(2011) 09 DEL CK 0183

In the Delhi High Court

Case No : OMP No. 609 of 2011, I.A. No''s. 13609 of 2011, 13610 of 2011 and CCP (O) 76 of 2011

Cox and Kings India Ltd. APPELLANT

Vs

India Railway Catering and Tourism Corp. Ltd. RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 36, 9
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 38 Rule 1, Order 39 Rule 2
Contract Act, 1872 — Section 13, 2H

Citation : (2011) 3 ARBLR 538 : (2011) 185 DLT 5 : (2012) 1 ILR Delhi 1

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Ashok Desai, Mukul Rohtagi, Rajiv Nayar, N.K. Kaul, Peter Lobo, Rishi Agrawala, Mahesh Agarwal, Akshay Ringe and Nikhil Rohtagi, for the Appellant; G.E. Vahanvati, AG, A.S. Chandhiok, ASG, Saurabh Aggarwal, Bhagat Singh, Abhijeet Sinha, Vidit Gupta, Yashwardhan Tiwari, Sandeep Sethi and Abhimanyu Mahajan, for Applicant in IA No. 13610/2011, for the Respondent

Judgement

Manmohan Singh, J.—The Petitioner Cox and Kings India Ltd. (for short as C&K) has filed the present petition praying, inter alia, seeking stay of the operation of the Respondent''s letter dated 12.08.2011 seeking to terminate the joint venture agreement between the Petitioner and the Respondent and also from interfering or preventing the Petitioner and the JV Company, i.e. Royale Indian Rail Tours Limited from operating the Luxury Tourist Train "Maharaja Express" and from obstructing the Petitioner in operation of the JV Company and as a consequence from operating the bank accounts dealing with venders, suppliers and any third parties for smooth functioning of the luxury tourist train.

2. Few relevant facts are that the Respondent floated an Expression of Interest for a joint venture partner for a luxury train project and to operate, manage and run the luxury tourist train on a Pan India Route within India in December, 2006.

In June/July, 2007, Ministry of Railways (Rail Mantralaya), Railway Board, approved the proposal submitted by the Respondent, i.e., Indian Railway Catering And Tourism Corporation Ltd. (hereinafter referred to as IRCTC) for running a Luxury Tourist Train and broad principles for running the said train were set out in the letter dated 29.11.2007 addressed by the Indian Railways to the Respondent which are reproduced as under:

(a) The Respondent will own the rake;

(b) The Respondent will pay to the Indian Railways the cost of maintenance and periodical over haul of the rake;

(c) Railways be entitled to recover the haulage cost;

(d) The Respondent with their associate agencies will manage on board/off board services, marketing, booking, pricing etc.

3. The Petitioner was selected to be a joint venture partner by the Respondent for the operation of Luxury Tourist Train Project. After some discussion, on 11.01.2008 the Respondent forwarded to the Indian Railways the draft Memorandum of Understanding which was proposed to be executed between the Petitioner and Respondent.

4. The Respondent by letter dated 14.01.2008 stated that:

a) the joint venture partner will bring in the funding for the project and the Luxury Tourist Train would be leased by the Respondent to the JV Company on a 15 years lease term which can be extended by another 10 years on conditions mutually agreed between the Petitioner and the Respondent. As already mentioned, the JV Company is Royale Indian Rail Tours Limited (hereinafter referred to as "JV Company/JVC or short as RIRTL).

b) The Petitioner and Respondent are equal shareholders of the JV Company. The obligations of each of the joint venture partners were mentioned in the said letter.

c) The estimated project cost was Rs. 37.5 crores out of which an amount of Rs. 7.5 crores was to be contributed by the Ministry of Tourism as a grant and an amount of Rs. 15 crores was to be contributed as an advance leased rental by the Petitioner as its share. Copy of the letter dated 14.01.2008 is already placed on record.

5. After approval of Indian Railways to the Respondent a Memorandum of Understanding dated 10.07.2008 was executed between the Petitioner and the Respondent. In the said MoU dated 10.07.2008, it was stated that the Ministry of Railways has given the permission to the Respondent to own and operate the Luxury Tourist Train for the exclusive use of the JV Company for the period of 15 years and was renewable for a further period of 10 years. In the MoU, it was also stated that the JV Company (RIRTL) will manage the on board/off board services, marketing, booking, pricing etc. for the operation of the train on tracks with the Indian Railway was to be coordinated by the Respondent. In the said MoU, it is

clear that the Respondent claimed that they are an extended arm of Indian Railways and they had an extensive network. The Petitioner and Respondent accordingly executed a Joint Venture Agreement dated 10.12.2008 recording in detail the terms of the agreement.

6. In the said agreement, it was also recorded that pursuant to the permission given by Indian Railways to the Respondent to own and operate the Luxury Tourist Train consisting of approximately 23 coaches, the Joint Venture Company was formed.

7. Some of the relevant clauses of the Joint Venture Agreement are as follows:

Article -1 gives the definitions to the terms and conditions of JVA.

Article -2 describes the business objective of the JVC, Article - 2.2 deals with the Memorandum and Articles of the Company and the main object of the company is the business of acquiring, furnishing, maintaining, managing and operating luxury train with a view to market and sell holiday packages with such luxury train being the principle mode of transportation.

Article -2.3 is a share capital of the company which is Rs. 5 crores and both parties have equally contributed Rs. 2.5 crores each.

Article - 2.3.3.1 (c) talks about signing of contract documents and none of these contracts have been signed as of date save and except the contract for the on board hospitality services which was IRCTC''s obligation has been out sourced to hospitality partner Ninth Dimensions Hotels and Resorts Pvt. Ltd. (better known as MAPPLE) who incidentally are also the hospitality partner and on board service providers to the Golden Chariot being the other luxury tourist train operated in Karnataka, Goa and South India by K.S.T.D.C.

Article -3 specifies the term of the agreement and states as follows "This agreement shall take effect upon its execution and shall continue to bind the parties initially for a period of 15 (fifteen) years from date of first commercial run of the train and thereafter renewable for a further period of 10 (ten) years, on mutually acceptable terms and conditions". It has been clearly stated that agreement shall continue to bind the parties for a period of 15 years from the date of first commercial run of the train and thereafter renewable for a further period of 10 years.

Article -5 deals with the provision of luxury train. This clause specifies that IRCTC has agreed to lease the train to the JVC. IRCTC would acquire the coaches/rake from the Indian Railways. The JVC shall design the interior concept at its cost and provide it to IRCTC. The JVC would coordinate to ensure whether the train is manufactured as per the specification and design.

