court of India in **DIAL Vs. AERA** reported in **(2022) SCC ONLINE SC 850** has upheld the findings of this Tribunal. Paragraph no.138 of the aforesaid decision reads as under:

"**138.** AERA sought to rebut these contentions before the TDSAT. It was contended that the avowed task of determining the Project Cost could only be looked at from a narrow hole - i.e. in order to examine the incurred cost as per available records and verify whether it relates to the approved and essential parts of the

Airport. This in turn had to be taken on the basis of accounts bearing certificates granted or approved by the Chartered Accountant. **It was vehemently argued that such cost cannot be re-examined on the yardstick of efficient cost but has to be taken as the incurred cost only, as appearing in the duly certified books of accounts. The aforesaid plea of the AERA found favour with the TDSAT and was accepted.**"

[Emphasis Supplied]

63. Attempt to read the "efficiency principle" of sub-clause (iii) of Section 13(1)(a) of the AERA Act, 2008 (which relates to the cost for improving efficiency) in sub-clause (i) of Section 13(1)(a) of the AERA Act (which relates to capital expenditure incurred and timely investment in improvement of airport facilities) has been rejected in DIAL Supreme Court Judgement, wherein the Hon'ble Supreme Court observed as follows:

"148. *...Additionally, there is also some substance in what is contended by the Airport Operators that the terminology in*

Sections 13(1)(a)(i) and 13(1)(a)(iii) of the said Act cannot be read into each other. *The manner of reading of the provision by FIA is to combine sub-para (iii) with sub-para (i) while determining tariff.*

149. *In our view, the provisions have been separately made because the concept of Section 13(1)(a)(i) requires AERA to determine the tariff by including capital expenditure incurred and timely investment in improvement of airport facilities. **One of the other distinct factors to be considered is the cost of improving efficiency as under Section 13(1)(a)(iii).** These aspects have no doubt been examined by the authority concerned, although not necessarily in the manner FIA seeks them to. Does it really lie with us to superimpose a view which has not been found feasible in the given conspectus of the large number of reports and documents before the AERA as well as the TDSAT. We thus reject the contention."*

[Emphasis Supplied]

64. In view of the aforesaid decisions and the stand taken by AERA, it

appears that now AERA cannot be permitted to take contradictory stand with respect to its jurisdiction. There cannot be two different stands or contradictory stands by AERA in different appeals before this Tribunal.

65. It has been held by this Tribunal in its judgment dated 21.07.2023 in DIAL Vs. AERA in AERA Appeal No.1 of 2021 in paragraph No.165 (f) as under:

“As per Section 13 (1)(a)(i) of the AERA Act, 2008, it was a power coupled with a duty vested in AERA to determine the tariff for the aeronautical services taking into consideration, “the capital expenditure incurred and timely investment in the improvement of airport facilities” which is on “actual basis” meaning thereby, **if the actual capital expenditure is incurred by the appellant, the same has to be considered by AERA as per aforesaid provision of AERA Act and it cannot be so easily brushed and set aside by AERA under the guise of “the efficient cost.”**”

[Emphasis Supplied]

66. The very same principle has been applied by this Tribunal in

judgment dated 14.02.2024 in the case of **GMR Hyderabad International Airport Limited Vs. AERA** in **AERA Appeal No. 4 of 2021** and it has been held in paragraph no. 372, 373 and 381 as under:

“**372.** Thereafter, global tenders are being invited. Then the lowest no.1 will be chosen, and this is how the **“Market Discovered Price”** is being found out by the competitive bidding process and this **“Market Discovered Price”** for the construction in question cannot be so easily brushed aside or given go by on just an opinion given by or just an estimated price of construction is given by another body/committee. As per Section 13(1)(a)(i) of AERA Act,2008, AERA has to keep in mind capital expenditure incurred.

373. In view of the aforesaid provision of Section 13(1), AERA has to appreciate **actual capital expenditure incurred** by the appellant. As per Respondent No.1, the cost which is arrived at by the global bidding process is not an efficient cost and, therefore, AERA had arrived at its own efficient cost seeking consultant’s report from RITES.

381. Looking to the Section 13(1)(a)(i) of AERA Act, 2008, **AERA cannot rely on any notional or estimated price when the actual price is available for the expansion project in question.** AERA has relied upon estimated cost for the project in question given by the consultant – RITES - appointed by AERA, ignoring the actual “Market Discovered Price” (MDP) arrived at through competitive bidding process.”

[Emphasis Supplied]

67. In view of the aforesaid decisions, it is explicitly clear that under Section 13(1)(a) of the AERA Act, AERA has to consider “**the capital expenditure incurred**” for determination of tariff for aeronautical services. AERA is not empowered to suggest its own capital costs, determine specifications of materials or regulate the capital expenditure under the guise of “efficient cost”.

68. The impugned order dated 06.06.2016 (Annexure A-1) has referred IMG Norms in paragraph 3. It has been mentioned in paragraph 3 that IMG Norms should be followed. For the ready reference, paragraph 3 of the impugned order dated 06.06.2016 (Annexure A-1) reads as under:

“3. The Authority, in its Consultation Paper No. 05/2014-15 dated 12.06.2014 in the matter of Normative Approach to Building Block in Economic Regulation of major Airports observed that Capital Expenditure of Airports depends on the scope, engineering and specifications of the facilities proposed to be created and as far as the scope for Terminal Building is concerned IMG Norms should be followed. Based on analysis of various factors and the costs submitted by Airport Operators, the Authority proposed that it would take into account allowable project cost with a ceiling of Rs.65,000 per sqm or actual whichever is lower for the purposes of Regulatory Asset Base (RAB). Similarly, the Authority proposed to consider capital Cost of Runway/Taxiway/Apron at a ceiling cost of Rs.7,000 per sqm or actuals whichever is lower (excluding earthwork up-to the subgrade level.”