Article -6 deals with the lease of the Luxury Train. IRCTC was to bear the cost of the train and lease it to the JVC for a period of 15 years from the dated of commercial run, renewable for a further period of 10 years. The JVC has paid

IRCTC an advance payment of 50% of the (total cost of the train minus capital subsidy) towards lease charges (Advance Lease Charges) of the Luxury Train C&K shall provide unsecured loan to the tune of 50% of the (cost of the train capital subsidy) to the JV company and the proceeds shall be utilized by the JV Company towards payment of Advance Lease Charges to IRCTC for partially meeting the cost of the luxury train. The payment of advance lease charges is paid to IRCTC as per Article 6. The advance lease charges shall be adjusted against the annual lease charges payable to IRCTC in equal installments over a period of 15 (fifteen) years.

Maintenance of the luxury train as per Article 7. The JVC is responsible for bearing all expenses relating to operation and maintenance of the luxury train which includes maintenance of interior fittings and maintenance and replacement of soft interior. Article - 7.2 relates to payment of haulage charges to Railways. The JVC is responsible for reimbursement of all payments made by IRCTC to Indian Railways towards haulage charges. The payment of haulage charges by JVC to IRCTC will be in accordance with to the payment condition laid down by Indian Railways and amount payable will be as demanded by Indian Railways from times to time. IRCTC was required to provide records and documents of haulage payments made by IRCTC to Indian Railways. Article - 8: Unsecured Loans: C&K shall provide an unsecured loan for a period of 15 (fifteen) years of an amount which will be 50% of the total cost of the luxury train (i.e. cost of the coach shell and the interior fittings and furnishings - (minus) the capital subsidy available in relation to the luxury train project, as per the applicable tourism policy of the Central and State Governments. The provision of unsecured loan by CNK (the Petitioner) to the JVC for a period of 15 years being 50% of the total cost of the luxury train as in Article 8.

The repayments of the unsecured loans was treated as an advance lease charges adjustable/amortized in 15 years.

Article - 9 dealt with the Technical Operation and maintenance of the luxury train on Indian Railways and the same were the responsibility of IRCTC. The JVC was to use booking engine of IRCTC. The JVC was to acquire the entire peripheral software for integrated front and back end office management from CNK. The JVC was responsible for obtaining necessary clearance and permission.

All internal facilities, itinerary was to be decided by the Joint Venture Company as per Article 10.

The income from the sale of packages and other services was to be the revenue of the Joint Venture Company as per Article 11.

The JVC was responsible for the tour packages and JVC through itself or through SLA market, promote train based tour packages to ensure luxury train potential fully realized and the luxury train is positioned as a premium luxury train. The JVC was responsible for all hospitality services. (Page 39)

A current account of the Joint Venture Company was to be operated and was to be maintained with joint signature of both parties of JVC as per Article 134.

The JVC was responsible for mobilizing funds as per Article - 14.

The JVC was to have nine Directors on its board, three Directors from IRCTC, three Directors from CNK and three independent Directors, one each to be appointed by IRCTC and CNK and third independent Director to be jointly by IRCTC and CNK. Article - 15.3 provided that the Chairman shall be the nominee of the IRCTC. Article - 16 pertains to the meetings of the Board of JVC. The quorum at BOD meetings, adjourned meetings and Article - 16.5 (page 42) clearly stated that in case of equality of votes at the BOD meetings, the Chairman SHALL NOT have a casting or second vote.

Article - 17 pertains to the management of the JVC. As per Article 17.2 the management of the JVC was to be supervised by the Director Finance nominated by IRCTC and the Director Operations nominated by CNK. As per Article 17.6 certain agreement were was required to be executed by and between the company and IRCTC or CNK as the case may be. None of these agreements have been executed save and accept the agreement at Article - 17.6 (B), the agreement for providing on board services has been executed by the JVC with MAPPLE since IRCTC not having the international exposure and experience in providing Five Star super luxury fine dining opted to outsource the onboard services of the luxury train to MAPPLE who are also the on board service providers to the Golden Chariot.

Article - 20: The parties to the JVC were to make a detailed project report finalized itineraries higher and recruit staff make process for selling products and systems for collection of revenue and disbursement of the same.

As per Clause 24.2 provided the lock in period for holding shares was 15 years from the date of commencement of lease. As per Clause 24.3 if there was a shareholder''s default then either of the party could sell the shares to the other at the preretirement provisions as provided under Article 24.3.

8. As provided under the JV Agreement and MoU, the service agreement dated 05.03.2010 between the JV Company (RIRTL) and Ninth Dimension Hotel and Resorts Pvt. Ltd. (hereinafter referred to as "MAPPLE Hotels") was also executed for providing hospitality services on board and their respective roles and responsibilities were mentioned in the said agreement.

9. After completion of other formalities, the commercial operation of the Maharaja Express was flagged off by the Minister of Railways on 20.03.2010 at Kolkata station. It is the admitted position that upto April 2011, the said train, i.e., the Maharaja Express, 34 journeys were completed out of 4 journeys in the inaugural runs till 31.03.2010 and 30 journeys between April, 2010 to April, 2011.

10. In between, i.e., in November, 2010, the Respondent forwarded the draft of

lease agreement for lease of the Luxury Tourist Train to the Petitioner who in the month of March/April, 2011 pointed out that the said draft of the lease was inconsistent with the arrangement between the parties including the terms of MoU and the JV Agreement. The Petitioner submits that the Respondent somewhere January 2011 forwarded a copy of the draft MoU proposed to be executed between the Respondent and the Indian Railways which according to the Petitioner was inconsistent with the terms of the JV Agreement.

11. The Petitioner in para 14 of the petition has also given the detail of other inconsistencies pointed out to the Respondent with the terms of the JV Agreement and also protested and objected to the said MoU which would, if executed, completely negate the terms of JV Agreement which was executed in the month of December 2008 and the MoU executed between the Petitioner and the Respondent in July, 2008.

12. The case of the Petitioner is that the parties, i.e., the Petitioner and the Respondent, came together to form the JV Company which was set up specifically for the purpose of acquiring, furnishing, maintaining, managing and operating Luxury Tourist Train with a view to market and sell holiday packages. The terms were recorded in the MoU of July, 2008 and the JV Agreement and pursuant to the same, the Petitioner had invested a sum of more than Rs. 45 crores in the said JV company.

It is submitted by the Petitioner that the said MoU and JV Agreement were executed after the specific permission given by the Ministry of Railways, Government of India, which permitted the JV company to own and operate the Luxury Tourist Train during the period of 15 years as specified in the JV Agreement. The said agreement also recorded that the JV Company will manage, on board and off board services and in view of that the Petitioner initially invested Rs. 22.25 crores on the basis of the representation of the Respondent and the Indian Railways. The Petitioner submits that the entire arrangement between them was with the full consent and approval of the Indian Railways/ Ministry of Railways. But, when the Petitioner received the letter somewhere in January 2011 enclosing the Draft MoU between the Respondent and the Indian Railways to change the entire meaning, modify and vary the terms of the arrangement entered between the Petitioner and the Respondent and the Petitioner''s role and position was sought to be diluted in the said Draft MoU, the Petitioner has rightly raised the objections by letter dated 13.06.2011 with copy to Indian Railways who had full knowledge about the MoU as well as JV Agreement between the Petitioner and the Respondent and also having permitted the parties for the same. Therefore, the Petitioner says that under no circumstances the Indian Railways now could seek to change the terms by executing an inter-se agreement between the Ministry of Railways and Respondent which would seek to dilute the position of the Petitioner.

13. It is alleged by the Petitioner that now the Respondent by letter dated 21.06.2011 addressed to the JV Company, i.e., RIRTL, claimed that the lease

agreement and the haulage charges were payable by the JV Company. The Petitioner submits that it was done in order to divert the attention of the Petitioner from Draft MoU as the payment of haulage charges was an obligation on the Respondent. The Respondent and Indian Railways are now seeking to amend the terms of the JV Agreement by seeking to introduce a new policy.

14. In nutshell, according to the Petitioner, the Respondent after the gap of long time is seeking to change various terms by proposing the said document, the detail of which is given in para 21 of the petition. The Petitioner states that the Petitioner has paid advance loan of Rs. 4 crores for payment of haulage charges for the period April to July, 2011.

15. There are many other grievances raised that the Petitioner did not receive the bank statements of the JV Company for more than two and half years. The Petitioner also set out the detail in which more than Rs. 30.69 crores upto March 2010 have been paid by the Petitioner towards the expenses and advance loan in the form of providing off board services, loans and expenses etc. and they have also incurred expenses towards off board services and loans amounting to Rs. 16.92 crores from April 2010 to March 2011. The subsequent letters dated 11.07.2011, 04.08.2011, 05.08.2011 and 06.08.2011 were exchanged between the parties.

16. It is not in dispute that after the end of last season, the Respondent on 18.04.2011 took the said train to the India Railways workshop for annual repairs and maintenance.

17. Learned Senior Counsel appearing on behalf of the Petitioner has referred to few letters during the hearing of the petition, particularly the letter dated 04.08.2011 whereby the Respondent referred to its earlier letters dated 07.07.2011 and called upon the Petitioner to withdraw its protest relating to the execution of the MoU of June, 2011 between the Indian Railways and the Respondent. Another letter dated 06.08.2011was also referred wherein the suggestion was made by the Respondent that the work on the train should be completed as early as possible.

18. However, learned Senior Counsel states that vide letter dated 12.08.2011 the Respondent terminated the lease arrangement pursuant to the JV Agreement on various grounds mentioned in the said letters. Thereafter, the petition has been filed by the Petitioner seeking relief of stay of operation of termination letter and another prayer is made that till end of this season i.e. April, 2012, the arrangement which was continued, be maintained subject to any terms and conditions granted by the Court.

19. The Petitioner submits that the act of termination by letter dated 12.08.2011 by the Respondent would put the huge investment made by the Petitioner into jeopardy and the goodwill and reputation would also be spoiled in the eyes of their travellers who are from overseas countries and the reputation of the Indian Government is also at stake. Therefore, it was stated that the letter of

termination dated 12.08.2011 is arbitrary, illegal and void on various ground stated in the petition, thus, the interim order is sought.

20. The Petitioner submits that the Petitioner has been marketing the bookings internationally and within India. The season of this train is between the months of September to April. The train is mainly booked by foreign tourists and the bookings are made much in advance. The JV company has received and his holding approximately 400 bookings for the current year upto December 2011. The said bookings have been made by various international travel companies. The said foreign tourists make their bookings either directly or indirectly through a travel agent after considering the services offered by the JV Company as stated on their website and the 100 of workers employed by the JV Company, who are connected with the train, would be jobless. All these factors show that at this stage the running of the train cannot be stopped without assigning any reason irrespective of the fact that the lease deed is not signed and JV stands terminated.

21. Article 30 of the JV Agreement provides the clause of dispute resolution by mutual negotiations otherwise, in the event of disputes remaining unresolved, the same are to be referred to the arbitration.

22. Lastly, the Petitioner submits that the Petitioner is entitled to specific performance of the JV Agreement which has no termination clause. It is also stated by the Petitioner that though there is no formal lease agreement for the train executed between the Respondent and JV Company but as per conduct of the parties and documents executed earlier and correspondence exchanged between the parties, the said lease is effective and subsisting by implication. The Petitioner submits that as per Article 6 of the JV Agreement, it was provided that the lease will be for a period of 15 years from the date of first commercial run and the first commercial run took place on 06.03.2010. The lease rent was also paid in advance for the period of 15 years. Therefore, the prayer made in the petition is liable to be granted, otherwise, the Petitioner would suffer grave harm and irretrievable injury. On the question of arrangement of seasons between September, 2011 to April, 2012, it is averred that the first batch of advance international bookings have been made for the "Maharaja Express" which is to run from 14.09.2011.

23. The last contention of the learned Senior Counsel for the Petitioner is that there is no dispute that there are various claims of the Respondent against the Petitioner and JV Company and similarly the Petitioner has various claims against the Respondent company. But at this stage, some interim measures have to be made by the Court. Insofar as the merit of the case is concerned, it is stated that claims and counter-claims have to be determined by the arbitral tribunal. Therefore, due to peculiar circumstances of the case and the fact that the said function of providing services to the foreign tourists who have already booked for the another season of the train cannot be put to prejudice due to the stalled relationships between the parties to the agreement, therefore, some

arrangement has to be made by the Court so that the interest of the Petitioner is not harmed in the eyes of their customers.