69. In view of the aforesaid impugned order, it appears that IMG Norms have been relied upon by AERA while passing the impugned order. These **IMG Norms** are at **Annexure A-7** to the memo of AERA Appeal No.4 of 2016. It has been mentioned in the preface of the IMG Norms report as under:

“For rationalizing the capital costs of airport expansion and at the same time providing world-class services, it was felt that norms and standards may be evolved and adopted so as to serve as a guideline for formulating projects and for appraising and approving the same.

With a view to recommending norms and standards for determining the terminal capacity of airports, the Empowered Sub-Committee of the Committee on Infrastructure (ESCOI) chaired by Deputy Chairman, Planning Commission, constituted an Inter-Ministerial Group (IMG) under the chairmanship of Secretary, Ministry of Civil Aviation. The IMG submitted its recommendations that were considered and accepted by ESCOI in its meeting held on April 13, 2009.

The norms and standards specified in the Report of the IMG are expected to serve as a guideline for formulation and implementation of projects by AAI with a view to ensuring a judicious use of resources as also to ensure that airports of different categories follow uniform norms and standards across the country and are built to world-

class standards.”

[Emphasis Supplied]

70. As per paragraph 3, there are certain recommendations in the IMG Norms report and **Paragraph – G** thereof reads as under:

“G. Airports developed through Public Private Partnerships

In the case of airports developed through Public Private Partnerships, the project authorities may adopt a **case-by-case approach** with respect to norms relating to unit area and unit costs. **Based on the judicious consideration of international best practices** and financial viability, the norms may be specified in each case **prior to inviting bids for private participation.**”

[Emphasis Supplied]

71. In view of the aforesaid **paragraph–G of IMG Norms** recommendations, it is not applicable to **PPP Airports** which are governed by their own specifications and standards as mentioned in **OMDA (Annexure A-3)** to be read with **SSA (Annexure A-4)**. The

Report recognizes that cost of construction is dependent on various variables including the location. Therefore, cost of construction must be benchmarked across projects being implemented with similar planning horizon for AAI Airports. The IMG Norms recommend that unit **cost of construction for PPP Airports should be decided on a case-to-case basis and there cannot be a benchmarking exercise for new developments and that the benchmarking should be set prior to inviting bids for the airport.** The Impugned Order subjects DIAL to IMG Norms even though the IMG Norms itself acknowledge that the same are wholly inapplicable to PPP Airports and the bidding process of IGI Airport did not propose any Unit Costs for assets.

72. Moreover, as per the aforesaid paragraph-G which is the recommendation by IMG Norms, it has been categorically mentioned that these norms may be specified in each case prior to inviting bids for private participation.

73. In the facts of the present case, the bidding process was completed before these IMG Norms were prescribed and, therefore, the IMG Norms of Rs.65,000/- and Rs.4,700/- for terminal building and for runway/taxi way/apron was never mentioned in the notice inviting tenders for IGI

Airport nor it was mentioned in the bids for CSMIA Airport, Mumbai, and airport at Hyderabad and the airport at Bengaluru. It is not even the case of AERA that these norms were already mentioned in the bids or in the notice inviting tenders whereby these private airport operators were selected for operating the airports.

74. Thus, IMG Norms are not applicable to the appellants.

75. Learned Senior Counsel appearing for the appellants have pointed out that AERA has done exactly opposite to what is prescribed in IMG Norms for Airports operated by AAI. These IMG Norms should not be made applicable to PPP Airports and the norms should be mentioned in the notice inviting tenders for private participation, but, AERA has done exactly opposite to these recommendations meaning thereby to that these norms are not applied to AAI Airports and is made applicable to Airports developed through Public Private Partnership.

76. Learned Senior Counsels appearing for the appellants have pointed out that Chennai Airport (which is an AAI Airport) was permitted Rs.1 Lakh per sq. mtr. cost in the Second Control Period order dated 16.04.2018. **Similarly**, for Patna Airport (which is also an AAI Airport)

Rs.1 Lakh per sq. mtr. cost was allowed while passing the First Control Period order in October, 2019.

77. In a zig-zag manner and in a whimsical manner, sometimes AERA has followed IMG Norms and sometimes they have not followed IMG Norms for the very same airports even after the IMG Norms report was given.

78. IMG Norms report is of 2009, and thereafter for several years in different tariff orders for different control periods, the actual cost incurred was considered and not the normative cost which is prescribed at Rs.65,000/- and Rs.4,700/- as stated hereinabove. This type of zig-zag approach of AERA is hereby deprecated. In case of MIAL, while passing the tariff order for first control period in the year 2013, IMG Norms/report was not applied by AERA. **Similarly**, while passing the tariff order for second control period also, AERA has not followed IMG report/norms. First control period is from 1.4.2009 to 31.3.2014 and Second Control Period is 1.04.2014 to 31.3.2019.

79. Thus, for the aforesaid period of one decade, IMG Norms/report were ignored and the actual expenditure was allowed because of

Clause-G of the recommendations given in the IMG Norms/report which is already quoted hereinabove in the earlier paragraphs.

80. It ought to be kept in mind by AERA that all airports are different. IMG Norms report was not circulated to these appellants – private airport operators, nor AERA has taken any input from these appellants - private airport operators. Thus, there is violation of principles of natural justice while passing the impugned order, because the documents which are relied upon by AERA were not supplied to the stakeholders.

81. In the case of DIAL, AERA has passed an order determining aeronautical tariff for **First Control Period i.e. 1.4.2009 to 31.3.2014.** Though IMG Norms were available from 2009 onwards, AERA has followed Clause-G of the recommendations of IMG Norms and has determined tariff on the basis of capital expenditure incurred by DIAL and referred to provisions of SSA and not the IMG Norms.

82. Thus, in view of the aforesaid facts and reasons and looking to the recommendations of the IMG report/norms (Annexure A-5) especially as per "**Clause – G**" thereof, the IMG Norms are not applicable to these appellants and AERA has to consider capital expenditure incurred while

determining tariff for the aeronautical services as per Section 13(1)(a) of the AERA Act, 2008.

83. As per Section 13(1)(a)(vi), the concession granted by the Central Government has to be considered while determining tariff for aeronautical services. The concession offered by the Central Government means the two agreements which have been referred hereinabove as OMDA (Annexure A-3) and SSA (Annexure A-4). OMDA is an agreement entered into between Airports Authority of India (AAI) and DIAL on 4.4.2006 (Annexure A-3). SSA is a contract entered into between Hon'ble the President of India and DIAL dated 26.4.2006 (Annexure A-4).

84. Looking to the impugned order dated 6.6.2016, it appears that various clauses of OMDA and various clauses of Schedule-1 of SSA have not been followed or even ignored. AERA cannot ignore OMDA and SSA. The OMDA executed by DIAL clearly stipulates that DIAL would be governed by the provisions of SSA and other Project Agreements for the development of the IGI Airport facility. At the time of IGI Airport's privatization, it was envisioned that the facility should meet world-class standards for major international airports, offering high-

quality services to all users and should be at par with the top five international airports in the Asian region of similar scale and size.

85. When ceiling cost is applied by the impugned order, AERA has transgressed into the domain of airport design and specifications. AERA has ignored the standards and specifications for design and development of the IGI Airport under the OMDA and SSA and DIAL's obligation to undertake capital-intensive development works to meet such standards. **AERA cannot pre-suppose the cost to be incurred without considering the specifications and standards to be built, developed and maintained by the airport operators governed by the PPP model and it ought to have considered the provisions of OMDA.**

86. Clause 8.1 (i) of OMDA, Clause 9.1 of OMDA, Article 8.3.1 of OMDA, Clause 8.3.5, Clause 8.3.3, Clause 8.3.7 and Clause 9 of OMDA have categorically mentioned that DIAL has to operate, maintain, develop, design, construct, upgrade, modernize and manage the IGI Airport to meet the requirements of world-class airports in accordance with Good Industry Practice and development standards and requirements (set out

in Schedule-1 of OMDA) and operations and maintenance standards and requirements set out in Schedule-2 of OMDA.

87. The master plan prepared by DIAL for the development of entire airport is for 20 years and is submitted to Ministry of Civil Aviation (MoCA) for review and comments and to AAI for its information as per Clause 8.3.1 and as per Clause 8.3.5 of OMDA. The master plan is consistent with the quality and service performance standards as per OMDA and SSA. Schedule-1 of OMDA is based on specific Development Planning Principles.

88. Thus, in view of the aforesaid provisions of OMDA and SSA, which are agreements as stated hereinabove, OMDA between AAI and Airport Operator, and SSA is between Hon'ble the President of India and Airport Operator, are bound to be followed scrupulously.

89. Thus, if those standards and norms of construction are to be maintained, then the cost incurred should be considered by AERA as per Section 13(1)(a)(i) while determining tariff for aeronautical services.

90. If the impugned order dated 6.6.2016 (Annexure A-1) is allowed to be followed by AERA then it will create a great anomaly **because** norms

and standards of construction of terminal building as well as runway/taxi way/apron etc. will be as per OMDA and SSA whereby the norms for world-class airports are to be followed, but, the capping or ceiling cost will be as per the impugned order. These two contradictory things cannot go together and, therefore, the words **“the capital expenditure incurred”** have been used in Section 13(1)(a)(i) and this capital expenditure incurred has to be taken into consideration while determining tariff for aeronautical services. If this impugned order is held as a valid one and this cost of Rs.65,000/- per sq. mtr. & Rs.4,700/- per sq. mtr. are allowed, then the quality and specification norms for construction will have to be deviated.

91. A thing which cannot be done directly, cannot be done indirectly. AERA cannot change the norms, specifications and standards for building, development and maintenance of airports which are governed by Public Private Partnership Operators.

92. By virtue of the impugned order, if the ceiling is applied to the capital expenditure, it will have a direct nexus and effect upon the specifications and standards of building, development and maintenance of the airports. OMDA and SSA are fixing the specifications and

standards of construction and these agreements have never put a cap upon the capital expenditure and, therefore, by virtue of the impugned order, SSA and OMDA cannot be altered or amended by AERA. On the contrary, AERA is bound to follow the concessions offered by the Central Government as per Section 13(1)(a)(vi) of AERA Act, 2008. The concession granted by the Central Government means OMDA and SSA agreements which are at Annexure A-3 and Annexure A-4 to the memo of AERA Appeal No.4 of 2016.

93. If Schedule -1 of OMDA is to be followed, then for runway/taxi way/apron the design of **ICAO Code-F standards** are to be maintained. The terminal buildings are to be designed as per the **IATA level** of service standards. This Schedule-1 of OMDA gives specific development planning principles and as per these principles, the development is to be carried out of the airport by the Private Airport Operators – these appellants. The Master Plan is submitted to MoCA for review and comments and also given to AAI.

94. These standards of construction have to be maintained on “**actual cost incurred**” for terminal buildings and “**actual cost incurred**” for runway/taxi way/apron is to be considered by AERA and not the pre-

supposed cost as fixed by AERA in the impugned order is required to be followed by Public Private Partnership (PPP) Airport Operators – these appellants. “The cost is pre-fixed by AERA” by the impugned order and “the standards are fixed under OMDA to be read with SSA”. This cannot go together. The impugned order cannot rewrite OMDA and SSA nor can it alter any of the Clauses of OMDA and SSA nor the impugned order has any overriding effect upon the two agreements namely OMDA and SSA which is entered into between these appellants and AAI as well as between appellants and Hon’ble the President of India respectively. What is agreed by Hon’ble the President of India is to be followed which is in the form of SSA. **Nobody can be wiser than the parties to the agreements** (the parties to the agreements are appellants, AAI and the President of India). On the contrary, as per Section 13(1)(a)(vi) of AERA Act, 2008, concession offered by the Central Government in any agreement or memorandum of understanding has to be taken into consideration while deciding tariff for aeronautical services. This concession offered by the Central Government means OMDA and SSA which are at Annexure A-3 and Annexure A-4.