24. Mr Ashok Desai, the learned Senior Counsel for the Petitioner, has also made a submission as to the possible interim arrangement which can be done at this stage including the appointment of the receiver and running the train under his supervision and depositing the part of the booking amount in the separate account but, the train may be allowed to run as per the earlier arrangement for this season and the Petitioner would have no objection if one or two representatives of all concerned parties may also be allowed to act as observers in addition to above for the purpose of smooth running of the train. He has also agreed not to make further bookings for the next season, subject to any order if passed as per its own merit by the Arbitral Tribunal. He further states that the Petitioner has no objection if any retired Judge of this Court or from Supreme Court be appointed as an arbitrator and time schedule be fixed so that the dispute between the parties be determined within the period of 3 to 6 months. All this arrangements have been suggested by Mr. Desai as without prejudice to the rights and contentions and claims to be raised by the parties before the arbitral tribunal.

25. The Respondent has strongly contested the matter, inter alia, on the following grounds:

a. The petition is not maintainable as the same was filed on the basis of two letters on 12.08.2011 (termination letter) issued by the Respondent by which the Respondent for the reasons stated in the said letters terminated the Joint Venture Agreement entered between the Petitioner and the Respondent on 10.12.2008.

b. The Joint Venture Agreement is void as the consent of the Respondent was obtained by fraud and misrepresentation and cannot be given effect to and is also unenforceable and therefore, the petition would not be maintainable.

c. The Petitioner in the matter in fact is seeking the stay the operation of one letter dated 12.08.2011 issued by the Respondent to Joint Venture Company. The said Joint Venture Company is not a party to the proceedings and also not party to any arbitration agreement. Therefore, granting of any relief would be amounting to grant of a mandatory injunction and in any event, if losses are suffered by the Petitioner it could be compensated in terms of money as the contract has been terminated between the parties on account of various breaches committed by the Petitioner of the Joint Venture Agreement. In fact, the train was never operated in the manner as contemplated in the Joint Venture Agreement by the Joint Venture Company. Nor the Petitioner had agreed to pass on the booking revenues to the Joint Venture Company and instead raised inflated debit notes.

26. It is stated by the Respondent that by seeking the relief on the basis of the Joint Venture Agreement, the Petitioner is trying to get a lease in favour of the

Joint Venture Company, a third party who is not even a party to the present case and the agreement. The lease was never executed in favour of the said company. The rights of the Petitioner cannot be beyond than what has been laid down in the Articles of Association of the Joint Venture Company. The relation between the Joint Venture Company and the Respondent has already come to an end and has been terminated. Therefore, now the Petitioner is attempting to create a right for use of the train which was never in the possession of the Petitioner and the Petitioner is not entitled to use the same in future as the Respondent is the owner of the train. Thus, it is not open to the Petitioner to claim any relief in relation to the train which is subject matter of the train withdrawal letters which were issued by the Respondent to the Joint Venture Company being the owner of the train. It was also stated that earlier the Joint Venture Company was allowed to run the train on an ad-hoc arrangement, otherwise no terms and conditions of any lease arrangement were finalized, therefore, now the Respondent is not inclined to continue with the said arrangement for the reasons stated in the said letter.

27. Mr. G.E. Vahanvati, the learned Attorney General of India, appearing on behalf of the Respondent has referred to Articles 5 and 6 of the Joint Venture Agreement and argued that the Respondent was merely to give the train on lease to the Joint Venture Company which was conditional subject to the terms and conditions being agreed upon between the Respondent and the Joint Venture Company as well as payment of lease rental and after adjustment of the advance lease rental, haulage charges of the Railways etc. The said conditions are not fulfilled. Further as the terms and conditions of the lease were not finalized nor was the lease agreement executed between the parties, the dispute relating to train involving the Joint Venture Company cannot be resolved by the arbitration.

28. It is also argued by learned Attorney General that the Petitioner has suppressed the material fact from this Court when it is stated that the Joint Venture Company was incorporated after entering into the Joint Venture Agreement, though the said Joint Agreement Company was incorporated on 27.11.2008 prior to the date of Joint Venture Agreement dated 10.12.2008. The said Joint Venture Company was in fact in existence on the date of agreement. He argued that on this ground itself no relief should be granted as sought.

29. The learned Attorney General has argued that the Petitioner had retained all revenues which is more than 18 crores in respect of bookings made by the journeys of the train already operated upto April, 2011. Even the revenue from the month of September, 2011, till April, 2012 has not been transferred to the Joint Venture Company. The Petitioner had issued inflated bills towards "off board services" for the train totaling to Rs. 21,36,98,595/- and unilaterally sought to adjust all the booking revenues which had been retained illegally by the Petitioner against its own inflated bills/debit notes raised on Joint Venture Company and suo moto appropriated/adjusted the entire booking revenue of Rs. 18.87 crores by keeping Rs. 4.95 crores as commission and adjusting the

balance of Rs. 13,83,72,184/- in respect of the inflated and unauthorized bills/ debit notes raised by the Petitioner.

30. On the other hand, the Respondent has not received any amount from the Petitioner. Therefore, the Respondent is no longer willing to permit the Joint Venture Company to use or operate the train for the reasons stated in the Train Withdrawal Letter. The question of use of train by the Joint Venture Company cannot be the subject matter of the present proceedings. In fact, the Petitioner is trying to directly or indirectly take over the complete control of the operations of the train, though the Petitioner was never authorized to use the train. Mr Vahanvati, the learned Attorney General, has also argued that the Petitioner has charged the Joint Venture Company commission at the rate of 30% on the total booking revenues of Joint Venture Company. The said rate of 30% is very higher.

31. Therefore, by the discontinuation of the permission granted for a limited period to Joint Venture Company to use the train, the Petitioner will not suffer any losses. It is argued that the basic roles of the Petitioner defined in the Joint Venture Agreement was to hand "off board services". As per Article 9 of the Joint Venture Agreement, the Joint Venture Company was to enter into service agreements with the Petitioner for off board services and with the Respondent for on board services. The agreement of the Mapple with the Joint Venture Company has no significance and cannot be subject matter of the proceedings as the Petitioner and the Respondent are not the parties of the said agreement.

32. It is argued that the Respondent has not denied that as per Clause E of the MoU, the haulage charges were the liability of the Respondent. The Respondent was to pay the amount of haulage charges to the Ministry of Railways and the said amount was to be reimbursed to the Respondent at actual but there was breach on the other side.

33. The Respondent has also given the detail of various defaults made by the Petitioner in paras 47 to 51 of its reply. In para 53 of the reply, the Respondent has also given the detail of the two financial projections and proposal from the Petitioner which is reproduced as under:

Projected Financials as per C&K Bid dated 16.04.2008

Projected Financials as per C&K Bid dated 16.04.2008

1

Max Occupancy

905 (yr 5 onward)

65% (yr 5 onward)

2

Max Prices (USD/pax/day)

2150

2500

3

5 years cumulative P/L

36 Cr (profit)

-72 Cr (Loss)

4

Haulage Charge (Lakhs/ day)

5.3 Lakhs

6.0 Lakhs

5

On Board+Off Board

USD 146/head/day

USD 320/head/day

6

Agent Commission

20%

30%

34. It is also argued by the Respondent that the investments made by the Respondent are far greater than the Petitioner. In para 70 of the reply it was referred by Mr. Vahanwati in support of his submission wherein the Respondent has given the details about the investments made by the Respondent, inter alia, in the following manner:

(i) It was because of the Respondent that the Ministry of Tourism gave a grant of Rs. 12.37 crores to the Respondent [under its scheme for PSU projects and distinct from PPP/private sector projects] which was also spent in the development of the train.

(ii) No doubt a sum of Rs. 18,50,00,000 [Rs.4.2 crores has been returned] was given by RIRTL [not the Petitioner, since the Petitioner is charging interest for that amount on the joint venture company] to the Respondent, but then about Rs. 10.97 crores of that amount had to be paid to the Railways for haulage charges, Rs. 3.33 crores was paid towards use of the train for the limited period, Rs. 0.65 crores was spent towards the office space rentals of RIRTL and the balance of Rs. 3.5 crores was only left after accounting the moneys with the

Respondent. Infact, the haulage charge amount is more than what has been adjusted [as Rs. 1.54 crore more is to be paid to the railways] besides the license fee being 0.5% of the total revenues also has to be adjusted being the revenue share of Respondent as per the bid of the Petitioner.

The Respondent was to collect from RORTL and pass n the haulage charges to the Railways. Earlier RIRTL had paid around Rs. 2.55 crores to the Railways and the Respondent had paid about Rs. 6.5 crores out of its own pocket. After the adjustment of the amounts, now the Respondent has paid a further amount of Rs. 4.46 crores and Rs. 1.54 crores to the Railways for use of the train by RIRTL.

(iii) Interestingly, while the amount had been advanced to the Respondent by the RIRTL, the Petitioner is claiming to have acquired an interest on the train operation on the basis of this amount. Remedy, if any, in respect of non-payment of monies owed by RIRTL to the Petitioner, cannot be against the Respondent.

(iv) RIRTL did not pay the advance lease rental for 15 years as alleged. Only a part thereof was paid and those amounts have been adjusted against costs incurred for actual usage of the train by RIRTL in the manner mentioned above.

(v) After adjustments, as mentioned above, a balance of Rs. 3.5 crores was left with the Respondent against the so-called "advance rentals". These amounts cannot, without prejudice to the other contentions of the Respondent, be sufficient to cover operational expenses of the train any more, let alone until December, 2011. Infact, the actual haulage charge levied by the Ministry of Railways is much more than what has been adjusted besides the license fee being 0.5% of the total revenues also has to be adjusted being the revenue share of the Respondent as per the bid of the Petitioner, as such, this amount of Rs. 3.5 crores would get reduced further.

35. It is the further contention of the Respondent that in the operation of the train till 19.04.2011, the Respondent has only got the rental of the train amounting to Rs. 3.3 crores out of total revenue of Rs. 31.65 crores. The said money is either lying with the Petitioner or the Joint Venture Company. The Petitioner, on the other hand, has made substantial profits in terms of the commission from the booking amounting to Rs. 5.15 crores and would also be making substantial profits out of the off board services, the detail of which is mentioned in the debit notes. The Petitioner has also claimed interest on the said amount loaned to the Joint Venture Company amounting to Rs. 1,56,15,154/-.

36. In nutshell, it is argued that the Petitioner operated the train and has not paid the haulage charges to the Respondent for payment to the Railways, a substantial portion of the amount of Rs. 18.55 crores given to the Respondent had to be adjusted towards haulage charges and rental and thus, leaving such a small amount with the Respondent that any further operation of the train would result in liabilities of the haulage charges. In view of the above said facts and circumstances, the learned Attorney General has made submissions that the Petitioner is not entitled for any interim relief sought by it.

37. The learned Attorney General has also referred to the case of Bharat Catering Corporation Vs. Indian Railway Catering and Tourism Corporation Limited (IRCTC) and Another, in support of his submissions. Para 17 of the said judgment is reproduced as under:

17. Apart from merits, even otherwise, in our view, the scope and ambit of Section 9 do not envisage the restoration of a contract which has been terminated. The learned Single Judge, in our view, rightly held that if the Petitioner is aggrieved by the letter of termination of the contract and is advised to challenge the validity thereof, the Petitioner can always invoke the arbitration clause to claim damages, if any, suffered by the Petitioner. It is not open to this Court to restore the contract u/s 9, which is meant only for the sole purpose of preserving and maintaining the property in dispute and cannot be used to enforce specific performance of a contract as such. A bare glance at the said Section will suffice to show that pending arbitration proceedings, the Court and the Arbitral Tribunal have been vested with the power to ensure that the subject matter of the arbitration is not alienated or frittered away. The provisions of Section 9, for the sake of convenience, are FAO(OS) 226/2009 Page No. 15 of 20 extracted below:

9. Interim measures, etc. by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

38. The Respondent is not agreeable with the suggestions given by Mr Desai to

allow the Joint Venture Company or the Petitioner to run the train as per earlier arrangement or on the terms by him. It is argued that in case the suggestions of the Petitioner are accepted, it will amount to writing a fresh contract which is not permissible in law and simultaneously he gave his own proposal without prejudice to the rights of the Respondent in order to avoid any complication to be suffered by the tourists who have already made the booking till the date of this season. The Respondent has made the following suggestions in order to honor the bookings as stated by the Petitioner without prejudice to the rights and contentions of the parties:

a) The train has to be run by the owner/ Respondent. All the facility material including crockery, furnishings etc which are in custody of the Petitioner should be handover to Respondent for executing this facility arrangement.

b) All revenues arising therefrom without any deductions earned either by the Petitioner or Respondent may be deposited in the separate account from which expenditure will be funded.

c) All the bookings may be allowed to the transferred to the Respondents for honouring.

d) All the on board or off board expenses and railway payments may be allowed to be charged to this account. In this way, the amount will be sufficient to cover the expenses and there will be no need for further loans.

e) The existing service providers may be retained.

As per the Respondent, the arrangement can be acceded to only at the above terms in order to avoid any hardship and harassment to the tourists.