95. Thus, in view of the aforesaid facts and interpretation, Section

13(1)(a) of AERA Act, 2008, AERA cannot ignore the concession granted by the Central Government. In the facts of the present case, AERA by the impugned order has ignored OMDA and SSA which is in gross violation of Section 13(1)(a)(vi) of AERA, 2008.

96. Thus, under the SSA, AERA is mandated to accept the Master Plan and Major Development Plan and AERA cannot question nor change the approach to development if it is consistent with the Master Plan and Major Development Plan [Clause 8 of Schedule I of the SSA]. However, AERA by passing the Impugned Order is not only questioning/refusing to accept the Master Plan but is also dictating the manner of development of IGI Airport by way of the Impugned Order. As such, the Impugned Order is in breach of the SSA, which in turn is a breach of Section 13(1)(a)(vi) of the AERA Act, 2008.

97. Moreover, the Impugned Order ignores DIAL's obligation to follow the IATA Airport Development Reference Manual for development and designing of facilities at IGI Airport [Schedule 1]. It is impermissible for AERA to alter the contractual obligations or direct DIAL to deviate from standards set out in the OMDA through its orders. Rather, in discharge

of its functions, AERA is mandated to honor and respect the concessions and contractual obligations of DIAL.

98. Looking to the impugned order dated 6.6.2016 (**Annexure A-1**), AERA has failed to consider that the need of setting cost ceiling for assessing efficiency does not arise in the case of these appellants because OMDA itself contains mechanism to ensure efficiency of costs.

99. Clause 8.5.7 (i)(c)(aa) of OMDA mandates DIAL to go for competitive bidding procedure in the field of public works and contracts whose value exceeds Rs.50 Crores in the competitive bidding process & thus **“market discovered prices”** will be derived. This **“market driven price”** has been held as a real and efficient capital expenditure by the judgment of this Tribunal dated 21.07.2023 in **AERA Appeal No.1 of 2021** which stated that the cost which is arrived at for phase 3A expansion for IGI Airport, Delhi through global bids invited is giving real and efficient cost. It is a market discovered price through competitive and transparent bidding process.

100. In view of the aforesaid decision and the clauses of OMDA, the bids are driven by market forces and consequently competitive, and

therefore resorting to normative approach in determining the price should have been avoided by AERA by the impugned order. Thus, it is not open for AERA to prescribe its own cost, stamping the same, as reasonable cost of development of airports.

101. Thus, the impugned order dated 6.6.2016 (**Annexure A-1**) undermines the vested rights and obligations of these appellants under OMDA and SSA and the impugned order is also in violation of Section 13(1)(a)(vi) of AERA Act, 2008 and the judgments delivered by this Tribunal as well as by Hon'ble the Supreme Court of India in DIAL Vs. AERA reported in:

(i) DIAL Vs. AERA (2022) SCC online 850 (paragraph nos. 19 and 20 thereof)

(ii) AERA Appeal No.6 of 2012 dated 23.4.2018 (paragraph nos. 31 and 36 thereof)

(iii) AERA Appeal No.7 of 2012 dated 13.1.2023 (paragraph nos. 13.2, 13.5 and 13.6 and 15.1 to 15.6)

102. Looking to the impugned order dated 6.6.2016 (**Annexure A-1**),

AERA's "**one-size fits all**" approach is arbitrary and contrary to the Proviso to Section 13(1)(a) of the AERA Act, 2008. As per the Proviso to Section 13(1)(a) of AERA Act, 2008, there will be different tariffs for different airports.

103. It ought to be kept in mind that the airports which are operated under PPP model like IGI Airport, Delhi, CSMIA Airport, Mumbai, Hyderabad International Airport and Bengaluru International Airport are governed by their respective Concession Agreements, with varied terms and conditions. If uniform standard is set up for every Airport, it will be in violation of Concession Agreement as well as in violation of AERA Act, 2008. The provisions of the AERA Act, 2008 need to be interpreted in the background of Concession Agreements which are OMDA (Annexure A-3) and SSA (Annexure A-4).

104. Table-5 of the Consultation Paper (Annexure A-5) refers to a comparison of cost for passenger terminal building at various major airports in India. Table-5 from the Consultation Paper reads as under:

“Table 5: Comparison of costs for passenger terminal development at major Indian airports

S No.	Airport	Newly constructed/ Proposed Terminal Building area (Sq mts)	Cost of Newly constructed/ proposed Terminal Building (INR crore)	Cost per Sq.mt of Newly Constructed/ proposed Terminal Building (INR)
1.	IGI Airport, New Delhi - Terminal 3 & Associated Buildings	533,887	6,836	123,419
2	Bangalore – Terminal 1 expansion	85,000	1,235.2	145,318
3	Chennai – New Integrated Dom & International Terminal Building	133,142	1,547	116,156
4	Mumbai - New Terminal (T2), MLCP and Access roads	439,512	5,083	115,650
5	NSCBIA, Kolkata – New Integrated Terminal Building	198,692	1,553	78,167
6	Trivandrum – New Integrated Terminal Building *	23,000	289	125,652
7	Cochin – New terminal proposed	150,000	650	43,333
8	Guwahati Terminal Building **	2,005	26.83	133,815
9.	Lucknow	20,000	123.4	61,700
<p>* In case of Trivandrum the scope includes apron, taxiway, open car park etc. ** In case of Guwahati the scope includes not only expansion (2005 sq. mtrs.) of the Terminal Building but also modification of existing Terminal Building (14395 Sq. mtrs.) in terms of segregation of domestic and International passengers. Hence, the expenditure incurred is not only for the expanded area of 2005 sq. mtrs. and therefore the cost per Sq. mtrs. in case of Guwahati is not representative of the Construction of a new terminal building.”</p>				

105. Similarly, Table-6 which is a part of the Consultation Paper reflects

the comparison of costs of several International Airports. Table-6 of the Consultation Paper published by AERA reads as under:

“Table 6: Comparison of costs for passenger terminal development at some international airports

Overall Cost Parameters	BKK - Bangkok	KUL – Kula Lumpur	PEK - Beijing	LHR - London	MAD - Madrid	IGIA, New Delhi	Revised Estimate CSIA Mumbai
Terminal Design Capacity (mppa)	45	25	43	28	42	34	40
Floor Area (in Sq. mts.)	563000	479404	900000	353020	757000	553887	439512
Total Actual Cost (in Million US\$)	2800	1600	3800	4100	2948.2	1367.2	1129.55
Actual Cost per mppa (in Million US\$)	62.22	64.00	88.37	146.43	70.20	40.21	28.24
Actual Cost /m2 of GFA (in US\$)	4973.36	3337.48	4222.22	11614.07	3894.58	2468.37	2570.01
Actual Cost /m2 of GFA (in INR)*	298401.4	200248.8	253333	696844	233674	148102	154200

Terminal Costs in US \$ (Conversion factor: 1 US \$ = INR 45)

Source EIL - Verification of Project Cost Report (DIAL / MIAL)

Conversion: 1 UD \$ equals INR 60”

106. Despite the aforesaid comparative costs available, AERA had considered the cost of Cochin Airport which has the lowest cost. It is

evident from the aforesaid tables especially within India that there are several terminal buildings of AAI Airports at Chennai, Kolkata, Trivandrum and Guwahati. The cost of terminal building per sqr. mtr. is at **Rs.1,16,156/-**, **Rs.78,167/-**, **Rs.1,25,652/-**, **Rs.1,33,815/-** respectively which exceeds the benchmark of Rs.65,000/- as proposed by AERA.

107. Thus, AERA has chosen Cochin Airport as a benchmark & the cost at Trivandrum Airport (which is approximately only 250 Kms. away from Cochin Airport) is at Rs.1,25,652/-.

108. Clause -11 of OMDA (Annexure A-3) reads as under:

“In respect of quality standards with regard to any facility at the Airport, the benchmarking will be the prevailing quality standards as observed in the top five international airports in the Asian region (as ranked on AETRA or analogous rating) of a similar scale and size.”

[Emphasis Supplied]

109. In view of Clause-11 of OMDA, DIAL is obliged to build, operate and maintain the IGI Airport at the same standard as that of **“the five**

best airports in Asian region of a similar scale and size”.

110. Thus, AERA has failed to appreciate Clause-11 of OMDA while passing the impugned order. DIAL is obliged to build, operate and maintain the IGI Airport at the same standard as that of **“the five best airports in Asian region of a similar scale and size”.**

111. Thus, DIAL is neither obliged to build, operate and maintain its airports as per Cochin Airport. If the specifications and cost of CIAL (which is not governed by any specific obligations to build operate and maintain its airport as per international standards) is considered against the specification and obligations of DIAL to build, operate and maintain IGI Airport at international standards, the cost incurred by DIAL might appear to be higher. However, DIAL cannot be penalized by AERA for complying with its obligations under the OMDA which requires it to build operate, maintain and develop IGI Airport at international standards. On the contrary, DIAL is liable to pay liquidated damages to AAI if the standards of IGI Airport are below the Development Standards and Requirements set out in the OMDA.

112. The liquidated damages is to be paid as per Clause 9.1.4 (c) of

OMDA (Annexure A-3). For ready reference, Clause 9.1.4 (c) of OMDA is as follows:

“(c) Default

- (i) If after the review of such reports furnished by the JVC and independent verification carried out by the Independent Engineer, the Independent Engineer certifies that a particular development under progress at the Airport (or any portion thereof) is below the respective Development Standards and Requirement, which post notification of AAI to JVC is not rectified prior to completion of that development; or
- (ii) the completion report of any development submitted by the JVC shows that the development at the Airport (or any portion thereof) is below the respective Development Standard and Requirement; or
- (iii) two consecutive quarterly reports of various developments in progress show that the Airport (or any portion thereof) is rated below the respective Development Standard and Requirement,

In respect of any of the aforesaid default, the JVC shall pay to the AAI 2.5% of the monthly Revenue (prior to default) for every month that the standards are below any of the Development Standards and Requirements as liquidated damages provided however that the total liquidated damages payable hereunder shall not exceed 15% of the monthly Revenue (prior to default).”

[Emphasis Supplied]

113. All airports cannot be classified in a single category by AERA for the purpose of setting ceiling of capital costs irrespective of their specifications and standards. Hence, this exercise of applying the same cost of terminal building to all major airports in India is unreasonable and arbitrary. Such a classification suffers from the vice of being over-inclusive, which also tantamounts to treating un-equals as equal and, therefore, the same is violative of Principles of Equality as enshrined in Article -14 of the Constitution of India.

114. Hence, also the impugned order at Annexure A-1 dated 6.6.2016 deserves to be quashed and set aside.

115. Much has been argued out by Learned Senior Counsel appearing for AERA referring to the possibility of “gold plating” by Airport Operators. It has also been mentioned in the Consultation Paper published by AERA in paragraph 7.9 of the Consultation Paper that “Feeling in some quarters that the costs of the airport need to be contained and rationalized...”.

116. In a reply filed by AERA in AERA Appeal No.4 of 2016, it has been mentioned in paragraphs 8 and 9 thereof that AERA has received “reports” regarding escalation and gold plating of project cost by Airport Operators due to over design and use of expensive finishes which necessitate the issuance of the impugned order. This contention of AERA is **not accepted** by this Tribunal mainly for the reason that:

(i) AERA has failed to bring such Reports on record in this matter.

(ii) The mere possibility of occurrence of gold plating and feeling of certain stakeholders cannot be the basis for AERA to pass the impugned order.

(iii) AERA cannot conduct a pre-determined tariff exercise in the nature of impugned order based on such extraneous and unverified “reports”.

(iv) AERA has not verified such reports and contents thereof nor it has been revealed in the Consultation Paper nor it is revealed in the impugned order nor it is revealed in the reply filed by AERA in this appeal.