39. As far as termination of the Joint Venture Agreement is concerned, it is agreed that it would be subject to outcome of arbitral proceedings that may be initiated by the Petitioner and all objections, claims and contentions of both sides be kept open before the arbitral proceedings.

40. Let me now first deal with the first prayer made by the Petitioner i.e. seeking stay of the operation of the Respondent letter dated 12.08.2011 whereby the Joint Venture Agreement dated 10.12.2008 was terminated by the Respondent on various reasons. No doubt, the Petitioner has challenged the validity of termination as per details given in the petition. So the question in the present petition has arisen as to whether any of the parties had violated the conditions mentioned in the Joint Venture Agreement between the parties. It is to be examined as to whether at this stage, when the agreement has been terminated/ rescinded by the Respondent right or wrongly on account of purported fraud, can this Court go into the contentions of the parties and conclude that the said termination is invalid?

41. It is a settled law that the court while granting the interim measures u/s 9 cannot arrive at the conclusive finding as to the fact that the agreement is validly

terminated or it is invalid as it is for the arbitral tribunal to decide whether the termination was valid or invalid. As held by the Supreme Court and various Court that in case the party, who is seeking the interim order, has made out a prima facie case is entitled to take action for termination of agreement. Its validity at this stage of interim measure is only for the limited purpose as to whether any prima facie case is made or not. And in case no interim order is made, the party would suffer loss and injury which cannot be compensated by damages.

Therefore, in view of the settled law on the point involved, I am of the considered view that the scope of Section 9 does not allow the Court in the facts and circumstances of the present case, as mentioned above, to restore the Joint Venture Agreement which has been terminated/ rescinded by way the said fraud as alleged by the Respondent in its letter dated 12.08.2011, doing this would mean nullifying the said termination. I feel that only remedy lies to challenge the validity by invoking the arbitration clause and claim damages, if any. However, at this stage of interim injunction as prayed in the second relief the said termination is to be examined for the limited purpose as to whether the Petitioner has made out a prima facie case to pass such orders. Thus, the first prayer of the petition is disallowed.

42. Now coming to the first contention raised by the Respondent that the petition is not maintainable as the Joint Venture Company is not a party to the Joint Venture Agreement and, therefore, cannot be included within the ambit of arbitration.

43. It is not in dispute that the Articles of Association are an agreement between the shareholders and the Joint Venture Company. The definition of the party includes the Petitioner as well as the Respondent. Since the Articles of Association is an agreement amongst the shareholders and the company itself, therefore, the Petitioner and Respondent are included therein The Memorandum and Articles have been signed by the Respondent.

44. The JV Company has a separate arbitration agreement between the Petitioner and the Respondent and Article 200 of the Articles of Association of the JV Company contains an arbitration clause. The Arbitration Clause, i.e., Article 200, of dispute resolution reads as under:

200. Reference to an Arbitrator IRCTC and C&K will endeavour to resolve by mutual negotiation any dispute, differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, arising between them in connection with this Agreement.

(a) Any and all disputes differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, which cannot be satisfactorily resolved by mutual negotiation within ninety (90) days of issue of a notice by a party, shall be finally settled by arbitration, in accordance with the rules of Arbitration of Indian council of Arbitration (ICA) under...."

It is also pertinent to mention that the Articles of Association in the clause defines:

a. "The Company" or "this Company" means Royale Indian Rail Tours Limited.

b. "Party" means IRCTC or C&K as the case may be.

c. "Parties" in relation to this Company would include Cox and Kings (India) Limited and IRCTC.

45. However, the Petitioner and Joint Venture Company have filed two separate applications under Order 1 Rule 10 CPC for impleadment as Respondent No. 2. Mr Sandeep Sethi, the learned Senior Advocate, with Mr Abhimanyu Mahajan, Advocate, appeared in the matter on behalf of Joint Venture Company. Mr. Sethi says that in view of above, any arrangement or suggestion if made by this Court, his client would abide the same. He further says that he is prepared to go for arbitration for the dispute arose between the parties.

46. Therefore, prima facie it cannot be said that there is no arbitration between the Joint Venture Company and the parties in the present petition. The only shareholders and persons in management of the Joint Venture Company are the Petitioner and the Respondent.

47. The Board of Directors of the said Joint Venture Company constitutes 3 nominees of the Petitioner, 3 nominees of the Respondent and 3 independent nominees. In the application it is stated that the consent to file the present application was given by 5 Directors out of 9 Directors of the Joint Venture Company. The copy of the Resolution approved by 5 Directors along with Articles of Association of the Joint Venture Company was annexed along with the application.

48. Section 9 of the Arbitration and Conciliation Act, 1996 reads as under:

S. 9. Interim measures etc. by court. - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court:

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings: or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration:

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

A plain reading shows that the Court has jurisdiction to pass orders until the Award is submitted for enforcement u/s 36 of the Act.

49. Therefore, u/s 9 of the Arbitration and Conciliation Act, the Court has a jurisdiction to preserve the subject matter of the dispute in many forms depending upon the facts of each case and as per orders sought for. The Court is to decide by the order in the facts and circumstances of each case for purpose of passing such protection/presentation.

50. The proceedings in a court, as distinct from those before an arbitrator, are also between parties to an agreement/transaction only. Still, the practice of issuing interim orders/directions qua third parties exists.

51. It is also to be noted and an arguable case as to whether the JV Company is completely a third party as the said JV Company is the offshoot of the Petitioner and the Respondent. It is to be seen that the Petitioner and Respondents joined hands for some purpose of running the train jointly which was performed by the JV company being owned together by the Petitioner and Respondent at the ratio of 50: 50. It is also a matter of fact that for the previous season the Respondent itself has itself allowed the JV Company to run the train on its behalf. Moreover, the articles of association also show close connectivity, participation and nexus of the Petitioner and Respondent in the JV Company by providing the arbitration clause under Article 200. Therefore, at the prima facie stage, it cannot be said that the said JV company is to be treated an outsider to the dispute rather it is intricately connected with the parties.

52. In similar circumstances, the Bombay High Court in the judgment of Heritage Lifestyles and Developers Pvt. Ltd. Vs. Amarvilla Co-operative Housing Society Ltd., Mrs. Sandhya R. Rao and Mr. Navnitlal P. Shroff, , in para 14 observed as under:

Admittedly, there is an arbitration clause between the parties, and there exist a arbitrable dispute as raised. The Scheme of Section 9 has been elaborated by the Apex Court in various judgments. It is now made clear that all the provisions of the CPC which are necessary for passing an appropriate order u/s 9 needs to be taken note of which includes Section 9A, Order 37, Order 38, Order 39, Rules 1 and 2, Order 40 of CPC. Therefore, while passing any order u/s 9, apart from the facts and circumstances, the Court needs to consider all desired facets which are otherwise available for passing ad interim, interim and/or even mandatory order. There is no bar and if case is made out, I see there is no reason that the Court u/s 9, cannot pass such order, even against the person who is not the party to the agreement but specially when such third person is claiming protection or right through the party who is consenting party to the arbitration agreement.