(v) AERA has failed to maintain transparency and has failed to make its decision in the impugned order fully documented and explained as mandated in **Clause 13(4)** of the **AERA Act, 2008**. For the ready reference, Section 13(4) of AERA Act, 2008 reads as under:

“(4) The authority shall ensure transparency while exercising its powers and discharging its functions, inter-alia-

- (a) by holding due consultations with all stake-holders with the airport;
- (b) by allowing all stakeholders to make their submissions to the authority; and
- (c) by making all decisions of the authority fully documented and explained.”

[Emphasis Supplied]

117. As mentioned in paragraph 8 and 9 of the reply by AERA in this

appeal, it has been mentioned that AERA has received "Reports" regarding escalation and gold plating of project costs by Airport Operators. This averment is made in the reply to justify the impugned order.

118. It ought to be kept in mind that this reasoning of "report received regarding escalation and gold plating of project cost by Airport Operators" has not been mentioned at all in the impugned order. The impugned order does not refer any such report received by AERA and, therefore, the impugned order cannot be justified by giving additional reasons by subsequent affidavit. It has been held in paragraph 8 of the judgment reported in **(1978) 1 SCC 405** in case of **Mohinder Singh Gill Vs. Chief Election Commissioner:**

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention

to the observations of Bose, J. in *Gordhandas Bhanji*.

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.”

[Emphasis Supplied]

119. Thus, the reasons which are not mentioned in the impugned order, cannot be given subsequently by filing additional affidavits in the Court/Tribunal.

120. Looking to the provisions of OMDA (Annexure A-3) to be read with the provisions of SSA (Annexure A-4), the specifications and standards set out in the respective project agreements, the cost of terminal building will vary from Cochin Airport because of the difference in geographical situation of the airport in a country, due to difference in

the specifications and standards of construction, due to price difference of the raw material which is different in different parts of the country, availability and the price of the human resources is also different in different parts of the country. Merely because there is a cost difference, it cannot be presumed that there is gold plating by the Airport Operators. The cost of material as well as the cost of construction is remarkably different at Delhi from Cochin. Even specifications and standards of terminal buildings are different. All cannot be driven by the same yardstick, thus, AERA has failed to appreciate OMDA and SSA which are binding contracts, the specifications and standards of construction have already been mentioned in OMDA and SSA and it is to be approved by a Committee. Thus, the construction is not at the whims and caprice of Airport Operator, but, it is guided by OMDA and SSA and as per procedure, such construction is being approved by the Committee.

121. Learned Senior Counsel Mr. P.C. Sen on behalf of AERA submitted that the impugned order dated 6.6.2016 (Annexure A-1) is a tentative norm for a benchmark. This impugned order has not been given effect to in the case of DIAL in the tariff order issued for IGI Airport and,

therefore, DIAL is not an aggrieved person and, therefore, DIAL cannot prefer an appeal against the impugned order more particularly because AERA will review the impugned order in due course of time and, therefore, as and when final order is passed following the due process of stakeholders' consultation, DIAL will have a right to challenge this impugned order.

122. The aforesaid contention of AERA is **not accepted** by this Tribunal mainly for the reason that:

(i) The impugned order has been issued under **Section 13(1)(a) of AERA Act, 2008** and it fixes the ceiling costs that will serve as a benchmark for evaluating capital expenditure to be incurred by Airport Operators of Major Airports. Thus, impugned order directly affects the evaluation of capital expenditure to be incurred by the Airport Operator - Appellants. Hence, Airport Operators of major airports are "aggrieved persons".

(ii) There is no provision under th AERA Act, 2008 which empower AERA to set ceiling costs or benchmark costs for incurring capital expenditure.

(iii) The impugned order is passed in excess of jurisdiction of AERA and in violation of OMDA (Annexure A-3) and SSA (Annexure A-4). These agreements are bound to be considered by AERA in view of Section 13(1)(a)(vi) of AERA Act, 2008 and, therefore, Airport Operator is an "aggrieved person".

(iv) Appellants – Airport Operators have "legitimate interest" in the impugned order. By virtue of the impugned order, Financial and Operational Planning of Airport Operator is directly impacted by regulatory framework established by AERA.

(v) Airport Operators, including DIAL's right to challenge the impugned order is based on the principle that any order issued in excess of jurisdiction or imposing unjustifiable restrictions (such as arbitrary cost ceilings) affects the rights and interest of the affected party.

(vi) The impugned order is binding which can be enforced against any Airport Operator and is presenting an immediate and tangible threat to the operation and financial planning of the appellants and, therefore, the present appeal is always tenable at law at the behest of these appellants.

(vii) In third control period tariff order for DIAL, AERA had disallowed the actual capital expenditure incurred by DIAL under the guise of considering only “reasonable costs or efficient costs”. This decision was challenged by DIAL before this Tribunal and this Tribunal vide judgment and order dated **21.7.2023** in **AERA Appeal No.1 of 2021** wherein it was held that AERA has to take into account the **“actual capital expenditure incurred”** under Section 13(1)(a)(i) of the AERA Act, 2008. The aforesaid decision has been reiterated in another **AERA Appeal No.4 of 2021** by this Tribunal in its judgment dated 14.2.2024.

(viii) **Paragraph 165 (f)** of the judgment dated **21.7.2023** delivered by this Tribunal in **AERA Appeal No.1 of 2023** reads as under:

“165 (f). As per Section 13 (1)(a)(i) of the AERA Act, 2008, it was a power coupled with a duty vested in AERA to determine the tariff for the aeronautical services taking into consideration, **“the capital expenditure incurred and timely investment in the improvement of airport facilities”** which is on **“actual basis”** meaning thereby, **if the actual capital expenditure is incurred by the appellant, the same has to be considered by AERA** as per aforesaid provision of AERA Act

and it cannot be so easily brushed and set aside by AERA under the guise of “the efficient cost”;

[**Emphasis Supplied**]

(ix) It has been held by this Tribunal in **AERA Appeal No.4 of 2021** in its judgment dated **14.2.2024** in **Paragraph number 380 to 385** which reads as under:

380. In the absence of any claims of procedural irregularities, fraudulent conduct, or malicious intent, AERA lacks the jurisdiction to intervene in the capital expenditure decisions made for this significant expansion project. It is beyond AERA’s scope to revise or override a legally sound and valid contract between HIAL and the foremost successful bidder. Consequently, this Tribunal does not uphold the arguments presented by the counsels for respondent no.1 and respondent no.2 seeking the disallowance of a portion of the capital expenditure incurred by HIAL for the enhancement project designed to expand the capacity of RGIA, Hyderabad to 34 MPPA.