53. In V.B. Rangaraj Vs. V.B. Gopalakrishnan and others, , it has been held that articles of association of a company are a contract binding upon the company and its shareholders. Therefore, in the present case, the company itself is a party to the arbitration clause. Under Order 1 Rule 10(2), the Court has power to strike out or add parties at any stage of the proceedings either upon or without the application of either party and on such terms, as may appear to the Court to be just, order to add parties. Since the Petitioner and Respondent in the present case are co-shareholders of the Joint Venture Company, I feel that there is no harm if the Joint Venture Company be also added as Respondent No. 2. Therefore, the applications filed by the Petitioner as well as the proposed Respondent No. 2 are allowed. The Joint Venture Company is impleaded as Respondent No. 2. The amended memo of parties as already filed is taken on record.

54. The next objection of the Respondent that the Joint Venture Agreement was pre-existing on the date of the Joint Venture Agreement is without any substance since the subscribers to the Memorandum of Association of the Joint Venture Company are both, the Petitioner and the Respondent. It is not in dispute that the Joint Venture Company was incorporated on 24.11.2008, whereas the Memorandum of Understanding between the Petitioner and the Respondent containing the arbitration clause was executed on 10.07.2008. Admittedly the Joint Venture Company was incorporated for the purpose of same transaction.

55. Further submission of the Respondent is that since a lease has not been executed between the Joint Venture Company and the Respondent, there is no obligation on the Respondent to provide the train to the Joint Venture Company. It is also argued that earlier the Joint Venture Company was allowed on the basis of ad-hoc arrangement. Admittedly, the lease is not executed between the parties and at the same time Joint Venture Agreement is terminated, the Respondent, therefore, is not inclined to continue with the said arrangement any more in the absence of lease-deed.

56. This submission of the Respondent is devoid of merit as by doing the interim measures this Court is not attempting to rewrite the agreement or to confer any leasehold rights in favour of the Petitioner or JV company but rather in the larger public interest which is going to effected by virtue of sudden stopping of the train, booking of which are already undertaken by the Petitioner, there is no harm in continuing the said arrangement for some more period of time and more

so when the parties have already earlier operated the said arrangement without the execution of the said lease deed. Accordingly, the said continuation of the arrangement which was previously operated upon does not confer any further rights in favour of any of parties as this Court is aware that it is claim to be adjudicated upon by the arbitral tribunal.

57. In the case of Old World Hospitality Pvt. Ltd. v. India Habitat Centre 73 (1997) DLT 378, this Court observed as under:

(48) The argument on behalf of the Defendant is that there has been no concluded contract. But a perusal of the Memorandum dated 5.4.1994 and the ''Draft Agreement'' would show that the contract is ''symbiotic'' containing not only reciprocal obligations, complete duties and responsibilities and parties had agreed and come to a complete understanding about the operations by the Plaintiff. The further argument is that there has been no consent by the Defendant. Section 2H of the Contract Act states an agreement enforceable in law is a contract. Section 13 of the Contract Act defines consent "Two or more persons are said to consent when they agreed upon the same thing in the same sense". It is axiomatic that a contract is complete as a contract as soon as the parties have reached an agreement as to what to each of the essential terms is or with certainty be ascertained. It is an elementary principle:

IDCERTUM Est Quod Certum Reddi POTAST; Sed Id Magis Certum Est Quod De Semet Ipso Est Certum - that is certain which can be made certain, but that is most certain which is certain on the face of it. Nobody can dispute the proposition that a fair agreement to negotiate has no legal content. But that is not the position here, for a considerable length of time the parties had acted on the terms and conditions and nowhere it is stated by the Defendant that the Plaintiff acted beyond the terms of the agreement except staling that the bargain is not beneficial to the Defendant. That is a different aspect which will be dealt with in the course of this judgment.

58. Another reason which persuades this Court to continue such arrangement is that the booking for this season commenced from 8th May, 2011. The Respondent cannot deny the fact that they were not aware about the said bookings already made as the Respondents were in continuous communication with the Petitioner since November 2010. Had the Respondent got any intention to discontinue the Joint Venture Agreement in view of dispute arose between the parties in November, 2010 with regard to draft MoU to be executed between the Respondent and Railways which according to the Petitioner were inconsistent and against its interest to the MoU and Joint Venture Agreement between the parties, the agreement ought to have been terminated prior to the date of booking or with reasonable notice to the Petitioner so as to not to indulge into further bookings of the said train. Rather it appears from the record that the Respondent uptil 6th August, 2011 were suggesting the Petitioner that the work on the train should be completed as soon as possible. In view of the said conduct of the parties and present situation, this Court is of the opinion if some interim

arrangement is not made, there may be some serious repercussions as it is not merely the question of goodwill and reputation of the Petitioner is at stake but the Respondent also. Supreme Court in the case of Mahabir Auto Stores v. Indian Oil Corporation, reported in (1990) 3 SCC 772, to some extent of similar situation in para 20 to 21 has held that in a situation between the parties procedure should be followed which will be reasonable, fair and just and that is the process which normally be accepted. Paras 20 and 21 are reproduced as under:

20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the Appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work.

21. Therefore, we direct that the case of the Respondent be put to the Appellants, and let the Respondent authorities consider afresh the submissions made by the Appellant firm, namely, that the existing arrangement amounts to a contract by which the distributorship was continued in case of the Appellant firm without any formal contract and further that the new policy of the Government introduced in December, 1982 would not cover the Appellant firm and as such the Appellant should continue. It will be sufficient, having regard to the nature of the claims, for the Respondent authority to consider this aspect after taking the Appellant firm into confidence on this aspect. Nothing further need be stated or required to be done and we give no ''directions as to whether reasons should be recorded or hereinafter should be given. In the facts and circumstances, it is not necessary to give oral hearing or record the reasons as such for the decision. The decision should be based on fair play, equity and consideration by an institution like IOC. It must act fairly.