381. Looking to the Section 13(1)(a)(i) of AERA Act, 2008, AERA

cannot rely on any notional or estimated price when the actual price is available for the expansion project in question. AERA has relied upon estimated cost for the project in question given by the consultant – RITES - appointed by AERA, ignoring the actual “Market Discovered Price” (MDP) arrived at through competitive bidding process.

382. This is an error committed by AERA and hence, impugned order dated 31.08.2021, of disallowing part of capital expenditure undertaken by this appellant for phase expansion of RGIA, to increase capacity to 34 MPPA is hereby quashed and set aside.

383. Similarly, it appears that AERA has considered Airport Users Consultative Committee (AUCC) document wherein there was a proposal for 2,48,809 sq. mtrs. construction, whereas the actual design comes to 2,58,089 sq. mtrs. for the expansion project in question, therefore, AERA has allowed only 2,48,089 sq. mtrs. construction.

384. This decision of AERA is far away from the facts that the actual construction is 2,58,089 sq. mtrs. AUCC document is

nothing but merely a statement of intent instead of the actual final design of the expansion in question. AERA ought to appreciate Page 205 to 292 that it is within the power, jurisdiction and authority of airport operator to propose the need and nature of construction and the same has to be approved by the committee which is a multimember committee including the members of Government and other experts.

385. Once, this committee is approving the need, nature, and expenditures of construction that perhaps there is little or practically no scope of interference by AERA and that too with the help of some consultant's report under the guise of "efficient cost". If this type of interference by AERA is permitted by this Tribunal, then it tantamount to sitting in appeal against the decision of the committee which is a multi-member committee."

[Emphasis Supplied]

(x) The potential application of arbitrary ceiling costs as set forth in the Impugned Order creates significant regulatory uncertainty for DIAL. This uncertainty stems from the possibility that capital expenditure already

incurred by DIAL may not be recognized by AERA if it exceeds the benchmark costs derived from CIAL or on some other arbitrary ground, as was done in the Third Control Period Tariff Order for DIAL.

(xi) By virtue of the impugned order, AERA has admitted to compare IGI Airport Delhi, Chhatrapati Shivaji Maharaj International Airport (CSMIA) Mumbai, Hyderabad International Airport Hyderabad, Bengaluru International Airport and Cochin Airport and, therefore, has disregarded “the vastly different operational realities of Delhi, Mumbai, Hyderabad and Bengaluru Airports from Cochin Airport. By virtue of the impugned order, AERA has failed to consider the unique nature of DIAL, MIAL, HIAL and BIAL and their constant endeavor to meet requirements of world-class airport with quality standards being at par with the top 5 international airports in Asian region (as per OMDA and SSA) such as-

- Size
- Passenger traffic
- Investment commitments
- Project scope
- Design standards
- Passenger traffic projections

- Geographical constraints
- Regulatory requirements
- Financial structures
- Maintenance
- Cost of upgradation or modernizing
- Cost of labour
- Cost of raw materials
- Cost of transportation.

(xii) It has also been highlighted factually that Cochin Airport is operated by AAI where there is nothing like OMDA and SSA agreements, whereas, the present appellants have agreements separately entered into between them and the Government in the form like OMDA and SSA which prescribes the quality standards of top 5 international airports in Asian region and is obliged to follow IATA Airport Reference Manual for development and designing of facilities of IGI Airport, Delhi (as per Clause 8.1(i), Clause 9.1, Clause 8.3.1, Clause 8.1.5, Clause 8.3.3, Clause 8.3.7, Clause 9.1.2(a), Clause 9.1.3, Clause 9.1.4 and Schedule–1 of OMDA and Clause 8 of Schedule–I of SSA). There is no such obligation on the part of Cochin Airport because there are no

agreements like OMDA and SSA. These facts make a remarkable difference between the appellant airport operator and Cochin airport. This remarkable difference has been ignored looking to the substance of the impugned order dated 6.6.2016 (Annexure A-1) and, therefore, appellants can always challenge the impugned order. This type of approach of AERA is known as **“one-size fits all”** approach.

(xiii) If the contention of AERA is accepted to the fact that the impugned order is merely “tentative” and the norms prescribed in the impugned order do not impact any Airport Operator, then also the impugned order deserves to be quashed and set aside because AERA has no intention to apply the same. If AERA wants to apply the impugned order, then it suffers from several vices and illegalities as referred hereinabove and, therefore also, it deserves to be quashed and set aside.

123. It is also stated by Learned Senior Counsel for AERA that the impugned order (**Annexure A-1**) enhances the transparency and it also encourages the economic efficiency and it ensures that only efficient capital cost would be considered for determination of the aeronautical tariff. Hence, the impugned order is legal and valid. This contention of

AERA is **not** accepted by this Tribunal for the following facts and reasons:

(i) By virtue of the impugned order, benchmarking is being done by AERA without considering **“airport-specific factors”** such as construction obligation under concession agreement like OMDA and SSA, cost structures, traffic projections, financing models, service quality expectation etc.

(ii) Without proper evaluation of airport’s operational and financial realities, the impugned order has been passed which tantamounts to arbitrary standardization and thereby has failed to account for unique characteristics of individual airports, particularly those developed under PPP Model.

(iii) By virtue of the impugned order, there is an imposition of generic benchmarks without appreciating the fact that PPP airports like DIAL, MILA, HIAL and BIAL, which operate in a commercially structured framework distinct from other airports, including those operated by AAI.