59. The Petitioner has provided the booking summary for the period of September 2011 to April 2012. The advance booking was started for this season from 2nd week of May, 2011. Upto December, 2011 the total booking between September, 2011 and December, 2011 is 448 passengers which include 416 confirmed bookings, 22 time limit booking and 10 Fam booking and upto April, 2012, 53 are confirmed booking and 45 is of time limit booking.

60. In this light of above, let me now examine as to whether the Petitioner has made out a case of relief of mandatory injunction. Admittedly, after completion of all formalities, the commercial operation of the "Maharaja Express" was flagged off on 20.03.2010. Upto April, 2011 the said train made 34 journeys. The season of this train is between September to April. The train is mainly booked by foreign

tourists and such bookings are made much in advance. This train was awarded runner up in the Special Train Operators Category at the Conde Nast Traveller Readers'' Travel Awards. There were following 10 competing trains:

1. Hiram Bingham, Peru

2. RIRTL''s Maharajas'' Express

3. Orient Express

4. Rocky Mountaineer, Canada

5. The Blue Train, South Africa

6. The Old Patagonian Express

7. Palace on Wheels

8. Deccan Odyssey

9. Rocos Rail, South Africa

10. Royal Canadian.

61. Thus, there is no force in the submission of the Respondent that in order to preserve and restore the status quo, this Court cannot have the power to grant a mandatory injunction if the case of greater risk of injustice is made out for temporary period in order to preserve the status quo ante in the absence of executed lease-deed between the Joint Venture Company and Respondent. The Respondent''s main grievance against the Petitioner and Joint Venture Company is related to non-payment of monies and inflated bills raised by the Petitioner and the amounts payable as per agreements. It is also not in dispute that the parties concerned have their respective claims and contentions against each other and the said disputes have to be determined by the Arbitral Tribunal. The claims of damages if suffered by the parties on account of breach and also to be determined when the arbitration clause is invoked. I agree with the submission of the Respondent that a mandatory injunction cannot be passed normally but it is settled law that in cases involving the particular status which existed prior to the institution of the case or continuation of enjoyment of the property prior to the approaching of the court, the court can preserve the satus quo ante which may be in the form of mandatory injunction in order to enable the party to continue to enjoy the status for a period be it limited or otherwise subject to the satisfaction of the principles of grant of injunction. In Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, the Apex Court, while holding that interlocutory mandatory injunction are usually granted to preserve the last uncontested status quo until the final hearing, in para held as under:

16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or

the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The Plaintiff has a strong case for trail. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

62. Therefore, after having considered the overall facts and surrounding circumstances of the matter and in order to strike the balance between the parties, I am of the view that it is fit case to appoint a receiver as a matter of interim measure, though this Court is aware of the fact that normally the court should be slow in appointing a receiver in interim but in the present due to exceptional circumstances, where the parties are reluctant to go into cooperation mode on their own, the said requirement is necessitated else the irreparable loss shall ensue to the Petitioner and to the public at large by discontinuation of the running of the train, bookings of which are already made. I hereby appoint Shri Sudhir Nandrajog, Senior Counsel of this Court, (Mobile No. 9810121790) as a receiver in the matter.

63. The present petition is thus disposed of with the following directions:

a) For the period commencing from 14th September 2011 uptil 31st December 2011 which is the major period for which the bookings are effected by the Petitioner and their agents in overseas countries, the train namely "Maharaja Express" Train shall continue to run for the said period under the supervision of the learned receiver as per the arrangement which was continuing at the earlier season.

b) The Petitioner shall deposit 50% of the total receipt of the sum against the bookings made upto 31.12.2011 without any deduction within four days in separate account to be opened in the Nationalized Bank in the name of the Respondent. The Petitioner shall not withdraw any amount from the said account without the prior permission of the court or the arbitral tribunal. The said account will be maintained by the Receiver who will sign the cheques and make the payment to the Respondent as per the direction (f) issued by this Court.

c) The Petitioner shall also deposit 50 % of the amount in the separate account maintained for the future bookings to be conducted by it uptill the December 2011 in the said account as stated in (b).

d) The Petitioner and the Joint Venture Company shall maintain the proper and true accounts pertaining to booking amounts, expenses incurred or to be incurred in future by them. The statement of accounts shall be filed before the Receiver every fortnightly for the purposes of the records.

e) Subject to agreeing to the aforementioned directions, the Respondent shall, after repair if any or maintenance, allow to run the train as per previous manner. The JV Company is also allowed to make the furnishing and other arrangements consequent upon the receiving the permission of the said train from Respondent from 9th September 2011 onwards.

f) The Respondent/ Indian railways would be entitled to recover the haulage charges, on board expenses (only for the current period), operational and maintenance/ repairing expenses against the train which is going to run for the said interim period and the same can be paid by the Receiver after due consideration of the same from the deposit made in the separate account. If any shortfall is occurred, the Respondent shall maintain the accounts and give the detail to the Receiver. The said amount shall be subject to the discussion and adjustment of the final award to be passed by the Arbitral Tribunal.

g) As regards the remaining 50% booking amount retained by the Petitioner, the same shall be subject to the maintenance of the accounts of the Petitioner and JV Company which shall be filed before learned Receiver. The said booking amount shall also be adjusted towards the expenses incurred or to be incurred in running the said train. Any shortfall of revenue beyond the said 50% amount shall form the subject matter of the claim before the Arbitral tribunal.

h) Parties are granted liberty to approach the Court or the Arbitrator (if appointed) for modification of order in case the circumstances do arise.

i) Authorized representatives of all concerned parties are allowed to co-operate with the Receiver in order to smooth running of train in question and can have joint meeting, if necessary. If the presence of Receiver is required at the site, he may exercise his discretion in this regard.

j) The Petitioner or any of his agents shall make not any further bookings for the next season which is, September, 2012 to April, 2013.

k) The above said arrangement shall be treated as tentative in nature.

64. The Fee of the Receiver at the initial stage is fixed at Rs. 50,000/- upto the first meeting. Thereafter, he shall be paid Rs. 30,000/- per visit/meeting which shall be paid by the Petitioner only subject to the final adjustment.

65. Parties are free to take the necessary steps to resolve their respective disputes by appointment of Arbitral Tribunal. Arbitral Tribunal shall decide their disputes without the influence of the order passed in the matter. All rights and contentions of both sides before the Arbitral Tribunal will be kept open.

66. The order passed in the present petition shall have no bearing when the

disputes are decided on merit. The present arrangement is made subject to outcome of arbitral proceedings.

67. The petition and all pending applications and contempt petition are accordingly disposed of without any further orders. No costs.

68. Copy of the order be given under the signature of the Court Master to the parties as well as to the Receiver.