(iv) The transparency envisioned under the AERA Act necessitates that all regulatory decisions, including cost assessments be based on a reasoned analysis rather than arbitrary comparisons with other airports that operate under different financial, contractual, and infrastructural conditions.

(v) By virtue of impugned order (**Annexure A-1**), **“a rigid benchmarking approach”** has been followed by AERA disregarding airport specific realities.

(vi) There can be no greater transparency than acceptance of capital expenditure incurred as mandated by Section 13(1)(a)(i) of the AERA Act that can be scrutinized based on audited accounts of DIAL and certificates provided by Chartered Accountants.

(vii) AERA cannot assume more power than what is granted under the AERA Act, 2008 to be read with OMDA and SSA, which are at **Annexure A-3** and **Annexure A-4** respectively by contending that AERA can adjudge “if excessive investment is made without

requirements of asset". This contention of AERA is antithetical to the GOI's vision of development/ upgradation of airports through **PPP Model wherein decisions relating to development, design, construction, upgradation, modernization of airports have been delegated to concessionaires. If such contentions of AERA were to be accepted, it would tantamount to granting AERA the power of not only economic regulator of airports but also the airport designer/ planner.** As stated earlier, DIAL has been granted the exclusive right to design, develop, construct upgrade and modernize the IGI Airport under **OMDA** [Grant of Functions - **Clause 2.1.1**] in accordance with the Development Standards and to achieve and maintain the Service Quality Standards as prescribed in OMDA. Further, it is mandated for DIAL to undertake the development works so as to adhere to the Master Plan as reviewed by MoCA [Clause 8.3.5 of OMDA]. **The SSA specifically states that AERA cannot question or change the approach of development if it is consistent with the Master Plan and Major Development Plan. (Clause 8 of Schedule 1 of SSA).**

(ix) AERA cannot sit in appeal to determine the veracity or requirement of the particular development of the Aeronautical Asset in a particular manner and in a particular form and quality. The impugned order **(Annexure A-1)** tantamounts to encroachment upon such functions which are solely made available to DIAL, MIAL, HIAL and BIAL – these appellants under the contract (OMDA and SSA) which are at **Annexure A-3** and **Annexure A-4** respectively.

(x) The impugned order pre-supposes the cost to be incurred. AERA ought to have appreciated that when appellants – Airport Operators undertakes a development project, the cost of such project will be as per the requirements of the development project which is approved by following the procedure as laid down in OMDA and SSA and is further finalized at the touchstone of competitive bidding process because competitive bidding process brings on surface a price driven by market forces which is also known as **“market driven prices”** and once the process of giving contract is followed as per OMDA and SSA and through competitive bidding process once market driven price is arrived at for a particular development project, a separate contract is always entered

into by the Airport Operator with a successful bidder. This contract is binding and AERA cannot alter this binding contract between Airport Operator and a successful bidder. The cost of project is being paid by the Airport Operator to the successful bidder by way of bank entries and, therefore, also AERA cannot reduce the cost of project otherwise it will tantamount to change in terms of contract between Airport Operator and a successful bidder by AERA. This change in a contract is prohibited by SSA. If the impugned order is allowed, AERA will be empowered to alter the terms of contract between the Airport Operator and a successful bidder. Thus, a thing which cannot be done directly, can never be done indirectly meaning thereby to AERA cannot alter the terms of contract especially of cost/consideration for a particular project which is arrived at through "market discovered price" (bidding process). This impermissible thing will be permitted if the impugned order is held as a valid one. In that eventuality, AERA cannot alter the price or cost of the project under the guise of efficient cost or in the guise of "economic efficiency" or in the guise of "maintaining more transparency". AERA cannot make or alter the contract under a hopeless reasoning that AERA is drafting a more efficient contract.

(xi) Looking to the impugned order which is dated 6.6.2016, normative value of the cost has been fixed which is impermissible because the concept of the cost is a floating one. **Cost changes by the passage of time.** The cost of project depends on a variety of factors like passenger traffic, investment commitments, project scope, design standards, passenger traffic projections, geographical constraints, regulatory requirements, financial structures, maintenance, cost of upgradation of modernizing, cost of labor, cost of raw materials, cost of transportation.

(xii) Thus, by no stretch of imagination a fixed value of cost can be given for any of the items used at or in the airport. The cost determined in 2016 cannot be continued for decades together. In fact, such price of any commodity for the project work at airport **cannot** be fixed, especially when OMDA and SSA have enough provisions for checks and balances.

(xiii) AERA by way of Impugned Order seeks to **pre-emptively 'estimate' the costs** that may be incurred based on estimated prices

and **disregards** the actual cost arrived at through market discovery which is contrary to its mandate under Section 13(1)(a)(i) to determine tariff for the Aeronautical services taking into consideration the capital expenditure 'incurred' i.e. actually spent.

(xiv) If impugned order is held as a valid one and if the cost of runway has to be revaluated by AERA and subsequently allowed to be reduced, it will have a disastrous effect because with a lower cost, lower quality of runway will be given. This is not permissible especially for the construction at the airport because every construction at the airport has a definite specification and sometimes as per international standards (i.e. for runway etc.). If the international standards are to be maintained, then the cost arrived at after due process of bidding which is known as "**market discovered price**" ought to have been allowed by AERA because it is a "**cost incurred**" as per Section 13(1)(a)(i) of AERA Act, 2008. At no cost, the project cost can be reduced by AERA which has a direct bearing upon the operational efficiency of the airport and, therefore, Section 13(1)(a) of AERA Act, 2008 has used the words "the Capital Expenditure incurred". Thus, by virtue of the impugned

order (**Annexure A-1**), AERA cannot provide benchmark of capital expenditure.

124. In view of the aforesaid facts, reasons and judicial pronouncements, we hereby, quash and set aside the impugned order No.7/2016-17 dated 6.6.2016 (Annexure A-1). All the aforesaid AERA Appeals are hereby allowed.

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

**(SUBODH KUMAR GUPTA)
MEMBER**

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